成文法解释中立法史使用的对比研究

Comparative Approaches to the Use of Legislative History in Statutory Interpretation

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【摘　要】　在许多法律体系中，立法史在成文法解释中的重要性仍然未有定论。这篇文章探索了德国、英国以及美国法律的这类问题。文章以法学理论、宪法以及法律与经济学为基础展开论述，由此为大西洋两岸国家就当下法学方法论的争论提供了较为深入的观点。同时，这一主题也旨在促进比较法学方法论的进一步发展。

【关键词】　成文法解释　立法史　比较法学方法论　排除规则　动态成文法解释

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Abstract: In many legal systems the significance to be attributed to legislative history in the context of statutory interpretation remains unsettled. The following article explores this matter with regard to German, UK and US law. It develops arguments based in legal theory, constitutional law, and law and economics and thus affords deeper insight into the current discussion on legal methods on both sides of the Atlantic. At the same time, the topic is used to promote the further development of comparative legal methodology.

Key words: Statutory interpretation　Legislative history　Comparative legal methodology　Exclusionary rule　Dynamic statutory interpretation

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一、简介

法学方法论以及成文法解释的问题长期被大西洋两岸国家所忽视。[1] 在那个时候，许多美国法学家视成文法解释为“仅仅是人们在做的事情，而不是人们应该讨论和分析的独立主题”。[2] 同理，著名德国学者以及现代比较法的创始人，恩斯特·拉贝尔（Ernst Rabel）曾经说过：“每个优秀的法学家都有一个方法，只不过他不说而已”。[3] 这段在美国被称为“长睡不醒”的长期学术空白，现在已经结束了。[4] 各地法律界对成文法解释的兴趣似乎又复燃了。[5] 但是关于这个课题的大多数文献仍然将解释方法论仅视作一国范围内的研究范畴。[6]

本文认为，通过对成文法解释方法的比较研究，这一主题很可能进一步复活起来。由于实体法的学术比较研究有很多益处，为了细致考察不同法律系统提供的方法论范畴，在解释方法之间进行比较似乎是较为可行的想法。尽管在裁判风格[7]、法律推理以及宪法文本上不同国家之间存在差异，但同时也存在大量的共同特征，从而让我们可以慢慢勾勒出不同国家法学方法论的大致轮廓。在成文法解释遵循一般解释学的客观要求时就能发现其中的一个特征。[8] 例如，伽达默尔（Gadamer）的“真理与方法”[9]

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〔1〕 Not all that long ago, *Weisberg*, Judicial Artist, Statutes and the New Legal Process, 35 Stan. L. Rev. 213 (1983) wrote: “[T] he general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention.”

〔2〕 *Frickey*, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 244 (1992).

〔3〕 Reported in *Fikentscher*, Methoden des Rechts in vergleichender Darstellung, vol. I, 1975, p. 10.

〔4〕 Borrowing from the title of *Raymond Chandler's* famous novel, see *Frickey* (n. 2 above).

〔5〕 Speaking the mind of many *Eskridge*, Dynamic Statutory Interpretation, 1994, p. 1: “Statutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected, it now dances in the ballroom.”; most recently *Gluck*, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 111 Yale L. J. 1250 (2010); from a European perspective *Fleischer*, Europäische Methodenlehre-Stand und Perspektiven, RabelsZ 75 (2011) (forthcoming).

〔6〕 See *Hesselink*, The Common Frame of Reference as a Source of European Private Law, 83 Tul. L. Rev. 919, 936 (2009): “Legal methods that are normative and meant to contribute to the rational solution of cases according to a specific legal system are not universal but, by definition, local.”; along the same lines *Kramer*, Juristische Methodenlehre, 3rd ed. 2010, p. 42 f.

〔7〕 See *Kötz*, Über den Stil höchstrichterlicher Entscheidungen, RabelsZ 37 (1973), 245; *Goutal*, Characteristics of Judicial Style in France, Britain and the U. S. A., 24 Am. J. Comp. L. 43 (1976); *Markesinis*, Conceptualism, Pragmatism and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court, 34 Am. J. Comp. L. 349 (1986).

〔8〕 On the particularities of legal hermeneutics see for example *Mastronardi*, Juristisches Denken, 2nd ed. 2003, marg. nos. 101 ff.

〔9〕 *Gadamer*, Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik, 1st ed. 1960, 6th ed. 1990.

最初不仅被德语学者进行原文研究，还在世界各地被翻译成英语、法语或是意大利语[10]，由此，成文法解释的种子散播在世界各地。[11] 维特根斯坦（Wittgenstein）的语言哲学[12]以及德里达（Derrida）的文字学[13]也已经被不同地区、不同法律体系的法律学者所接受。[14] 方法论原则源自罗马法，因其本身在很多法律体系中已经建立了起来，所以也起到了统一的作用[15]。通过比较德特勒夫·利布斯（Detlef Liebs）的目录“拉丁语法律规则与法律用语”（Lateinische Rechtsregeln und Rechtssprichwörter）[16] 与罗兰（Roland）与波伊尔（Boyer）的“法国法的格言”（Adages du droit français）[17] 就可以找到证据支持。最后，统一的国际法长期以来一直致力于促进成文法解释方法的跨国发展。[18] 尽管《联合国国际货物销售合同公约》第 7 条第（1）项[19]是公认的一般条款，且不包含任何成文法解释的规范化方法，但这一条款也是典型例证。[20]

然而，接下来的反思并不是追求一种武断的目标——去概述支配全欧洲甚至是全世界的解释方法的框架。相反，本文试图通过一个简单的例子来说明解释方法的比较途径。特别是成文法解释中立法史的重要性这一既简单又复杂的问题。

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〔10〕 *Gadamer*, Truth and Method, 2nd rev. ed. 1989; Vérité et Méthode, 1996; Verità e Metodo, 1983.

〔11〕 From the point of view of German interpretative methodology, *Frommel*, Die Rezeption der Hermeneutik bei Karl Larenz und Josef Esser, 1981; for an American perspective *Eskridge*, Gadamer/Statutory Interpretation, 90 Colum. L. Rev. 609 (1990); *Eskridge*, Dynamic Statutory Interpretation, 1994, p. 58 ff.; see also *Dworkin*, Law's Empire, 1986, p. 228, as well as his ironic barb directed at the *textualism* preached by *Justice Scalia*, in *Scalia*, A Matter of Interpretation: Federal Courts and the Law, 1997, p. 115: “Justice Scalia has managed to give two lectures about meaning with no reference to Derrida or Gadamer or even the hermeneutic circle, and has set out with laudable clarity a sensible account of statutory interpretation. These are considerable accomplishments.”

〔12〕 *Wittgenstein*, Tractatus Logico-Philosophicus, 1921.

〔13〕 *Derrida*, De la grammatologie, 1967.

〔14〕 On *Wittgenstein* see for example *Arulanantham*, Breaking the Rules? Wittgenstein and Legal Realism, 107 Yale L. J. 1853 (1998); *Busse*, Zum Regelcharakter von Normtext-Bedeutungen und Rechtsnormen. Was leistet Wittgensteins Regelbegriff in einer anwendungsbezogenen Semantik für das Interpretationsproblem der juristischen Methodenlehre?, Rechtstheorie 19 (1988), 305; *Markell*, Bewitched by Language: Wittgenstein and the Practice of Law, 32 Pepp. L. Rev. 801 (2005). On *Derrida* see for example *Amstutz*, Der Text des Gesetzes. Genealogie und Evolution von Art. 1 ZGB, ZSR 2007, II, 237, 245 ff.; *Critchley*, Derrida: The Reader, 27 Cardozo L. Rev. 553 (2005).

〔15〕 For a compilation see *Kramer*, Lateinische Parömien zur Methode der Rechtsanwendung, Festschrift Ernst Höhn, 1995, p. 141.

〔16〕 *Liebs*, Lateinische Rechtsregeln und Rechtssprichwörter, 7th ed. 2007.

〔17〕 *Roland/Boyer*, Adages du droit français, 3rd ed. 1992.

〔18〕 *Gruber*, Methoden des internationalen Einheitsrechts, 2004.

〔19〕 The exact text states: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”

〔20〕 See for example *Ferrari*, in Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 5th ed. 2008, Art. 7 marg. no. 28.

二、德国的立法史：从主观理论到客观理论，再从客观理论到主观理论？

（一）关于立法解释目标的基本争论

1. 主观理论与客观理论

菲利普·赫克（Philipp Heck）早在 1914 年写道："在成文法解释的所有个案问题中，围绕法律史的价值及其使用问题的争论在某种程度上来说是最为激烈、深刻的。"〔21〕关于这个特定问题的争论非常火热，因为事实上它包含了每代法学家都会重新审视的永恒话题——立法解释的目标〔22〕。〔23〕两个互相对立的解释理论正在争夺各自的主导权；在令人遗憾的名称变化中〔24〕，这些理论被称之为主观理论与客观理论。〔25〕

主观理论，存在很多种类，意在寻求历史性的立法意图。此理论最杰出的倡导者之一，伟大的学说汇纂派学者伯恩哈德·温德沙伊德（Bernhard Windscheid）曾尖锐地指出，法律的解释者"必须考虑到所有可利用的资源，尽可能充分地按照立法者核心思想来思考问题"〔26〕。后来的支持者，尤其是菲利普·赫克（Philipp Heck）——图宾根利益法学派最杰出的成员，不再寻求事实上的立法意图，而是探究规范性的立法意图。〔27〕因此，人们也可以将其说成原文本的〔28〕或历史目的性〔29〕解释。主观主义者们倾向于通过指出立法目标和立法价值是如何对法官有约束力的〔30〕来证明他们的立场，有时他们

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〔21〕 *Heck*, Interessenauslegung und Interessenjurisprudenz, AcP 112 (1914), 1, 105 f. 813 6A635

〔22〕 For an in-depth study see for example *Mennicken*, Das Ziel der Gesetzesauslegung. Eine Untersuchung zur subjektiven und objektiven Auslegungstheorie, 1970.

〔23〕 In a similiar vein *Engisch*, Einführung in das juristische Denken, 10th ed. 2005, p. 123: "I am in fact of the opinion that the entire problem has not yet been solved and that, like every truly fundamental problem, it can not be definitively solved."

〔24〕 Critical, for example, *Röhl/Röhl*, Allgemeine Rechtslehre, 3rd ed. 2008, p. 631: "'Subjective' interpretation is objective, 'objective' interpretation is subjective"; speaking, too, of "surprisingly badly chosen and misleading labels", *Rüthers/Fischer*, Rechtstheorie, 5th ed. 2010, marg. no. 796.

