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Law and history: some introductory remarks

1. Law and history in Italian comparatist scholarship

Italian comparatists often suggest a greater use of the diachronic method: more history is invoked as a remedy for incomplete reconstruction of legal systems or specific institutions. However such recommendations are normally limited to seminars and symposia where methodology is one of the topics of discussion.

If one focuses on textbooks, the situation is quite different. Some classical treaties, such as Biscaretti's and Pizzorusso's, hardly mention constitutional history at all in the treatment of the method and aims of comparative law, mainly referring it to traditional Western legal systems, such as those of Great Britain and of France.[1] The classical manual by Costantino Mortati,[2] widely used in Italian universities all through the '80s, describes the forms of state in the evolution from the feudal system up to the welfare state before coming to the synchronic approach, but spends no words on methodological problems. Even another master like Rodolfo Sacco,[3] in the chapter dedicated to the object of comparative law, defines it as a historical science "par excellence", mentioning the different interpretations of the Code Napoleon by different generations of lawyers in the 19th century as an example of models succeeding one another, to be considered in a pragmatic perspective. Again Sacco, together with Gambaro and Monateri,[4] describes the state of comparatist literature without emphasizing the role of the use of the diachronic approach.

1 Biscaretti di Ruffia (1988) 21 and Pizzorusso (1998) 149. No mention of the historical method is made in earlier texts, such as Del Vecchio (1909) and Sarfatti (1933) 118, where there is only a short passage concerning the importance of discovering the common origins of legislations.

2 Mortati (1973).

3 Sacco (1992) 50.

4 Gambaro, Monateri, Sacco (1988) 48.

More recently conceived handbooks are no more lavish in terms of space dedicated to the diachronic method. De Vergottini mentions the historical perspective only in the paragraph concerning the function of comparative law described as «verification of knowledge», together with the empirical evidence regarding circumscribed subjects and the recourse to statistical data.[5] Morbidelli, Pegoraro, Reposo and Volpi,[6] in the second and broadest edition of their manual, briefly mention historicism as a stream of thought, between jusnaturalism, sociological jurisprudence and positivism, in the initial chapter concerning interpretation, without mentioning the relevance or importance of the historical method in a comparative perspective. Again Pegoraro (with Rinella)[7] briefly mentions the use of history in comparative law in order to distinguish it from history of law, whose function is defined as ancillary though important to comparatists. In another work[8] Pegoraro sketches a few ideas about diachronic comparison, mainly to stress the difference between the study of the evolution of an institute or a legal system and the use of such knowledge in order to compare.

Mattei and Monateri[9] correctly make reference at history as one of the instruments useful in carving out comparative analysis. Bognetti[10] suggests that the mere superficial description of the constitutive elements of a legal system can be overcome through historical research, and, following Croce, proposes the investigation of the roots of the ideal inspiration of positive law, complains about the preference of Italian legal historians for ancient law, supposes that comparative lawyers can make up for the lack of historical understanding on the side of professional legal historians. In a later paper[11] the same author suggests that the practical stimulus which might originate historical verification should not be the vehicle for the hidden introduction of value statements.

5 De Vergottini (2014) 21–24.
6 Morbidelli, Pegoraro, Reposo, Volpi (1995) 26.
7 Pegoraro, Rinella (2007) 106.
8 López Garrido, Massó Garrote, Pegoraro (2000) 38.
9 Mattei, Monateri (1997) 19.
10 Bognetti (1994) 23, 90.
11 Bognetti (2009) 16 ff.

In a somehow more diffused way, Somma[12] describes history as a tool for a better choice between generalizing or individualizing approaches to the topic of comparison.

The only really extensive treatment of the link between historical research and comparative law is that of another classical author, Gino Gorla.[13] Moving from the qualification of comparison as a knowledge process aimed at isolating specific or common characters of institutions, the author thinks of historical facts or phenomena as distinctive or unifying factors. Such an approach would allow the interpreter to look at law as a historical fact and at the same time to avoid excessive abstractness. Ascarelli,[14] with the same premises, recommends strict adherence to social and economic facts in historical perspective and defines the relationship between comparative law and history as techniques of enlargement of the range of phenomena under study in terms, respectively, of space and time. Even Mario Rotondi,[15] another master of Italian comparative law, dedicates only a few lines to the application of the historical method to comparatism, mainly in order to evoke Joseph Köhler, Ernst Rabel and other earlier authors credited for tempering the knowledge of positive comparative law with some interest in history.