〔25〕 See the descriptions of these by *Bydlinski*, Juristische Methodenlehre und Rechtsbegriff, 2nd ed. 1991, p. 428 ff.; *Engisch* (n 23), p. 112 ff.; *Kramer* (n 6 above), p. 116 ff.; *Larenz*, Methodenlehre der Rechtswissenschaft, 6th ed. 1991, p. 316 ff.; *Rüthers/Fischer* (n 24 above), marg. no. 784 ff.; *Zippelius*, Juristische Methodenlehre, 10th ed. 2006, p. 21 ff.

〔26〕 *Windscheid*, Lehrbuch des Pandektenrechts, vol. I, 7th ed. 1891, p. 52.

〔27〕 See *Heck*, Gesetzesauslegung und Interessenjurisprudenz, AcP 112 (1914), 1, 50, 53, 64, 77; following his approach *Looschelders/Roth*, Juristische Methodik im Prozeß der Rechtsanwendung, 1996, p. 46 f.; *Rüthers/Fischer* (n 24 above), marg. no. 790.

〔28〕 *Kramer* (n 6 above), p. 116: "entstehungszeitlich". 8136A635

〔29〕 *Bydlinski* (n 25 above), p. 428: "historisch-teleologisch".

〔30〕 Pointedly *Heck*, Gesetzesauslegung und Interessenjurisprudenz, AcP 112 (1914), 1, 62: "Anyone who supports the objective theory is also a proponent of the deliberate circumvention of legislative intent."

也认为这种解释过程是更为科学的方法，其结果能够经受得起理性批判和检验。〔31〕弗里德里希·卡尔·冯·萨维尼（Friedrich Karl von Savigny），现代成文法解释的鼻祖〔32〕，是否也被认为是主观主义者则是一个有争议的问题。〔33〕许多情况表明，主观历史性立法意图在他的解释理论中只起到辅助作用。〔34〕

另一方面，客观理论认为成文法解释的目标是寻求法律文本本身的含义，这一过程具有客观性和目的性，并会随着时间的推移而有所改变。古斯塔夫·拉德布鲁赫（Gustav Radbruch）在解释此问题时，以一种风趣的但容易被滥用的说法指出："法律会比其制定者更为聪明——事实上，法律一定比其制定者更聪明"。〔35〕在解释这个问题时，客观主义者宾汀（Binding）、瓦克（Wach）和科纳（Kohler）〔36〕在 1885—1886 年三人执政期间〔37〕提出，一部制定法从刚一生效时就从其制定者身边剥离开了，并已成为客观存在："从官方公布的那个时刻开始就立即会引起立法者整个立法意图的根基和立法愿望的消失，也正是从那一时刻起，立法就变成了它自己，承载着自己的力量和动力，充满了自己的含义。"〔38〕另外，客观主义者诉诸有科学性的法官荣誉感，强烈反对立法史上的盲目信仰："有关立法史的研究只不过是司法常务官的艰辛工作，而不是科学"〔39〕，自由法学（Freirecht）运动的一个言辞尖锐的成员恩斯特·富克斯（Ernst Fuchs）痛斥道。

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〔31〕 See *Baden*, Gesetzgebung und Gesetzesanwendung im Kommunikationsprozeß, 1977, p. 186 ff.; *Rödig*, Die Theorie des juristischen Erkenntnisverfahrens, 1973, p. 181 ff.; see also *Alexy*, Theorie der juristischen Argumentation, 2nd ed. 1991, p. 294, who sees argumentation based solely on a statute's specific legislative history materials as a specific case of *empirical* argumentation. On falsifiability, or refutability, in scientific method, see the foundational study by *Popper*, The Logic of Scientific Discovery, 1959.

〔32〕 On his theory of interpretation, *von Savigny*, System des heutigen römischen Rechts, vol. 1, 1840, p. 206 ff., 212 ff.; extensively *Baldus*, Gesetzesbindung, Auslegung und Analogie: Römische Grundlagen und Bedeutung des 19. Jahrhunderts, in Riesenhuber (ed.), Europäische Methodenlehre, 2nd ed. 2010, § 3 marg. no. 55 ff.; *Huber*, Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht, JZ 2003, 1.

〔33〕 Dismissive *Rückert*, Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny, 1984, p. 354 ff., according to whom *Savigny*'s approach cannot reasonably be called subjective nor objective; see also *Schröder*, Recht als Wissenschaft, 2001, p. 224 ff., 241 f.; and *Meder*, Missverstehen und Verstehen, 2004, p. 125 ff.

〔34〕 In detail *Huber*, Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht, JZ 2003, 1, 12; agreeing *Meder* (n 33 above), p. 125.

〔35〕 Radbruch, Rechtsphilosophie, 8th ed. 1973, p. 207; critical of this, for example Röhl/Röhl (n 24 above), p. 629: "It is of course not the law that is smarter, but its interpreters who think themselves smarter. That is why they seek to break away from the historical legislator."

〔36〕 Kramer (n 6 above), p. 121.

〔37〕 See Binding, Handbuch des Strafrechts, vol. I, 1885, p. 450 ff.; Wach, Handbuch des deutschen Civilprozessrechts, vol. I, 1885, p. 254 ff.; Kohler, GrünhutsZ 13 (1886), 1 ff. For greater detail on the historical-political background of these volumes see Caroni, Einleitungstitel des Zivilgesetzbuches, 1996, p. 92 ff.

〔38〕 Binding (n 37 above), p. 454 referring to Thöl, Einführung in das deutsche Privatrecht, 1851, p. 150.

〔39〕 Fuchs, Recht und Wahrheit in unserer heutigen Justiz, 1908, p. 53.

2. 主观理论的早期反对观点

早些时候，许多观点都反对主观理论[40]，从而也间接地否认了立法史的使用。其中一个观点是，在议会民主制中，不存在有特定意图的立法者[41]；相反，现代立法者被认为是无名的存在，是多个体的组合，因此他们也被赋予了不同的立法意图。[42] 然而，这种被认为是“意图论”的观点未能认识到：这个问题并不是某个个人立法者的意图[43]是否存在的问题，而是该法条可归因于谁的问题[44]，这个问题在法哲学[45]中可能会导致异想天开（或伟大的探险），但这对于现实的股份公司法研究者们来说应该是很熟悉的。正如股份公司具有规范性意志一样，其意志通过公司机关的多数决定来实现[46]，作为多数决定的立法者的规范性意图同样可以被看作是一种理论建构[47]或是民主理论的一种必要拟制[48]。

第二个反对观点提出这样的问题：立法史文献的零碎化特性会导致立法意图不具有确定性。在某些情况下的确如此，但在法院和法律工作者可以方便获取立法史资料时却并非如此。[49] 研究最近的法律史所需要的努力是最少的，因为大多数材料可以以电子方式获得；至于年代较久的成文法，为了评估这种研究的实用性与合理性，“解释的时

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〔40〕 For a systematic list of these see Heck, Gesetzesauslegung und Interessenjurisprudenz, 1914, p. 67 ff., who speaks of intention, form, trust, and amendment arguments; following this approach Hassold, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 207 ff.; for a differing classification see Baden, Zum Regelungsgehalt von Gesetzgebungsmaterialien, in Rödig (ed.), Studien zu einer Theorie der Gesetzgebung, 1976, p. 369, 384 ff., who speaks of enactment, uncertainty and flexibility arguments; agreeing Röhl/Röhl (n 24 above), p. 628.

〔41〕 Already writing about the issue of “collective statements” Bülow, Gesetz und Richteramt, 1885, p. 35 f.; more recently Thienel, Der Rechtsbegriff der Reinen Rechtslehre-Eine Standortbestimmung, Festschrift Friedrich Koja, 1998, p. 161, 178 ff.; Schäffer, Festschrift Heinz Peter Rill, 1995, p. 595, 602 f.; on the “inexistence” of collective intent see also *Kelsen*, Hauptprobleme der Staatsrechtslehre, 2nd ed. 1923, p. 169 ff.

〔42〕 Thus *Zweigert*, Juristische Interpretation, Studium generale 7 (1954), 380, 382. 8136A635

〔43〕 See among others *Röhl/Röhl* (n 24 above), p. 628: “A legislator's intent is nothing more than an effective metaphor for a historical context.”

〔44〕 Convincing *Christensen*, Was heißt Gesetzesbindung, 1989, p. 59; equally so *Jestaedt*, Grundrechtsentfaltung im Gesetz, 1999, p. 355: “normative imputation, not a true psychic attribution”.

〔45〕 For example *Dworkin* (n 11 above), p. 342 ff.

〔46〕 On the majority or agency model *MacCallum*, Legislative Intent, in Summers (ed.), Essays in Legal Philosophy, 1968, p. 237 ff., 261 ff.; agreeing *Cramer*, AJP 2006, 515, 516; *Müller/Christensen*, Juristische Methodik, vol. I, 10th ed. 2009, marg. no. 361 f.

〔47〕 Along these lines *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94, (1981), 192, 207: “Legislator is a normative term, a notional subject, to whom the law's command is imputed”; very similar *Hotz*, Richterrecht zwischen methodischer Bindung und Beliebigkeit?, 2008, p. 80: “normative construct”.

〔48〕 Thus *Looschelders/Roth* (n 27 above), p. 47 who add, that the *natural plurality of opinions* is not opposed to the assumption of a *unified normative intent*.

〔49〕 *Rüthers/Fischer* (n 24 above), marg. no. 791. 8136A635

效性”〔50〕确实是个问题。〔51〕作为这个观点的另一个说法被称为“不确定性观点”，即立法史易被操纵和滥用。〔52〕不幸的是，这种情况也不能被排除，也许是因为某些集团出于自身利益，可能会将一些观点“夹带”进立法史材料中，抑或因为法律工作者和法官可能更喜欢有选择性地使用史料，而不是整体查阅。德国联邦或州的机构应当对“立法外包”的做法给予特殊警惕。〔53〕但是，这些观点都不认为从一开始就禁止立法史的使用是正确的。

最后，主观理论常常因为解释太过于关注过去而受到批判，有点“死人支配活人”〔54〕的意味。据称，只有客观目的性解释可以使法律不断适应新的规范情形。但是被称为“修正观点或灵活观点”的这种看法，是对主观理论中法律发展作用的误解。〔55〕主观主义者也并非坚决地坚持一项规范的历史含义〔56〕，但的确要求任何改变都要进行披露并经过法院以及学术界的合理论证。〔57〕这种“论证要求”〔58〕并非不必要的负担；相反，用一种陈腐的但却必不可少的措辞来说，它会促进方法论的诚信化。〔59〕

3. 论辩的目前态势

经过了许多年的论辩后，斗士们似乎都已经精疲力竭了，所有重要的争论都进行了交换。〔60〕在法律学说中，客观理论通常被视为主流学说〔61〕，但仔细考察后会发现，中

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〔50〕 *Jabloner*, Die Gesetzesmaterialien als Mittel der historischen Auslegung, Festschrift Herbert Schambeck, 1994, p. 441, 447 f.