Michele Graziadei[16] has more recently dedicated important pages to the relevance of the understanding of the whole of a legal culture in the interpretation of positive law, from the viewpoint of the individual scholar, and in this perspective he underlines the relevance of historical research in the reconstruction of the roots but also as an instrument to free oneself from traditional wisdom and its constraints. He ends up equating the study of the past to the approach to contemporary foreign legal systems.

2. History and legal history in global comparatist scholarship

More literature is available outside Italy on the relationship between law and history in comparative terms.

12 Somma (2014) 149.
13 Gorla (1964) 928, 940, and Gorla (1962) 25.
14 Ascarelli (1952) 5, 12, 40.
15 Rotondi (1957) 819, 825.
16 Graziadei (1999) 531.

The obvious traditional premises of the interest for history are mainly two: on one side, the emphasis of Montesquieu on the importance of local historical conditions on the structure of statutes;[17] on the other, in the German world, the influence of Savigny and the historical school in conceiving national systems as developments of the Volkgeist, conditioning the relationships between a legal system and the social ancestry of the nation concerned.[18] The growing trend, during the 19th century, towards the reconstruction of the ideological origins of national institutions may have been seconded by codification and the consequent focusing on the morphology of individual systems, but at the same time might have stimulated scientific attention to comparison. Positivism as an intellectual force naturally opposed universalism, triggering some reactions against too parochial an inclination of legal studies at the end of the cycle of the historical school.[19] The development of the evolutionary thought stimulated both the deepening of differences between national systems in historical perspective and the contemporary interest for the comparative approach and even the search for a new universalism, most of all in the sphere of private and commercial law.

Contemporary scholars have approached the relationship between history and comparative law from many angles. It was Otto Kahn-Freund[20] who suggested resorting to the historical method in order to make building blocks («bricks») to be used for edifices belonging to comparative law, legal philosophy, sociology of law. Several authors followed his suggestions, though lamenting the insufficient interest of common lawyers in researching the relationship between legal history and legal theory.[21] Others got closer to the topic from the investigation of classical scholars and their idea of comparative law.[22]

Carl Friedrich's famous paper, dated 1961,[23] where he coined the famous expression «law is frozen history», is dedicated to Anglo-Saxon legal historiography, within which he moves with utter confidence.

17 Montesquieu (1749) Livre I, ch. 3.
18 Von Savigny (1840) 14.
19 Von Jhering (1852) 12 ff.
20 Kahn-Freund (1976) 6. By the same author see also Kahn-Freund (1966) 40.
21 See e.g. Samuel (1990); Samuel (1998).
22 Roscoe Pound was one of the most provocative starting points: see e.g. von Mehren (1965). Savigny is another obvious starting point: Zimmermann (1996).
23 Friedrich (1961).

René David, in all the editions of his masterpiece,[24] only mentions legal history in its relationship with comparative law to explain that the tendency to paint large frescos demonstrating the constant progress of humanity, whose founders were respectively Kohler, Maine and the College de France school, went out of fashion with the decline of positivism. Generalizations are no longer all the rage, though the contribution of comparative law to history cannot be debated. Yet, specific facts drawn from careful observations can still be used.

Zweigert and Kötz[25] seem to believe that history could be at most a means of finding out and defining the materials to be utilized for comparative aims, starting from the assumption that comparative law scholars must sometimes look beyond legal rules.

Mark Tushnet[26] harshly criticizes the superficial use of history and more generally the interdisciplinary work by jurists labelling it as «intellectual voyeurism».[27] In detail he opposes all forms of storytelling: history as progressive development (the Whig history), or its opposite, history as decline, and even history as complexity and contradiction, in other words history as the search for a usable past. However, his target is clearly not the combination of legal history, or of law-office history, in the famous words of Alfred Kelly,[28] and comparative law. His criticism is clearly directed against originalism in a quite domestic perspective, concerning possible uses of history by federal courts.[29]

Alan Watson[30] spends very favorable words for comparative legal history as the best instrument for the understanding of change, of its causes and its directions. He identifies it as the only scientific approach to the nexus between law and society,[31] though he does not offer further indications about the method to be applied.