〔51〕 Thus *von Arnauld*, Möglichkeiten und Grenzen dynamischer Interpretation von Rechtsnormen, Rechtstheorie 32 (2001), 465, 475.

〔52〕 For example *Binding* (n 37 above), p. 472 f.

〔53〕 See *Battis*, ZRP, Outsourcing von Gesetzesentwürfen?, 2009, 201; as well as *Krüper*, Lawfirm-legibus solutus?, JZ 2010, 655.

〔54〕 *Ehrlich*, Die juristische Logik, 2nd ed. 1925, p. 160; recently also *Baldus* (n 32 above), § 3 marg. no. 219: “We must not submit to persons from the past, but only to the law, and only currently applicable law at that.”

〔55〕 Clearly elaborated by *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 210: “The boundary between the judges' authority to develop the law and the legislators' legislative prerogative is *not* the object of the dispute between the subjective and objective theories of interpretation.”

〔56〕 See *Röhl/Röhl* (n 24 above), p. 628: “The subjective theory is not so rigid as to eternally bind a judge to a statute.”

〔57〕 See for example *Kramer* (n 6 above), p. 31 f. 8 13 6A635

〔58〕 *Meier-Hayoz*, in Berner Kommentar ZGB, 1962, Art. 1 marg. no. 155.

〔59〕 Also of this view *Rüthers/Fischer* (n 24 above), marg. no. 730d, 794, 813 and further references; also *Neuner*, Die Rechtsfindung contra legem, 2nd ed. 2005, p. 113; as well as *Wank*, Die Auslegung von Gesetzen, 4th ed. 2008, p. 32: “Recourse to the objective theory, though, requires that such a process of aging can be proven with regard to a particular statute. This evidence, however, is rarely bothered with by the adherents of the objective theory.”

〔60〕 Already of this view *Stratenwerth*, Festschrift Oscar Adolf Germann, 1969, p. 257, 258; more recently *Schluep*, Einladung zur Rechtstheorie, 2006, marg. no. 1117, according to whom the controversy in the field of statutory interpretation is being led “to the point of redundancy”.

〔61〕 See for example *Engisch* (n 23 above), p. 113: “Today the objective theory even if in many forms-definitely prevails”; also of this view *Rüthers/Fischer* (n 24 above), marg. no. 798.

间派立场占了上风〔62〕，他们有时以客观解释为基础〔63〕，有时则基于主观解释〔64〕。如今没有人〔65〕赞成禁止使用立法史的“严格”客观理论〔66〕，正如没有人会支持将解释者永远绑定在历史性立法意图上的“纯粹”主观理论一样。〔67〕成文法的重要性常常与其年龄有关；比起当今法律，立法意图在较早法律中的重要性较小。〔68〕据说，有时历史性立法意图对于解决未达成解释共识的问题更具有规范上的重要意义，而对于已达成总体解决方案的问题来说则没有那么重要。〔69〕结构主义法学（strukturierende rechtslehre）的支持者将立法史的运用视为系统性观点的例外，因为基于文本本身的解释会将往往孤立的规范性文本放到具有更广泛选择的其他文本中，并且最终将其整合到语义网上。〔70〕最后，某些学者并不将历史性解释视为众多解释中的一种标准，而是将它视为用于改善其他标准的一种横向标准。〔71〕

从传统上来讲，德国联邦宪法法院倾向于客观理论。该法院自 1952 年做出一个早期判决之后，这种态度就从未发生过变化，其认为立法解释目标的标准说法是：“立法条文的解释由立法者的具体意图来决定，正如法律条文的措辞本身及其文本语意所表达

〔62〕 Representative of this approach and well considered *Kramer* (n 6 above), p. 127 ff., 133 ff.; also *Engisch* (n 23 above), p. 114 with n 25 and p. 123 with n 47; as well as *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 209: “With regard to *intermediary methods* it would make sense to take elements of the subjective and of the objective theory and to combine them, or to apply one primarily and use the other one alternatively if the first fails, or to unite both in a graduated process of interpretation.”; additionally *Ott*, Juristische Methode in der Sackgasse?, 2006, p. 54, according to whom “both points of view are to be considered in every case”.

〔63〕 As typified by *Larenz* (n 25 above), p. 316: “Underlying each of the two theories is a partial truth; therefore neither can be approved without restriction.”, and p. 318: “It would be going much too far however, to deny that the regulatory intent of historical legislators and their discernable normative conception could have any significance for interpretation.”

〔64〕 Exemplified by *Rüthers/Fischer* (n 24 above), marg. no. 820: “The statutory interpretation problem cannot be reduced to an alternative between a time-of-origin and a current validity statutory application. The ‘subjective’ and the ‘objective’ theories of statutory interpretation each cover valid aspects of the issue.”

〔65〕 Thus, very clearly *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 202.

〔66〕 Thus *Cosack*, Lehrbuch des deutschen Bürgerlichen Rechts, vol. 1, 4th ed. 1907, p. 38: “as an interpretational command” without “the least utility”; similarly *Kohler*, Lehrbuch des bürgerlichen Rechts, vol. 1, 1906, p. 131; still less harsh also *Kohler*, Ueber die Interpretation von Gesetzen, GrünhutsZ 13 (1886), 1, 38.

〔67〕 Thus, with the same clarity *Wank* (n 59 above), p. 32.

〔68〕 See for example *Kramer* (n 6 above), p. 136 f.; *Wank* (n 59 above), p. 34; *Zweigert*, Festschrift Eduard Bötticher, 1969, p. 442, 447; also *Schluep* (n 60 above), marg. no. 1119: “Say a statute [...] was drafted the day before yesterday, promulgated yesterday and is applicable today, then, barring an act of God, there is no reason why the courts should be allowed to develop a new understanding of the law between the day before yesterday and today.”; critical however *Baden* (n 40 above), p. 369, 392.

〔69〕 Thus *Schroth*, Theorie und Praxis subjektiver Auslegung im Strafrecht, 1983, p. 105.

〔70〕 In greater detail *Christensen* (n 44 above), p. 60 ff. 8 13 6A635

〔71〕 Thus *Baldus* (n 32 above), § 3 marg. no. 220. 8 136 A635

的那样。另一方面，立法机关的主观意图就法律条文的含义方面并不具有权威性。只有在双符合上述原理的基础上进一步确定解释，或者当其消除了仅采用上述方法而不能减轻的疑惑时，法律条文的历史发展才具有意义”。[72] 此外，历史性立法意图“只应被视为成文法本身足够肯定的表达”[73]。在近些年的立法文本中，立法意图更加受到重视。[74] 然而，即使在面对较早的法律时，德国联邦宪法法院也是很谨慎地研究其发展历史，并持续不断地寻找立法意图。[75] 这样，理论上的主张与实践中的方法论经常产生重大的分歧。[76] 即便从《联邦宪法法院法》（Bundesverfassungsgerichtsgesetz，BVerfGG）第 31 条的意义上来说，联邦宪法法院的方法论主张也不具有约束力，这是很不幸的。[77] 同样，在涉及《法院组织法》（Gerichtsverfassungsgesetz，GVG）第 132 条的一件诉讼中，将这个问题委托给德国联邦司法法院最高合议庭、大参议院（Großer Senat）以及联合参议院（Vereinigter Großer Senat），并不能解释清楚这里的方法论上的不一致。[78]

近来，争论又开始激烈起来，并呈现出政治哲学[79]以及宪法学的色彩。许多有影响力的学者认为，方法论问题也常常是宪法问题[80]，他们呼吁回到主观理论，或至少更加强调基于历史的解释[81]：民主的合宪性基础、分权原则以及法治全都要求法院仔细考察立法史。以他们的观点来看，这是适用依照宪法所制定的法律不可或缺的第一个

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〔72〕 BVerfGE 1，301，312；affirmed in BVerfGE 10，234，244；11，126，130；and established case law.

〔73〕 BVerfGE 11，126，130.

〔74〕 See BVerfGE 54，277，297：“Particularly for the interpretation of new and substantively novel types of law，as long as literal meaning and context leave open doubts，significant weight must be given to the legislative intent of the legislators evident in the legislative procedure. In such a situation，the interpretation may not disregard an obvious legislative intent.”

〔75〕 An in-depth analysis of the case law in *Sachs*，DVBl 1984，73；for a current example see BVerfG NJW 2009，1469，1471 f. para. 45 ff.

〔76〕 Along the same lines *Rüthers/Fischer*（n 24 above），marg. no. 800：“In legal fact，the Federal Constitutional Court of Germany generally attributes particular，often even pivotal significance to the historical argument in its statutory interpretations. In this respect，its theoretical proclamation in favour of the ‘objective method’ is nothing but lip service.”

〔77〕 See *Rennert*，in Umbach/Clemens，BVerfGG，1st ed. 1992，§ 31 marg. no. 74：“Methodological statements have no formal legal quality.”

〔78〕 See *Simon*，Gesetzesauslegung im Strafrecht，2005，p. 585：“This process only serves to clarify legal issues，but not what method should be applied in order to find a solution to a legal problem. This leads to the unfortunate consequence that contradictory methodological statements can persist without resolution，or even that diverging statements can go unnoticed.”

〔79〕 See *Zippelius*（n 25 above），p. 23：“To put it bluntly：the interpretation someone chooses depends on their philosophy of government and State.”；agreeing *Schröder*，Festschrift Ulrich Eisenhardt，2007，p. 125.

〔80〕 See *Rüthers/Fischer*（n 24 above），marg. no. 705 ff.

〔81〕 See *Depenheuer*，Politischer Wille und Verfassungsänderung，DVBl. 1987，809，812 f.；*Hillgruber*，Richterliche Rechtsfortbildung. Demokratische und rechtsstaatliche Bedenken gegen eine scheinbare Selbstverständlichkeit，Journal für Rechtspolitik 9（2001），281；*Jestaedt*（n 44 above），p. 328 ff.，338 ff.；*Neuner*（n 59 above），p. 112 ff.；*Rüthers/Fischer*（n 24 above），marg. no. 780 ff.；see also *Auer*，ZEuP 2008，516，528 ff.

（而非最后的）步骤。[82] 如果立法一致性原则与体系兼容性原则更加受到重视的话，那么历史性解释的地位就会得到进一步提高。[83]

在一个被广泛关注的刑事案件中，联邦宪法法院的合议庭裁决触及了这些问题。[84] 根据多数意见，包括方法论选择在内的成文法解释，是由民事法庭来决定的问题，而且，这类决议将不会由联邦宪法法院进行广泛的审查。联邦宪法法院会限制其司法审查范围，以确定民事法庭在解释法律的过程中是否尊重了基本的立法意图以及是否合理采用了被认可的解释方法，即便其涉及有关权力分配的《德国基本法》第 20 条第 2 款第 2 句以及第 20 条第 3 款的规定。[85] 教授及法官 Vobkuhle，Osterloh 以及 Difabio 则持反对意见，他们回击了有关让解释方法论读起来像每日颂书一样的做法。他们认为宪法所固定下来的赋予法官进一步发展法律的权利，一直都具有局限性。如果立法者拥有一种明确的立场，法官就不能够修改法律去适应他或她的法律政策观念并由此在司法上提出一个并不会被议会接受的观点。[86] 立法者事实上是否已获得这种地位，只取决于是否采用了被认可的解释方法。任何解释的出发点必须是法律条文的词句本义，而法律条文并非总能指示出“立法者的（主观的或客观的）意图”[87]。为了回答支持这部法律的规制理论问题，在这部法律的立法史及其体系结构中寻找线索很重要，而且弄清该部法律在法律实践中是如何被理解的也很重要，这往往也能提供线索。自有争议的规范生效以来，立法者并未采取任何行动这一事实不能默认某部法律的特别或现行的适用，拒绝立法也不能由此得出立法者在向法院推卸其解决争端责任这样的结论。立法者没有义务定期重申立法意图以维持规范的有效性。[88]

（二）关于立法史使用的特殊问题

在对成文法解释的目标做了上述初步的论述后，也应当细致考察有关立法史运用的若干个案问题。

1. 立法史材料的选择及重要性

如上所述，在分工的过程中有大量的参与者承担着现今德国（联邦）法律的制定工作。参与此过程的主体通常是政府主管部门，这些部门会提出一项行政法案的草稿；联邦政府在进行跨部门咨询的基础上，会在议会上介绍联邦政府法案；并向联邦议院（Bundestag）及联邦参议院（Bundersrat）以及他们的各自委员会进行介绍。有时，专家组也需要努力促进一部

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〔82〕 Thus, with particular emphasis *Rüthers/Fischer* (n 24 above), marg. no. 812; similarly *Biaggini*, Methodik in der Rechtsanwendung, in Peters/Schäfer (eds.), Grundprobleme der Auslegung aus Sicht des öffentlichen Rechts, 2004, p. 27, 42, according to which historical interpretation is a “necessary (transitional) step for normative interpretation in a democratic constitutional State.”

〔83〕 See *Mehde/Hanke*, Gesetzgeberische Begründungspflichten und-obliegenheiten, ZG 2010, 381, 397: “If the Federal Constitutional Court of Germany takes consistency seriously, then it must always look in detail at the legislative background and base its decision upon it.”

〔84〕 See BVerfGE 122, 248 = NJW 2009, 1469; commenting this *Möllers*, Nachvollzug ohne Maßstabbildung: richterliche Rechtsfortbildung in der Rechtsprechung des Bundesverfassungsgerichts, JZ 2009, 668; *Rüthers*, Trendwende im BVerfG?, NJW 2009, 1461.

〔85〕 See BVerfG NJW 2009, 1469, 1470 para. 30.

〔86〕 See BVerfG NJW 2009, 1469, 1479 para. 97.

〔87〕 BVerfG NJW 2009, 1469, 1477 para. 98. 8136 A635

〔88〕 See BVerfG NJW 2009, 1469, 1477 para. 101.

法律的发展。[89] 这些准备工作的所有文件都是经常开放的，并且公之于众，这样，问题来了，这些材料中哪些可以被用于立法史目的以及在什么程度上被利用？

首先，区别在于行政部门与立法部门起草的文件。[90] 议会是宪法指定的立法机构这一事实就证明了上述差异。然而，其较大的合法性与其在专业技术问题上的较少经验形成了对比。在磋商与争论期间，国会议员经常只提出一项立法草案的一般意旨，尽可能使用模糊措辞，以使每个听众均可用自己的想法补白。[91] 因此，这些言论通常并未向法院表明某一特定条文的法律含义。换句话说，这一满载妥协的政见形成过程进一步阻碍了对法律相关的立法意图的探寻。[92] 因此，法院通常参考立法过程中的早期材料是不足为奇的。[93]

在法律理论中，基于“契约理论”（Paktentheorie），（政府的）解释性备忘录被视为立法意图的暗示。根据这一理论，不在审议和决议的过程中展开自己观点的议会，会认可法案起草者在（政府）解释性备忘录中所表达的意图。[94] 如果一个人将脑海中产生的合同与意图的概念置于一旁，而是更关注分工过程中的立法，那么此理论的基础便是合理的。[95] 进一步考虑到联邦政府与议会的多数通常在政治上具有一致性，我们有理由假设政府的解释备忘录与议会的投票相符。[96]

2. 口头陈述

通常，只有文献才被认为是对立法史的证明。理论上讲，我们当然可以想象，那些参与过法律发展过程之人的正式口头陈述也可能产生重要的影响。目前的法学方法论很少提到这点并且几乎是一律排斥。[97] 历史经验在这方面更为丰富，在 1910 年，柏林上诉法院（Kammergericht）为了了解委员会会议录以及作为 1906 年 5 月《船员供给法案》（Manns-

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〔89〕 In this regard see *Cramer*, Der Bonus als Malus-zur Überwälzung von Geschäftsverlusten auf Arbeitnehmer, AJP 2006, 515, 519.

〔90〕 See *Cramer*, Der Bonus als Malus-zur Überwälzung von Geschäftsverlusten auf Arbeitnehmer, AJP 2006. 515, 517.

〔91〕 Emphatically *Pawlowski*, Methodenlehre für Juristen, 3rd ed. 1999, marg. no. 620; see also *Larenz* (n 25 above), p. 329.

〔92〕 See *Luhmann*, Das Recht der Gesellschaft, 1995, p. 420.

〔93〕 See *F. Schmidt*, Zur Methode der Rechtsfindung, 1976, p. 24 ff.; concurring *Pawlowski* (n 91 above), marg. no. 618.

〔94〕 Probably first *Wächter*, Abhandlungen aus dem Strafrechte, I, 1835, p. 242 ff.; in more recent times *Bydlinski* (n 25 above), p. 431 f.; *Engisch* (n 23 above), p. 122; *Neuner* (n 59 above), p. 104; MünchKommBGB/*Säcker*, 5th ed. 2006, Einleitung marg. no. 110; critically *Larenz* (n 25 above), p. 329; also *Canaris*, Karl Larenz, in Grundmann/Riesenhuber (eds.), Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler, vol. 2, 2010, p. 263, 297 with n 129, according to whom Parliament's burden to contradict affects the separation of powers in a risky way and leaves far too much room for the contingencies of the legislative process.

〔95〕 Thus *Müller/Christensen* (n 46 above), marg. no. 362, who liken the legislative process to a “competitive role playing game”.

〔96〕 Convincing, *Looschelders/Roth* (n 27 above), p. 159.

〔97〕 See for example *Bydlinski* (n 25 above), p. 449 f.: “The limits of the human capacity to remember and of our lifespan on one hand, and the requirements of legal certainty and equal treatment on the other do indeed speak against different interpretations of general-abstract norms depending on whether or not particular persons are still available as sources of information.”; *contra Reinicke/Reinicke*, Zur Frage, ob das Gericht berechtigt ist, über den Willen des Gesetzgebers, Beweis zu erheben, MDR 1952, 141, 142.

chaftsversorgungsgesetz）立法性解释基础的那些材料，对德意志帝国议会委员会成员、帝国议会成员以及宣誓的政府成员进行了审查。[98] 这个方法被德意志帝国最高法院看好："[法官]的行动范围不限于审查立法性印刷品和其他文件，在适当情况下，还可通过审查证人或其他了解信息的人，来持续阐明并发现特别程序"。[99] 相比之下，澳大利亚最高法院于 1950 年决定，不允许讯问作为"立法者意图"证人的法案起草者。[100] "这个观点遭到特别强烈的拒绝。这会导致判例法的完全平庸化以及违背宪法固定下来的法院独立原则。一旦法律在联邦报纸上公布，其解释就变成了法院的问题。过去的起草者不可以再参与到这个程序中。"[101] 为了支持这个立场，人们可能会补充道：内阁或政府成员为了自己的利益后来可能会倾向于以充当证人作证的方式来纠正最初没有预见到的问题或者最近立法中不可预见的结果。因此，也存在政治争论将会被带到法院面前的这种风险。

3. 暗示理论

在现代解释方法论中未解决的难题是，历史性立法意图是否仅仅被视作已制定的文本所暗示的内容，即使其内容并不完整。许多学者即便在今天也在不断地提倡暗示理论（Andeutungstheorie）。[102] 这样做时，他们试图反驳客观主义者所认为的法律形式观点或法律制定观点，这种观点主张，只有与宪法相符的法律才有约束力，而非那些不足为信的史料。[103] 联邦宪法法院似乎也遵循这个原则。[104] 如果寻求比较法，《葡萄牙民法典》则表明了同样的观点；该法典第 9 条第（2）项规定，如果立法意图没有在法律文本中提及则是无关的。[105] 相反的观点也势头正猛，认为暗示理论在方法论意义上是过时的[106]或者只有经过改良才会被接受[107]。

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[98] The Court of Appeals' decision-as far as one can tell-was not published and only mentioned in newspaper reports; dismissive, *Klein*, Gesetzesuaslegung mittels Zeugenschaft, JW 1911, 834; approving, *Salmann*, Gesetzesauslegung mittels Beweisaufnahme. Eine Entgegnung, JW 1912, 321.

[99] RGZ 81, 276, 282. 8136A63 5

[100] See OGH JBl. 1950, 507, judicial principle 2.

[101] OGH JBl. 1950, 507, 508.

[102] See *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 208; *Schäffer* (n 41 above), p. 595, 615; it appears also *Kramer* (n 6 above), p. 129.

[103] See *Hassold*, Wille des Gesetzgebers oder objektiver Sinn des Gesetzes-subjektive oder objektive Theorie der Gesetzesauslegung, ZZP 94 (1981), 192, 208: "This-per se reasonable-argument is defeated by the allusion theory."

[104] See BVerfGE 11, 126, 130, which states that legislative intent "[can] only be considered insofar as it was sufficiently expressed in the statute."

[105] The exact text of the Code reads: "Não pode, porém, ser considerado pelo intérprete o pensamento legislativo que não tenha na letra da lei um mínimo de correspondência verbal, ainda que imperfeitamente expresso."

[106] Thus *Rüthers/Fischer* (n 24 above), marg. no. 799 together with marg. no. 734 ff.; also critical *Jestaedt* (n 44 above), p. 340 f., arguing that the *form* of the norm's development cannot without further elaboration be identified with its *content*; general criticism with 16 individual points against the allusion theory in *Simon* (n 78 above), p. 232 - 257.