24 See e.g. David, Jauffret-Spinosi (1992) 3.
25 Kötz, Zweigert (1990) A, § 3. However Kötz has elsewhere spent convincing words about the simultaneous use of comparative law and legal history: Kötz (1992) 20–22.
26 Tushnet (1996).
27 Such formula was first used by Leiter (1992).
28 Kelly (1965).
29 Posner (2000).
30 Watson (2004) 1 ff.
31 The topic is also deepened in Watson (2001).

James Gordley, in the chapter of the Oxford Handbook of comparative law dedicated to comparative law and legal history,[32] after describing the origins of both disciplines, starts from what he calls the common mistake of legal historians, i.e. the belief that a certain legal system can be studied in its development and structure without keeping an eye on others, and the error of comparatists that think the coherence of contemporary jurisdictions can be assessed independently of their diachronic evolution. A unifying principle, then, can be looked for in the spirit of a Zeit or Volk, in a "holistic" perspective, in the search for underlying economic interests, or, finally, in putting legal history and comparative law at the service of each other. The conclusion is that the two disciplines, though they emerged separately, are actually inseparable research tools in making the study of positive law really complete.

Mathias Siems[33] simply mentions the application of historical research to comparative methods, or even the implicit comparative dimension of historical research, as a tool to reach classifications or to find out causal regularities.

Uwe Kischel,[34] occupying a large part of his recent manual to methodological problems, saves only a few lines to history. Apparently, he seems to believe that history as such offers no methodological guarantee and that any elaboration of concepts and categories risks being too abstract to be useful to the comparatist.[35]

3. Which kind of history?

Not all historical approaches can fully adjust to the needs of comparative law. Dogmatic approaches, looking for the ultimate essence of things or final explanations, add very little to comparative research. Such criticism has been traditionally raised by the instrumentalist science philosophers, like Berkeley, Duhem and Poincaré: Duhem theorizes that philosophy of science does not

32 Gordley (2006). Mathias Reimann, however, has written several pages elsewhere in support of the interaction of the two disciplines: Reimann (1999), where he starts from the assumption of the insufficient methodological clarity to reach the conclusion that the synthesis can be comparative legal history (Vergleichende Rechtsgeschichte).

33 Siems (2014) 287 ff.

34 Kischel (2015) 166 ff.

35 Kischel (2015) 169.

exist without history of science (the latter showing the continuity of the former), and insists on «realistic» controls of theories[36] and on careful skepticism about artificial classifications; Poincaré criticizes facile transformations of brute scientific facts into generalizations[37] and argues that principles should be normally considered of merely conventional nature. Hegel's and later Benjamin's idea of history as sure progress,[38] i.e. a product of eternal reason, necessarily directing its steps towards the best, either in the transcendent or in the immanent version, is of no utility to comparative lawyers. Refusing metaphysical or ontological readings of history does not amount to giving up any hope of finding reason in history nor is it equivalent to sheer telling events in their inessential exteriority, in an accidental manner, deprived of any links.[39] A kind of reason is obviously inherent and needs to be reconstructed by the interpreter, even more urgently by the comparatist than by the historian. However it cannot be imposed on history top down as an a priori, revealing itself over the years. Determinism and evolutionism as such are not only of no help to comparative law scholars, but even misleading from the viewpoint of widening the scope of the institutional phenomena to be examined and of the consequent classifications.[40]

The comparatist can take advantage of the quite different approach that starts from facts[41] without limiting their narration to simple details, or fragments of facts,[42] but impartially finding connections between particular facts, exploring the inner forces operating behind them, in other words

36 Duhem (1913–1917).

37 Poincaré (1907).

38 Hegel (1973–1974); Benjamin (1974). On Benjamin's messianic vision of history there is an enormous amount of literature: see e.g. Beiner (1984); César (1992).