[107] Thus *Wank* (n 59 above), p. 33: "If the theory is extended so that indicators of legislative intent could be found with the assistance of all interpretative criteria [...] it might be possible to support the allusion theory."

的确，暗示理论太过于注重字面含义（Wortlautgrenze）。“praeter verbal egis”（即，与法律并非直接矛盾的）[108] 历史资料——即使价值不大，也能提供一些解释线索。[109] “contra verbal egis”（即与成文法直接矛盾的）[110] 资料却完全不同，因为使用这些资料意味着用非规范性文件来对抗规范性文件。[111] 然而，这种资料仍被用于修正法律起草过程中的错误，或是对过于宽泛的规定进行限制性解释（即目的论的减缩）。[112]

4. 立法史有约束力吗？

最后一个问题是，立法史的解释及评注是否对法院产生约束力。当下绝大多数作者都反对这个观点[113]；相反，立法史仅仅是对法院有“指导作用”[114] 的工具这一说法，似乎赢得了广泛共识。但在涉及历史性解释方法与其他解释方法之间哪个相对更重要的问题上却出现了分歧。法律话语理论的支持者有时会提议一种排序，即将以立法意图为基础的那些观点置于其他观点之上。[115] 而且，越来越多的学者认为，尽管法院没有绝对义务去遵照立法史，但法院却有查阅资料的义务。[116]

三、英国的立法史：“排除规则”下投射出的长长阴影

（一）传统的解释习惯：“排除规则”

长时间以来，英国呈现给对方法论感兴趣的观察者一个截然相反的画面[117]：自

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[108] *Kramer*（n 6 above），p. 139. 8136A63　5

[109] Differing *Kramer*（n 6 above），p. 139. 8136A635

[110] *Kramer*（n 6 above），p. 139. 8136A635

[111] See *Müller/Christensen*（n 46 above），marg. no. 441；arriving at the same result *Kramer*（n 6 above），p. 140.

[112] On both of these cases *Kramer*（n 6 above），p. 140 f.

[113] Differing however *Gelzer*，Plädoyer für ein objektiv-historisches Verständnis des Gesetzes，recht 2（2005），37，45.

[114] *F. Schmidt*（n 93 above），p. 19.

[115] See *Alexy*（n 31 above），p. 305：“As a pragmatic rule one could take the burden-of-argument rule：arguments that express a strict adherence to the literal meaning of a statute or to historical legislative intent take priority over other arguments unless reasonable reasons can be put forward why other arguments might be given precedence.”；agreeing *von Arnauld*，Möglichkeiten und Grenzen dynamischer Interpretation von Rechtsnormen，Rechtstheorie 32（2001），467，476 f.；*Grigoleit*，Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik，ZNR 2008，259，263 f.，270：In relation to objective-purposive interpretation，historical-original statements are presumptively given priority，but it can，however，be overridden by serious purposive considerations.”；dismissive *Heun*，Original Intent und Wille des historischen Verfassungsgebers，AöR 116（1991），185，206.

[116] See *Kramer*（n 6 above），p. 138；*Raisch*，Vom Nutzen der überkommenen Auslegungskanones für die praktische Rechtsanwendung，1988，p. 32；*Rüthers/Fischer*（n 24 above），marg. no. 730c，789，794；*Neuner*，（n 59 above），p. 104 f.；already of this view *Heck*，Gesetzesauslegung und Interessenjurisprudenz，AcP 112（1914），1，114 f.，206.

[117] Excellent comparative law treatment in *Hager*，Rechtsmethoden in Europa，2009，marg. no. 138 ff.；*Vogenauer*，Die Auslegung von Gesetzen in England und auf dem Kontinent，2001，vol. 2，p. 967 ff.

1769 年 Millar 诉 Taylor 案以后，根据排除规则[118]，议会辩论内容不得用于成文法解释[119]，它曾被幽默地描述为“没有英国法官在床底下看”[120]。为了论证排除规则的合理性，人们提出了一连串宪法问题和实际问题[121]：首先，受《权利法案》（1689 年）第 9 条[122]所保护的议会成员不受拘束的言论自由权，不允许议员在议会上发表的言论被讨论，更不允许法院对其进行批评；[123] 其次，法律的确定性要求成文法本身是公开的、易于理解的；[124] 最后，相关材料的搜集工作比较耗时，并且经常毫无收获，就像大海捞针，只可惜“针多半不在那儿”[125]。

在过去几年里，出现了对排除规则的批判观点。在 1977 年与 1981 年的两个判决中，丹宁大法官——可能是 20 世纪最有影响力的英国法官以及案卷主事官，承认秘密查阅过英国议会记事录[126]、议会辩论打印稿[127]，并且对“法官不得不在不开灯的情况下，在黑暗中探索一项法案的含义”之原因产生怀疑。[128] 在 1969 年发布的一份有关成文法解释的详细报告中，法律委员会确实承认，立法史在解释法律方面具有重要作用，

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〔118〕 Looking back at *Pepper v. Hart* [1993] AC 593, 630D: “Under present law, there is a general rule that references to Parliamentary material as an aid to statutory construction is not permissible (‘the exclusionary rule’).”

〔119〕 *Millar v. Taylor* (1769) 4 Burr 2303, 2332 (*Willes J*) (KB): “The sense and meaning of an Act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other house or to the Sovereign.”

〔120〕 *Herbert*, Bardot M. P.? And other Modern Misleading Cases, 1964, p. 167.

〔121〕 In summary, *Pepper v. Hart* [1993] AC 539, 633A (*Lord Browne-Wilkinson*): “Thus the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers), to construe the meaning of the words finally enacted; second, the practical difficulty of the expense of researching Parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, the improbability of finding helpful guidance from Hansard.”; in depth *Vogenauer* (n 117 above), p. 1208 ff.

〔122〕 The text reads “That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.”

〔123〕 See for example *Davis v. Johnson* [1979] AC 264, 350 (*Lord Scarman*): “Secondly, consel are not permitted to refer to Hansard in argument. So long as this rule is maintained by Parliament (it is not the creation of the judges), it must be wrong for the judge to make any judicial use of proceedings in Parliament for the purposes of interpreting statutes.”

〔124〕 See for example *Fothergill v. Monarch Airlines Ltd.* [1981] AC 251, 279 (*Lord Diplock*): “[...] the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.”

〔125〕 *Lord Reid*, (1972—73) XII J. S. P. T. L. 22, 28 (1972—73).

〔126〕 See *Davis v. Johnson* [1979] AC 264, 276 f. (*Lord Denning*); *Hadmore Production v. Hamilton* [1983] 1 AC 191, 201 (*Lord Denning*): “But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so.”

〔127〕 The name stems from the *Hansard* family. *Luke Hansard* was the printer of the *Journal of the House of Commons* from 1774 to 1828, his sons and grandsons carried on the business.

〔128〕 See *Davis v. Johnson* [1979] AC 264, 276 (*Lord Denning*). 8136 A635

但是由于一些现实原因，并不建议基于此而撤销排除规则。[129]

（二）佩珀诉哈特案（1992）："排除规则"的放松

1992 年佩珀诉哈特案（Pepper v. Hart）的标志性判决[130]带来了方法论范式的改变[131]，这份判决涉及税收法案的解释问题：一所私立学校与该校教师达成了协议，即学校收取教师孩子的学费数额是正常学费的五分之一。对这个财务效益的征税估值出现了争议，根据 1976 年的财政法案，税收根据其"成本"来核定。估值的计算方法是基于学费的平均成本，但是教师们认为应当采用附加成本或边际成本方式定价，因为私立学校并没有开足马力运行，所以这些成本实质上较少。恰巧在议会辩论期间，财政司司长特别强调说，附加成本应该是构成上述计算的基础。作为回应，英国上议院最初打算站在估税员一边，在一份 6：1 的裁决中背离了排除规则。由布朗尼·威尔金森（Browne-Wilkinson）大法官撰写的多数判决认为，没有什么合理的理由不让法院通过考虑立法史来支持立法意图。[132] 然而，英国上议院规定了放宽适用排除规则的三个先决条件。首先，需要被解释的条文必须是模糊的、不清晰的或者是会导致荒谬结果的。其次，只有在议会上由部长或其他法案的发起人做出的陈述才有可能被考虑。Drittens müsse eine solche Stellungnahme eindeutig sein（第三，这种观点必须是明确的、清晰的）。第三，有争论的陈述必须是明确的。[133] 麦凯（Mackay）大法官则提出了异议，他认为，在新的解释规则下，诉讼当事人将不得不在每个案件中都梳理立法史材料，这会导致诉讼费用的剧增。[134]

（三）当下的法律发展：对佩珀诉哈特案的基本批判与普遍坚持

人们对于佩珀诉哈特案的反应是复杂的。学术批评主要集中在宪法含义上：在不缺乏立法行为的情况下，负责部长的观点就会代表立法意图，这违背了分权原则。[135] 这种成文法解释方法将会促使政府夹带那些有争议的观点于议会辩论之中，而这些观点在

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[129] See The Law Commission (No. 21) and The Scottish Law Commission (No. 11), The Interpretation of Statutes, 1969, p. 31 f.

[130] [1993] AC 593.

[131] See also *Brudney*, Below The Surface: Comparing Legislative History Usage by The House of Lords and the Supreme Court, 85 Wash. U. L. Rev. 1, 6 (2007): "*Pepper v. Hart* was a watershed decision in constitutional as well as practical terms."

[132] See *Pepper v. Hart* [1993] AC 593, 635A (*Lord Browne-Wilkinson*): "But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words?"

[133] See *Pepper v. Hart* [1993] AC 593, 640C (*Lord Browne-Wilkinson*).

[134] See *Pepper v. Hart* [1993] AC 593 614G (*Lord Mackay*).

[135] See *Styles*, The Rule of Parliament: Statutory Interpretation after Pepper v Hart, Oxford Journal of Legal Studies 14 (1994), 151, 157: "[A] s the vast majority of authoritative statements by promoters are in practice made by ministers, the referral by the courts to such statements will in practice mean that the courts are directly referring to the opinions of the government ministers. Thus not only have the courts formally surrendered their powers in favour of Parliament but they have in fact surrendered them to the Government-to the executive acting through the legislature. This would constitute a major power shift in the British constitution."; in the same vein *Kavanagh*, Pepper v. Hart and Matters of Constitutional Principle, L. Q. Rev. 121 (2005), 98, 102.