39 Such was the critique of Hegel to Savigny and Neibuhr: Hegel (1973–1974) 21 ff.

40 According to Le Goff (1988) 214, the work of the historian aims at discovering the intelligibility of history, which at most can reveal its regularity, but in no case an inner law. Somewhat different is Fernand Braudel's research for tendential long term rules: Braudel (1986) 59 ff. and Braudel (1969).

41 «Stick to facts» is the famous address by Thomas Gradgrind in Dickens (1854) ch. 1. See now Wright (2015) 319. An analogous approach can be found in the French historians: see e.g. Marc Bloch's emphasis on the descriptive nature of the historical method looks like a variant of the same approach: see Bloch (1995).

42 According to Febvre (1952).

striving to place facts in their background[43] or context.[44] Facts are normally non repeatable,[45] but their reason is identifiable without being finalistically bound or amenable to some universal philosophy. Such a research technique is somehow closer to the meaning of Volkgeist in the interpretation of von Savigny[46] rather than that of Hegel: intrinsic rationality of human actions, expression of spontaneous evolution implicit in history and drawn out by the interpreter, with definitely no presupposed logic. It has been authoritatively said that the conscience of time presupposes the past/present opposition:[47] this is an excellent synthesis of the idea of framework for historical facts and of the reason to be discovered inside it.

A comparatist approaching legal history should benefit most from a method referable to Dilthey's synthesis: friendly adherence to the peculiarity of the historical process, determination of the value of facts inside the framework of the whole development where they have taken place, research in the past of explanations and norms for the present.[48] In this perspective, the empirical use of history does imply the refusal of facile universalism, but also requests the inclusion of the research of reason in a coordinated fact system. In German terms, it could be described not merely as a historical narrative (Zeitfolge), but as a reasoned system construction (Lehrgebäude). Leaning on such a ground, the comparative law scholar can possibly proceed to build models and classifications, techniques perhaps more naturally belonging to his vocational training.

Should we exemplify, the approach to the models of welfare state could start from the history of the British poor law system up to the reforms of the

43 Von Humboldt (1903) 46. Popper speaks as well of background knowledge referring to the theoretical framework within which the observation of facts is going to be placed before the formulation of a conjecture: Popper (1963); Popper (1991) 198. Analogous observations can be found in Hempel (1963): historical reconstruction cannot do without considering the observable behavior of human groups together with the physical and environmental factors where it takes place. On Hempel see e.g. Simili (1981).

44 In the words of Watson (2004) 2. A similar idea is developed by French historians and legal sociologists: see e.g. Charnay (1982) 390–396, where the reference is to a normative structure composed of precepts and behaviors, and, much earlier, Febvre (1952), about which Massicotte (1981).

45 "Le caractère 'unique' des événements historiques": Le Goff (1988) 24.

46 Von Savigny (1892) 71.

47 See again Le Goff (1988) 25.

48 Dilthey (1983): see the considerations of Schmitz (2006).

first decade of the 20th century and from 1946 to 1950, i.e. they must be placed in the framework of the industrialization waves, the extension of suffrage, the evolving party system, the growing regulation of the economy. The model which can be drawn is the redistributive-institutional one, with service universalism, high fiscal rates, heavy State presence. The same approach applied to the United States and to Italy helps to identify the residual model and the particularistic one. The definition of models different from the first one symmetrically requires the researcher to become familiar with distinct historical contexts, late-comers in comparison with the British one. Such classification ends up being shared by political sociologists[49] and comparative public law scholars.

Furthermore, there are whole fields of comparative public law that cannot be studied without the historical approach. Civil liberties are possibly the most prominent example. Their emergence from societal needs or from other nucleuses of natural law, however conceived, and their positivization, their universalization and reparticularization – using the conceptual categories forged by Peces Barba and Bobbio[50] – would be impossible to describe and to construe without the diachronic perspective. Even the comparison between positive forms of protection would be deficient, notwithstanding the similarities induced by continental European constitutions approved in the last half of the 20th century.

Another example could be the principle of equality. The case law of constitutional and supreme courts of several Western countries on rationality and proportionality in legislative choices has become more and more similar. Yet, the evolution of the application of the principle of equality according to race in the U.S. legal system is a fundamental key to the understanding of the present situation in the American legal order and of any comparison with other national systems.

It is obviously necessary, to follow this method wholeheartedly, to bear in mind that history reaches some kind of unity through links between facts or clusters of facts, but no absolute logic or continuity can be demonstrated. History is never complete, never gives life to a closed system, never follows an abstract idea of progress or providence, is hard to fully comprehend and to let the interpreter extract a reason useful to build the present on the past.

49 E.g. Flora, Heidenheimer (1981) and Alber (1982).

50 The obvious reference is to Peces Barba Martínez (1991) and Bobbio (1990).

Such features may seem unsatisfactory to the positive lawyer, and this is the very reason why legal history as an instrument of widening knowledge in terms of time should always be declined together with the careful synchronic examination of various legal systems in terms of space. Which is, after all, the meaning of the old maxim «comparison involves history» and the other way round.[51] The combination of diachronic and synchronic methods recalls and resembles the close connection of facts and norms, which was the core teaching of Dilthey,[52] and has become the motto of the Frankfurter School and above all of Jürgen Habermas:[53] strict positivism has to be tempered with attention to the social environment and historical premises.

From another angle, one can also share Kocka's opinion,[54] that it is comparison with other societies or legal systems that provides a better understanding of the main object of study in historical terms: therefore what he calls contrastive comparative method is a just a tool of historical research. It is doubtful whether Charles Tilly[55] follows the same or the opposite line when describing history as an instrument in order to individualize comparison or specify the uniqueness of a historical process or of a positive system. Other authors, such as Tim May,[56] Skocpol and Somers[57] argue that history can help comparative studies to isolate the responsibility or the causal relationships for differences or similarities between observed systems, so contributing to the construction of theories. Such approaches (theory-development view) emphasize the simultaneous use of history and comparative research in the perspective of looking for causal regularities and constructing theories.[58]

It can be objected that using the historical and comparative methods at the same time might complicate the task of the researcher. In fact, he has to isolate, first, the usable data:[59] such an operation is usually called situational

51 A. Somma describes the origins of the two sayings, the second attributed to F. W. Maitland and the first to G. Gorla, in Somma (2003).
52 Dilthey (1914) 127.
53 Habermas (1992) ch. 5.
54 Kocka (1996).
55 Tilly (1993).
56 May (1993).
57 Skocpol, Somers (1980).
58 See an overview in Azarian (2011).
59 The description of this technique in Smelser (1973) 45, and Smelser (1976) ch. 6.

manipulation, at least in hard sciences; in this case all the possible data are historical, and consequently exposed to a much higher rate of ideological preference. The second step consists in the use of the data, either through statistical elaboration, when a significant number of cases are available, or with a systematical comparative description, if the available cases are few. The third one is the resort to a kind of general knowledge, i.e. the placement of the data in the framework. Summing up, the researcher has problems in the selection and use of the data, therefore in choosing the units to be compared, then in applying dependent and independent variables, and finally finding the indicators to be able to construe a theory revealing the possible explanations at a progressively high level.[60]

It's hardly necessary here to mention the debate about the preference between history of culture (Kulturgeschichte) and political history (politische Geschichte) aroused by Burckhardt in the last quarter of the 19th century.[61] The important point is that historical experience is the main, if not the only, instrument to restrain synchronic analyses that would otherwise be concentrated exclusively on positive norms. This methodological choice is even more important nowadays for at least two orders of reason, in particular in the field of comparative public law.