政治上又过于敏感而不能体现在成文法中，但会记录在议会记事录中。[136] 另外，上议院并没有考虑存在统一的立法意图这种假设所引发的认识论问题。[137]

法官群体已从最初对佩珀诉哈特案的热情中摆脱出来，逐渐变得清醒。霍夫曼（Hoffmann）大法官对这一判决带来的法律成本的增加以及诉讼效率的降低感到惋惜，并认为，麦凯（Mackay）大法官——当时持相反态度，被证明是更好的预言家，他预测到议会辩论记录与律师肩负的巨大的调研压力相比毫无帮助。[138] 米利特（Millet）大法官，在出庭律师理事会的一次演讲中提到了佩珀诉哈特案这份“令人遗憾的判决”[139]，还有斯泰恩（Steyn）大法官，在 2000 年牛津举办的哈特（Hart）讲座中，认为不应当完全遵照佩珀诉哈特案的判决内容。根据经验，他认为，查阅议会材料的权利是一件昂贵的奢侈品[140]，几乎没有任何好处，还可能违宪。他补充道，这项新的权利，使得行政部门能够将自己的意志融进每个法案中，由此越权立法。[141]

尽管这种批评和随后的司法判决在一定程度上限制了佩珀诉哈特案的边界，英国上

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[136] See *Kavanagh* (n 135 above), 106 f.: “The rule in *Pepper v. Hart* contains an obvious temptation for the executive to bypass the burdensome enactment process in order to specify the details of legislation through the less onerous route of expressions on intent in Parliamentary debates.”; *Munday*, Explanatory Notes and Statutory Interpretation, Justice of the Peace 170 (2006), 124, 127: “It is also a concern that, through this medium, interpretations could be deliberately embedded by the more cunning political managers or by those who head the dominant political groupings.”

[137] See *Munday*, Interpretation of Legislation in England: The Expanding Quest for Parliamentary Intention, RabelsZ 75 (2011) (forthcoming); exhaustively too *Lord Steyn*, Pepper v Hart; A Re-examination, Oxford Journal of Legal Studies 21 (2001), 59, 64 ff.

[138] See *Robinson v. Secretary of State*, [2002] N. Ir. L. R. 390, 405 (*Lord Hoffmann*): “Speaking for myself, I think that Lord Mackay has turned out to be the better prophet. References to Hansard are now fairly frequently included in argument and beneath those references there must lie a large spoil heap of [parliamentary] material which has been mined in the course of research without yielding anything worthy even of a submission.”; recently *Chartbrook Ltd v. Persimmon Ltd* [2009] 3 WLR 267, 281D (*Lord Hoffmann*): “Your Lordships' experience in the analogous case of resort to statements in Hansard under the Rule in Pepper v Hart [1993] AC 593 suggests that such evidence will be produced in any case in which there is the remotest chance that it may be accepted and that even these cases will be only the tip of a mountain of discarded but expensive investigation.”

[139] *Lord Millet*, Construing Statutes, 20 Statute L. Rev. 107, 110 (1999). 8136A635

[140] *Lord Steyn*, Interpretation: Legal Texts and their Landscape, in Markesinis (ed.), The Clifford Chance Millenium Lectures, 2000, p. 79, 87: “expensive luxury in our legal system”.

[141] See *Lord Steyn*, Pepper v Hart; A Re-Examination, Oxford Journal of Legal Studies 21 (2001), 59, 68: “It was a rule of constitutional importance which guaranteed that only Parliament, and not the executive, ultimately legislates; and that the courts are obliged to interpret and apply what Parliament has enacted, and nothing more or less. To give the executive, which promotes a Bill, the right to put its own gloss on the Bill is a substantial inroad on a constitutional principle, shifting legislative power from Parliament to the executive. [...] *Pepper v Hart* treats qualifying ministerial policy statements as canonical. It treats them as a source of law. It is in constitutional terms a retrograde step: it enables the executive to make law.”; also *Chartbrook Ltd v. Persimmon Ltd* [2009] 3 WLR 267, 281D (*Lord Hoffmann*): “*Pepper v Hart* has also encouraged ministers and others to make statements in the hope of influencing the construction which the courts will give to a statute [...].”

议院——或者现在官方所称的英国最高法院——仍然继续支持此案。[142] 提到这点，最近一名英国上议院法官嘲讽道："有些传统主义者被看见公开阅读英国议会议事录就好像被抓到看黄色小说一样"。[143] 通过允许参考立法史，佩珀诉哈特案促进了英国法上目的解释方法的进一步传播，这使得一项法案的主观目的有了最重要的意义。[144] 只关注条文词句含义的字面规则这一做法由此似乎得到了很好的克服。

四、立法史在美国的运用：在意向主义、文本主义以及动态成文法解释之间

在美国早期，美国法院采用英国法律体系及其成文法解释规则，包括排除规则。[145] 美国南北战争爆发后随即迎来一场方法论解放运动，历经整个 19 世纪下半叶。[146]

（一）意向主义

1. 成文法解释的目的及方法

19 世纪下半叶，也称作古典时期，这一时期具有意向主义的特征，旨在确定历史上的立法意图。这种典型的解释方法出现在当时最高法院的诸多判决中："法律制定者的意图构成了法律。"[147] 当然，当成文法解释的目的旨在确立这种意图时，一部法律的立法史就成为关键。与排除规则的彻底决裂出现在 1892 年最高法院对圣三一教堂诉美国案（Church of the Holy Trinity v. U. S.）[148] 的判决中。[149] 但是，在古典时期的最后阶段，立法史材料的重要性开始衰落，然而，成文法解释则变得愈发字面化。经常被引

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[142] Exhaustively, *Vogenauer*, A Retreat from Pepper v Hart? A Reply to Lord Steyn, Oxford Journal of Legal Studies 25 (2005), 629; critical recently *Munday*, Interpretation of Legislation in England: The Expanding Quest for Parliamentary Intention, RanelsZ 75 (2011) (forthcoming).

[143] See *Cooke*, The Road Ahead for the Common Law, 53 Int'l & Comp. L. Q. 273, 282 (2004).

[144] See *R (o/a Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, 700: "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas. [...] [T] he shift towards purposive interpretation is not in doubt."

[145] See for example *The Charles River Bridge v. The Warren Bridge*, 36 U. S. 420, 545 (1837): "We adopt and adhere to the rules of construction known to the English common law."

[146] Excellent comparative law treatment by *Melin*, Gesetzesauslegung in den USA und in Deutschland, 2005, p. 77 ff. and *passim*; *Brudney*, Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court, 85 Wash. U. L. Rev. 1 (2007); and *Healy*, Legislative Intent and Statutory Interpretation in England and the United States, 35 Stan. J. Int'l L. 231 (1999).

[147] *U. S. v. Hartwell*, 73 U. S. 385, 396 (1868); *Atkins v. The Disintegrating Company*, 85 U. S. 272, 301 (1873); *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 300 (1876).

[148] 143 U. S. 457 (1892). 8136A635

[149] See *Baade*, Original Intent" in Historical Perspective: Some Critical Glosses, 69 Tex. L. Rev. 1063, 1091 n. 644 (1991): "[Holy Trinity] mark [ed] the definite rejection of the Court's exclusionary rule."; also *Frickey*, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 247 (1992): "Holy Trinity Church is the case you always cite when the statutory text is hopelessly against you."

用的原因是，某一条文的词句含义就是立法意图的最佳写照。[150]

2. 批判主义以及对批判主义的批判

在 20 世纪初，一场反对潮流席卷而来，其尖锐地批评了古典主义末期对立法史及其形式主义的关注。用奥利弗·温德尔·霍姆斯（Oliver Wendell Holmens）现在很著名的话说，“法律的生命不在于逻辑，而在于经验”。[151] 对法律现实主义者的批评听起来与德国人的观点相似：共同的立法意图恐怕不可能建立起来。[152] 而且，他们声称，国会的个体成员可以策略地论证，以便完成一部以政治为导向的法律或是阻挠一部不理想法律的诞生。最后，对立法意图的探寻会过于武断，以至于法官可能会将他们的裁决建立在这种武断的立法意图之上，同时将他们自己的价值观强加到成文法解释中。

尽管存在这些观点，但立法史在美国判例法中的重要性却在过去 30 年里得到了稳步提升。随着早期传统被打破，最高法院甚至表现出，在遵循立法史会违背立法意图或立法目的的情形下，愿意偏离普通的字面含义。[153] 事实上，以前曾坚持过这种方法的普通含义规则被降为“经验规则”。[154] 最近，联邦最高法院又开始强调成文法词句含义的价值。与德国联邦宪法法院的标准说明[155]非常具有一致性的是，肯尼迪（Kennedy）大法官撰写的一项新的判决认为：“正如我们再三认为的那样，官方的声明应是法律文本，而不是立法史或者任何其他外来材料。外来材料在成文法解释过程中的作用只限于阐明立法机关对模糊条款的可靠理解。并不是所有的外来材料都是洞察立法含义的可靠来源，然而，立法史容易受到两种尖锐的批评。第一，立法史自身往往是晦涩难懂、含混不清的，甚至是互相矛盾的。……第二，司法对于像委员会报告这样的立法材料的依赖……可能会给没有代表性的委员会成员，或更糟糕地，给未经选举的职员和说客以权力和动机去策略地操纵立法史，从而确保他们实现通过法律文本不可能实现的目的”。[156]

在法律理论中，许多学者著书立说来支持立法史在成文法解释中的可采用性与实用性，即使其潜在被滥用的可能性无法被排除。[157] 一些作者尝试在不同类型的立法史材

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[150] See *The Saratoga*, 9 F. 322, 325 (1880): “The primary maxim for ascertaining the intent of a statute is to look first of all to the language of the act itself.”; from an English perspective, even earlier, *The Sussage Peerage*, 8 Eng. Rep. 1034, 1057 (1844): “The words themselves alone [...] best declare the intention of the lawgiver.”

[151] *Holmes*, The Common Law, 1881, p. 1.

[152] See *Radin*, Statutory Interpretation, 43 Harv. L. Rev. 863, 870 (1930): “A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”

[153] See *U. S. v. American Trucking Associations*, 310 U. S. 534, 543 f. (1940); *U. S. v. Dickerson*, 310 U. S. 554, 562 (1940).

[154] *Boston Sand & Gravel Co. v. U. S.*, 278 U. S. 41, 48 (1928) (*Holmes, J.*).

[155] N 72 above.

[156] *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U. S. 546, 568 f. (2005).

[157] Indicative, for example, *Breyer*, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 847 (1992): “I should like to defend the classical practice and convince you that those who attack it ought to claim victory once they have made judges more sensitive to problems of the abuse of legislative history; they ought not condemn its use altogether. They should confine their attack to the outskirts and leave the citadel at peace.”