The first one consists in the pluralist structure of contemporary constitutionalism: value choices and principle balancing, committed mainly to constitutional or supreme courts, often yield different results from country to country in a short time span. Such variations could not be explained without reference to the history and the cultural and socio-economic framework of each legal system. The other one has to do with the cluster of phenomena which goes under the name of globalization. The prevalence of a thick layer of sources overlapping the national systems of legal sources may generate a complete homogenization at global or at least at continental level. The mode of reception, the capacity of adapting and, in some cases, resisting such sources at the moment of their introduction in the domestic system can be explained only in the light of peculiar historical factors. From this viewpoint history remains one of the best remedies against the flattening of the world, and the comparatist, working like a zoologist or botanist striving to

60 Such passages are well familiar to social researchers: see e.g. Radcliffe-Brown (1958); Tuma (1974); Sartori (2011).

61 A summary of this passage in Tessitore (2003).

save endangered species, must fulfill the engagement of bringing out and exploiting the typicalities – one is tempted to say the richness – of the national legal systems, whose main exemplary characteristics can be best appreciated in the historical dimension.[62]

It is questionable, finally, whether a historical reconstruction, though definitely useful to the comparatist, is likely to add certainty to the investigation of positive norms in synchronic perspective or to the contrary makes explanations less firm. History does not own the formal reliability of the causal rule; it rather follows regularities that belong to the statistical sphere. Since, however, law is a human science as well, though tending to the model of hard sciences, the techniques for the formulation of conjectures are more or less the same. Neither does it belong to the scope of this essay to take a position with regard to the age-old discussion about the unitary concept of all science, started by the publication of the Vienna Circle Manifesto in 1929.[63]

In conclusion, a few lines must be dedicated to tradition. In the last thirty years or so, there has been a discrete amount of literature concerning tradition in various declinations: for instance, the components of tradition, that Krygier, in one of the best studies on this topic,[64] identified in its pastness, its present authority or institutionalization, and its continuity between past and present, through generations; the antinomy between tradition and change or progress, likely a consequence of the liberal revolutions and of the Enlightenment culture; the different kinds of tradition, about which Karl Popper has written some fundamental pages related to the resistance to new theories in the scientific community.[65] This debate, even when developed by lawyers, concerns more sociology or anthropology than law. In fact, it tries to realize which factors accelerate or slow changes in legislation, according to social conditions, and what can or even should be the rate of change. Such research

62 A short account of this argument, for instance, can be found in Peters, Schwenke (2000): they signal the powerful levelling effect of regional integration and globalization both on legal rules and political and economic standards and possibly fearing the excessive convergence of national characteristics. Further arguments against the reduction of contemporary culture to immediate and synchronic connectivity at the expenses of history in Schiavone (2007).

63 See more recently Grignon, Kordon (2009) 247 ff.

64 Krygier (1986).

65 Popper (1969) par. 5.

can also be carried out in comparative terms, but it has little to do with comparative legal history. It can at times instrumentally imply some measure of legal history in order to verify how some legal traditions were born and consolidated. But normally the attitude of a legal system to self-reform is subject to political or ethical considerations, more than to legal ones, unless the focus is put, say, on the flexibility rate of a written Constitution or the capacity of adaptation to norms belonging to a global or continental system of legal sources. Somma has correctly noted that even resorting to the so-called Western legal tradition can often conceal an ideological justification of globalization or a hidden or open Americanization.[66] Post-modern comparative law, it has been said,[67] normally sets aside or overshadows historical research, and even when it focuses on tradition, it is only in order to avoid historical research. The two themes, therefore, must be kept completely separate.

4. History without comparative law? Dead or living constitution?

There is at least one legal system where the combination of the historical and comparative methods applied to public law is very rare, if not impossible. In the U.S., with the possible exception of a few constitutionalists who have recently converted to comparative law, those who support the recourse to comparison with foreign institutions normally oppose the use of history, at least by federal judges, and vice versa. This situation is the natural result of a harsh controversy which has lasted decades, and at the moment there is no sign of it abating, let alone of disappearing, though the recent death of Justice Antonin Scalia might displace it on partially different premises.

The beginning of everything might have been Brown v. Board of Education of Topeka,[68] when the Supreme Court asked for a rearguing of the case after collecting historical evidence about the intention of the framers and ratifiers of the 14th Amendment, though the final version of the decision set aside all reference to history, refusing to "put the clock back to 1868". Among various criticisms of the desegregation decision one of the sharpest was that

66 Somma (2003).
67 Somma (2003).
68 347 U.S. 483 (1954).

of using law-office history.[69] Yet, in the 70s, originalism came to the fore of constitutional doctrines. Robert H. Bork, the intellectual godfather of originalism, laid its foundations in a 1971 *Indiana Law Journal* article[70] and later on in a number of conferences held in American universities. Bork's version of originalism as original intent conceived constitutional interpretation as ineludibly historical in its need to construe constitutional provisions according to the purposes of the framers, as retraced by the interpreter.

The appointment of Antonin Scalia to the Supreme Court in 1986 marked the disenfranchisement of originalism, from a rather eccentric philosophy to a method of constitutional interpretation. Openly non-originalist decisions live side by side with essentially originalist opinions like Crawford v. Washington,[71] concerning the Confrontation clause, brought back – in the words of Scalia – to its original understanding «after twenty-four years adrift in the Sea of Evolutionism».[72] Scalia's aversion to constitutional interpretation techniques inspired by the idea of a living Constitution is clearly exemplified by the emphatic statement «the Constitution is dead, dead, dead, dead», with which he began the annual prestigious Herbert H. Vaughan Lecture at the University of Princeton in mid-December 2012.[73]

Apprendi v. New Jersey,[74] with its entirely originalism-centered debate on constitutional interpretation, is another example of the foothold finally gained by originalism at the Supreme Court. The historical method though has never been the primary concern of originalists, who tend to simply assume the suitability of summarily retraced historical accounts to serve as grounds for originalist interpretation. Justice Scalia elaborated the original understanding originalism, which combines textualism and history, trying to detect the meaning of constitutional provisions from the historical analysis of the linguistic usages at the time of the Framers.

The amateurish use of history is probably the most frequent argument against originalists.[75] Actually, even before the advent of originalism, prominent scholars put lawyers' defenses up against the misuse of history in legal

69 Kelly (1965) 122 ff.
70 Bork (1971).
71 541 U.S. 36 (2004).
72 Scalia (2007) 44.
73 Murphy (2014) 476.
74 530 U.S. 466 (2000).
75 Flaherty, Martin (1995) 523–529; Kramer (2003).

analysis. Carl Friedrich maintained that reconstructing history in terms of the "meaning" of past happenings as products of the mind (legal decisions, statutes, jurists' opinions) only makes sense if carried out with the proper historical methodology, thus through what can be called scientific history.[76]

Originalists really only started taking the methodology critiques seriously very recently, elaborating the New Originalism, which addresses the problem of reconciling law and history by distinguishing constitutional interpretation from constitutional construction. Only the latter being in need of «historical arguments» to be intended as arguments based on history, but practical and «presentist».[77]

Balkin attempts a defense of this argument[78] claiming that the resort to history for the purpose of legal interpretation only aims at persuading the audience, not at providing normative claims, thus downplaying both the methodological problem and the authoritative nature of originalist interpretation.

Richard Posner, an adversarial of originalism, insists on the difference between arguments assuming «past as normative» and arguments committed to the past, but tailored to solve present problems.[79] The rebuttal of any normative claim implies giving up the need for a judge to be a real historian; he should rather be a diligent researcher, whose use of history has primarily a persuasive and narrative function.

Setting aside originalism, there are other circumstances in which law and history are inextricably combined in constitutional interpretation. In Shelby County v. Holder[80] the conservative majority in the Supreme Court struck down a provision of the Voting Rights Act, concerning the federal preclearance of States electoral legislations on the assumption that the VRA is anachronistic in its attempt to control the legislative powers of Southern States in order to prevent racial discrimination to be put in place in voting procedures. According to Chief Justice Roberts, leaving the preclearance provision in force means to show an unnecessary past-dependency. The liberals on the bench relied on history to support the opposite argument, maintaining the

76 Friedrich (1961).
77 Balkin (2013) 651.
78 Balkin (2013) 641.
79 Posner (2000).
80 133 S.Ct. 2612 (2013).

topicality of racial discrimination in voting, providing a counter-reconstruction of the events from 1870 to nowadays. The only skepticism on the use of history can be found outside the Court, in a *New York Review of Books* article[81] where former Justice Stevens emphasizes that it is not the place of judges to write and rewrite history, with no attention to the methodology and the final purpose of its use.

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