料之间进行区别对待，例如，委员会报告比国会辩论期间的演讲更为重要。[158] 这种被称为目的论主义的解释方法，是成文法解释的进一步发展，其与意向主义密切相关。根据这个新方法，只有在立法史有助于澄清“成文法的意图”时才是有意义的。[159]

（二）（新）文本主义

上文所述的立法史的发展以及字面含义重要性的相对削弱，近日遭到了越来越多的批评。首先，他们以讽刺的方式来掩盖批评，开玩笑地认为只有在立法史模糊不清时，才应寻求法律条文的字面含义。[160] 然而，这个玩笑是有关批评家的，在 1971 年，联邦最高法院实际上对这些边界做出了判断：“立法史……是模糊的。……因为其所具有的模糊性，很显然我们必须主要查看法律文本本身来探求立法意图。”[161] 作为回应，意向主义的反对者提出了一个替代方法，即（新）文本主义。这个方法的支持者赞成回到严格遵照字面含义的成文法解释上。这个方法也同样适用于立法史，不同的支持者给出了不同的理由。

1. 安东尼·斯卡利亚（Antonin Scalia）：立法史以及民主合法性的缺失

安东尼·斯卡利亚（Antonin Scalia），联邦最高法院法官，强有力的文本主义带头人，他看出立法史中没有民主的合法性[162]，甚至认为立法史的运用是违宪的。[163] 他的主要论点与德国客观主义者观点在形式或内容上很相似：立法史并不适用在立法程序中，因此对法院没有约束力。斯卡利亚重写了马歇尔大法官在马伯里诉麦迪逊案[164]中的著名判决，斯卡利亚认为“我们是法治政府，不是委员会报告”[165]。此外，他还指出，99.99%的成文法解释案件中不存在立法意图，因此任何以立法史为基础的结论必然是错的。[166] 斯卡利亚对法律的理解是形式主义的，他的这种理解遭到了反对，为了对这种反对观点做出回应，他激烈地回答道：“法律当然是形式主义的！法律规则就是

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[158] See for example *Maltz*, Statutory Interpretation and Legislative Power: The Case for a. Modified Intentionalist Approach, 63 Tul. L. Rev. 1, 27 (1988): “In contrast to committee reports and explanations of floor managers, most statements made during debate by either supporters or opponents are not strong evidence of general legislative understanding.”

[159] See *Eskridge/Frickey* (eds.), Hart & Sacks' The Legal Process: Basic Problems in the Making and Application of Law, 1994, p. 1379: “The history should be examined for the light it throws on general purpose.”

[160] Thus, for example, *Frankfurter*, Some Reflection on the Reading of Statutes, 47 Colum. L. Rev. 527, 543 (1947): “Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute.”

[161] *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 412 Fn. 29 (1971). 8136A635

[162] See *Conroy v. Aniskoff*, 507 U. S. 511, 519 (1993) (*Scalia, J., concurring*): “The greatest defect of legislative history is its illegitimacy.” 8136A635

[163] See *Scalia*, A Matter of Interpretation: Federal Courts and the Law, 1997, p. 3, 29 ff., 35.

[164] 5 U. S. 137, 163 (1803): “The government of the United States has been emphatically termed a government of laws, and not of men.”

[165] *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597, 621 (1991) (*Scalia, J.*).

[166] See *Scalia* (n 163 above), p. 3, 31 f.: “What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false.”

关于形式的。”[167] 其他人还认为，严格遵循字面含义的成文法解释会在司法裁决中提供更大的可预测性，甚至还会产生教学上的效果：当一个立法者意识到法院非常重视条文字面含义时，他会更谨慎地制定法律条文。[168]

2. 弗兰克·伊斯特布鲁克（Frank Esterbrook）：立法史与公共选择理论

弗兰克·伊斯特布鲁克，联邦法官，公司法经济分析的早期开拓者，主要运用基于新政治经济学的公共选择理论来证明他对立法史的怀疑是合理的。[169] 此理论表明，立法史尤其易被操纵，并为在国会中不能获得多数席位的少数利益群体打开了闸门。由于这个原因，他也将“立法史”称为“失败者的历史”，因为民选代表的行为越来越忠于这句格言，即“如果你不能使自己的提议进入法案，至少要写部立法史来使你看起来像已经胜利了。”[170] 而且，伊斯特布鲁克告诫不要篡改法律中已达成的妥协；不应当允许法院以所谓的真实的立法意图为借口去纠正故意模糊的立法文本。[171]

3. 阿德里安·沃缪勒（Adrian Vermeule）：立法史与成本效益的考量

阿德里安·沃缪勒，曾经是斯卡利亚大法官的书记员，现在任哈佛法学院教授，最近提出可能是最激进的方法论提议。在他的《不确定状态下的裁判》一书中，他提倡制度改变，这种改变要将法律发展过程中的司法错误成本以及在方法论问题中那些缺少约束力的先例考虑进去。[172] 根据他的观点，法官事先并不知道，参阅立法史将会导致更清晰还是更混乱。唯一确定的是它会引发巨大的成本。[173] 因此，从成本效益的角度以及从适用理由不充分的决策理论原则的角度来讲，省掉所有进一步的解释方法是可取的，包括在词句含义很清晰的那些案件中的立法史。[174]

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[167] *Scalia*（n 163 above），p. 3，25.

[168] See *Summers*，Judge Richard Posner's Jurisprudence，89 Mich. L. Rev. 1302，1320（1991）：“At the same time，judicial adherence to the ordinary meaning of ordinary words in the statute may encourage the legislature to legislate more explicitly and thereby discourage ‘legislation’ hidden in mere committee reports and the like [...]. Judicial adherence to the relevant ordinary meanings of ordinary words can also operate to encourage careful drafting and thus serve not only legitimacy and democracy but also the values specific to the rule of law.”

[169] See for example *Arrow*，Social Choice and Individual Values，2nd ed. 1963；*Buchanan / Tullock*，The Calculus of Consent，1962.

[170] *In re Sinclair*，70 F2. d 1340，1343（7th Cir. 1989）（*Easterbrook*，*J.*）.

[171] See *Easterbrook*，The Role of Original Intent in Statutory Construction，11 Harv. J. L. & Pub. Pol'y 59，63（1988）；*Easterbrook*，Statutes' Domains，50 U. Chi. L. Rev. 533，540，544（1983）：“Almost all statutes are compromises，and the cornerstone of many a compromise is the decision，usually unexpressed，to leave certain issues unresolved. [...] My suggestion is that unless the statute plainly hands courts the power to create and revise a form of common law，the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process.”；recently summarising *Manning*，Second-Generation Textualism，98 Cal. L. Rev. 1287（2010）：“Second-generation textualism argues that lawmaking inevitably involves compromise；that compromise sometimes requires splitting the difference；and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose.”

[172] See *Vermeule*，Judging Under Uncertainty：An Institutional Theory of Legal Interpretation，2006；see the discussion of this in *Eskridge*，No Frills Textualism，119 Harv. L. Rev. 2041（2006）；*Nelson*，Statutory Interpretation and Decision Theory，74 U. Chi. L. Rev. 329（2007）；*Siegel*，Judicial Interpretation in the Cost-Benefit Crucible，92 Minn. L. Rev. 387（2007）.

[173] See *Vermeule*（n 172 above），p. 183 ff.

[174] See *Vermeule*（n 172 above），p. 193.

（三）动态成文法解释

最后，应该提及一下文本主义的一个新的逆流，这股逆流的目标是动态成文法解释。与德国“主观解释”（geltungszeitliche Auslegung）相似，为了能够考虑到当下环境的变化，这个方法允许法官修改（adapt）一部法律的解释，即使这种修改违背了法律的历史性立法意图。动态成文法解释方法的支持者们对立法机构并不信任，他们热衷于通过动态解释来克服国会的瘫痪与立法的缺陷，他们在这些方面是团结一致的。动态成文法解释的支持者包括许多人物，像法哲学家罗纳德·德沃金（Ronald Dworkin）[175]，法经济学先驱圭多·卡拉布雷西（Guido Calabresi）[176]，法学理论家威廉·艾斯康（William Eskridge）[177] 以及行为法学与经济运动的共同创立者卡斯·桑斯坦（Cass Sunstein）[178]。为了描述他们的解释模式，这群人经常采用图文并茂的类比。例如，在航海关系的比喻中，法律就像是一艘船，立法者建造它并送它出海；船的航向开始时是迷茫的；然而在公海上，主要是全体船员来决定船的航向。[179] 他们的另一个比喻是，解释过程就像连载小说一样，不同的作者连续在讲同一个故事；立法者在将一部立法通过的过程中，只写故事的第一章。[180]

（四）发展现状

总而言之，在美国，解释方法论很难说是一致的。因此，1958 年亨利·哈特（Henry Hart）和阿尔伯特·萨克斯（Albert Sacks）所做的令人深省的报告在某种程度上来说仍然适用于今天：“这个问题令人难以接受的事实是，美国法院并没有易于理解的、被普遍接受的以及长期适用的成文法解释理论”[181]。[182] 这在一定程度上源于这样一种事实，即美国判例制度的遵循先例原则并不适用于法院做出的方法论说明。[183] 除

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〔175〕 See *Dworkin* (n 11 above), p. 313 ff.

〔176〕 See *Calabresi*, A Common Law for the Age of Statutes, 1982, p. 1, 87 - 89, 214 - 216. 8136A635

〔177〕 See *Eskridge*, Dynamic Statutory Interpretation, 1994, p. 49ff. and passim. 8136A635

〔178〕 See *Sunstein*, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405 (1989).

〔179〕 Thus *Aleinikoff*, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 21 (1988): “Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going but the current course is set primarily by the crew on board.”

〔180〕 Along these lines *Dworkin*, Law as Interpretation, 60 Tex. L. Rev. 527, 541 (1982): “Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of the play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on.”

〔181〕 *Hart/Sacks* (n 159 above), p. 1169.

〔182〕 Most recently in this vein *Foster*, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 Geo L. J. 1863, 1866 (2008): “Scholars and judges [...] have agreed that this characterization continues to be an accurate description of American courts.”

〔183〕 See *Foster* (n 182 above), p. 1872: “Many scholars have asserted in passing that the courts do not give doctrines of statutory interpretation stare decisis effect without engaging in further analysis.”; *Gluck*, Methodological Consensus and the New Modified Textualism, 119 Yale L. J. 1750, 1754 (2010): “Methodological stare decisis-the practice of giving precedential effect to judicial statements about methodology-is generally absent from the jurisprudence of mainstream federal statutory interpretation, but appears to be a common feature of some states' statutory case law.”

了主导法律话语的宪法解释外，国家层面为了提前达到判决结构优化的目标，在发展法院的成文法解释规则或指导方针上也付出了努力。[184] 一些观察者将此看作是新改进的文本主义的发展，它“将不同的解释方法列出明确的适用顺序——文本分析在先，然后是立法史，接下来是默认司法推定——它包含不同等级的立法史。”[185] 《得克萨斯州法典解释法》中的解释规则被认为是一个特别突出的例子：

“§ 311.023. 成文法解释帮助

在解释一部法律时，不论其表面上是不是含义模糊的，法院都可能会考虑一些其他因素（1）欲达到的目标；（2）法律制定的环境；（3）立法史；（4）普通法或者之前的法律条文，包括相同或相似主题的法律；（5）某项解释会产生的后果；（6）法律的行政建构；以及（7）题目、前言以及紧急条款。”

五、比较法结论

自比较法涉足立法史领域之后，我们可以得出什么结论？

1. 首先，这种普遍对法律解释恢复兴趣的潮流是受欢迎的。它为未来特别是法学方法论的比较视角的研究打开了诸多大有希望的渠道。而且，这次复兴是对未来很好的预兆，因为它对欧洲统一的成文法解释方法的发展来说是必不可少的。[186]

2. 我们可以觉察出，欧洲大陆法律体系以及盎格鲁-萨克逊法律体系中的解释方法日渐趋同。[187] 如今，几乎所有地方都允许使用立法史。[188] 从比较法的视角来看也不惊奇，欧洲的解释方法比美国的解释方法更具一致性，在美国，成文法解释的这个钟摆左右摇晃得更加明显。德国没有或者至少不再有坚持认为不得使用立法史的安东尼·斯卡利亚大法官[189]；在英国，斯泰恩大法官尽管没有斯卡利亚大法官那么广泛的支持，但他却是主要的批评家。[190]

3. 这些法律体系至今仍未建立制度化的程序，来更正并统一判例法中那些不一致的方法论主张。在德国，不论是规定法院裁判约束力的《联邦宪法法院法》（BVerfGG）第 31 条，还是规定向联邦最高法院（BGH）合议庭提交意见书的《法院宪法法案》

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[184] In greater detail *Gluck*, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L. J. 1750 (2010).

[185] *Gluck* (n 183 above), p. 1758. 8136A635

[186] In greater depth *Fleischer*, Europäische Methodenlehre-Stand und Perspektiven, RabelsZ 75 (2011) (forthcoming); *Riesenhuber* (ed.), Europäische Methodenlehre, 2nd ed. 2010.

[187] Generally see *Kramer*, Konvergenz und Internationalisierung der juristischen Methode, in Assmann/Brüggemeier/Sethe (eds.), Unterschiedliche Rechtskulturen-Konvergenz des Rechtsdenkens, 2001, p. 31, 33 ff.; as well as the monumental, two-volume work by *Vogenauer* (n 117 above).

[188] See *Vogenauer* (n 117 above), p. 1256: “Today, no differences can be made out between German, French and English case law with regard to legislative history.”; see also *Healy*, (n 146 above), p. 233: “The Article concludes that English rules of statutory interpretation have become much more like U. S. rules and that *Pepper* itself shows how English law can be transformed, notwithstanding the House of Lords' effort to place principled, clear and significant limits on intentionalist interpretation.”

[189] For earlier proponents, see the evidence in n 66 above.

[190] See also *Brudney*, Below The Surface: Comparing Legislative History Usage by The House of Lords and The Supreme Court, 85 Wash. U. L. Rev. 1, 20 (2007): “In his Hart Lecture delivered at Oxford in May 2000, Lord Steyn assumed a lead critic's stance comparable to Justice Scalia's role in the Supreme Court.”

(GVG) 第 132 条，都未能发挥这个功能；在盎格鲁-萨克逊体系中，方法论主张也缺少具有约束力的判例效力（遵循先例）。无论这种情形是否应被纠正[191]，都必须在其他方面进行细致考察。

4. 就目前这些反对使用立法史的论据储备来看，法院几乎未曾利用那些认识论上的考量，因为可以理解的是，他们都回避提到这些问题。[192] 相反，宪法问题在判例法以及法律理论中起到越来越重要的作用。这与成文法解释宪法化的总体趋势相一致。从成本效益的视角来看，欲评价立法史的使用问题，采用讲求实际主义的盎格鲁-萨克逊方法比采用德国理论要容易得多。在德国，效率考量的使用通常都很模糊，而且经常被提起的暗示理论实际上是否真的会提高解释效率仍需检验。

5. 根据公共选择理论[193]，部分法官与法律学者有必要对有偏见的、片面的立法史来源的危险性保持更高的警惕。在议会层面也需要更加严格的预先管控以阻止可能发生的操纵行为。尤其需要关注的是“立法外包”过程中的准备工作。它与成文法解释的关联性以双协议理论为前提，打个比方说：负责的部长接管全部或部分的外部提案；接下来德国联邦议会（Bundestag）与联邦参议院（Bundesrat）通过政府提案。尽管事先制定的文本的确不总是被整篇采用，但抵御住这些提案的诱惑实属困难。在现代行为经济学中，这被称为现状偏差。[194]

6. 立法史必须被严格遵守的观念迄今为止已经很少有支持者了。立法史只是一个工具，就像佩珀诉哈特案（Pepper v. Hart）[195] 中提到的，是为了更好理解模糊条文的一种“帮助”或是“指导”。由此，这一时期的讨论已转向了立法史的重要性以及不同解释方法的适用位阶上。[196] 然而，德国与盎格鲁-萨克逊体系都没有规定成文法解释方法的适

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[191] Showing cautious tendencies on behalf of German law *Simon* (n 78 above), p. 588: “It is possible-perhaps due to the influence of the critical discussion on legal methods which has been on the rise since the 1970s-that we have finally come to the point where there are hardly any timeless insights to be gained in questions of methodology. For just that reason, it is possible to question whether a binding effect in matters of methodology is even desirable. Such doubts of course do nothing to change the fact that contradictory statements and procedures should be avoided in this field and other points of view (of one's own Supreme Court!) should be taken into account.”; agreeing, for US law, *Foster* (n 182 above), p. 1910: “Courts should give doctrines of statutory interpretation stronger stare decisis effect than they give to doctrines of substantive law. The net benefits of giving stare decisis effect to doctrines of statutory interpretation are greater than the net benefits of giving stare decisis effect to doctrines of substantive law.”

[192] Of a similar view, *Vogenauer* (n 142 above), 633: “All these are highly contentious jurisprudential and, ultimately, epistemological issues, and maybe this is why the courts refrained from entering this debate.”

[193] Critical, too, of the fact that the results of the public choice theory have hardly received any attention in German statutory interpretation, *Melin* (n 146 above), p. 320, who seeks to explain this fact by pointing out that the scepticism with regard to legislative process is not as widespread in Germany as it is in the United States.

[194] See *Krüper*, lawfirm-legibus solutus?: Legitimität und Rationalität des Gesetzgebungsverfahrens beim „ Outsourcing “ von Gesetzentwürfen, JZ 2010, 655.

[195] See *Pepper v. Hart* [1993] AC 593, 617D and G (*Lord Griffith*), 634D and 639F (*Lord Browne-Wilkinson*).

[196] See *Brudney*, Below The Surface: Comparing Legislative History Usage by The House of Lords and The Supreme Court, 85 Wash. U. L. Rev. 1, 60 (2007): “The debate within the Law Lords between legislative history advocates and sceptics thus goes to weight more than admissibility.”

用位阶。正如美国伟大的教授及法官菲利克斯·弗兰克富尔特（Felix Frankfurter）认为的那样："成文法解释没有对数表。没有任何证据具有固定的或平均的比重。"[197]

7. 查阅立法史资料的义务在比较法上并没有得到统一。一些国家在宪法中明确要求查阅立法史，而其他国家则只允许在法律条文含义不清或模糊的情况下才可以使用立法史。

8. 迄今为止，仍然没有立法史解释的一般规则。[198] 然而，对法律学者来说，分析不同立法资料[199]适用位阶的可能性和局限性是一个值得研究的问题，这些立法资料包括专家组的预备报告以及部委起草人撰写的评注中所包含的那些实际的或他们所理解的第一手解释资料。[200] 此外，为了更好地评价这些资料的价值，法官和法律学者们应当从细节上考察准备法律的过程。[201]

9. 最后一个建议并不是针对法官或法律学者的，而是针对立法者的。因为在目前成文法解释的情况下，不能够不考虑立法史，人们对立法史的作用、目标以及准确性的进一步思考是可取的。立法史作为法条的延伸，是用于回答个案问题呢，还是解决立法过程中出现的问题的储备？或者它——应当采取目的论模式——完全或至少主要地被视为一般性立法意图的表达？

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[197] See *Frankfurter*, Some Reflection on the Reading of Statutes, 47 Colum. L. Rev. 527, 543 f. (1947).

[198] See *Schroth* (n 69 above), p. 86: "There do not seem to be any general rules applicable to legislative history."; *Simon* (n 78 above), p. 260: "Strict rules on the use and interpretation of legislative history do not exist. The instructions developed in the 19th century with regard to common legislation on how to deal with legislative pronouncements normally and in cases of conflict have been more or less forgotten and were not developed any further. This abstinence on the part of theory is surprising [...]."

[199] For a U. S. perspective, see *Brudney*, Below The Surface: Comparing Legislative History Usage by The House of Lords and The Supreme Court, 85 Wash. U. L. Rev. 1, 67 (2007): "To be sure, there is a broadly recognized hierarchy of reliable legislative history sources. Conference reports, standing committee reports, and explanatory floor statements by bill sponsors or managers are clustered near the top, while legislative inaction, statements by nonlegislative drafters, and post-enactment history are arrayed close to the bottom."

[200] An indication in *Alexy/Dreier*, Statutory Interpretation in the Federal Republic of Germany, in MacCormick/Summers (eds.), Interpreting Statutes, 1991, p. 87: "For instance, sources of cognition can be parliamentary minutes, committee minutes, commission minutes, official justifications and commentary statements in the media. In general, everything may be taken into account. The more official a commentary statement and the closer its relation to the parliamentary plenum, the greater is its weight. Of the greatest weight is an intention expressed clearly and unanimously by all participants in the plenum."; see also *Fischer*, Auslegungsziele und Verfassung. Zur Bedeutung der Entstehungsgeschichte für die Anwendung des Gesetzes, Festschrift Klaus Tipke, 1995, p. 187, 205 f.

[201] Also of this opinion *Bennion*, Hansard-Help or Hindrance? A Draftsman's View of Pepper v. Hart, 14 Statute L. Rev. 149, 162 (1993): "Courts and practitioners should be better educated in the techniques and practices of legislative drafting. Then they would better understand the nature of the task they have to carry out when enactments fall to be construed."; in Germany, for over 100 years, attention has hardly been paid to the issues surrounding the origins and use of legislative history; notable exceptions are *Baden* (n 31 above), p. 369 ff.; as well as *Fischer* (n 200 above), p. 196.