WASHINGTON COURTS' USE OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION: AN OVERVIEW WITH AN EYE TOWARDS IFCA

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"[T]he fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law."

—Sir William Blackstone[1]

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1. COMMENTARIES ON THE LAWS OF ENGLAND *59 (quoted in State v. Meath, 147 P. 11, 13 (Wash. 1915)).

I. INTRODUCTION

"[W]e concede the divination of legislative intent is on occasion somewhat akin to the difficulties attendant in the elucidation of the Eleusinian mysteries . . . ." So wrote Justice James Dolliver in the opinion of the Washington Supreme Court in *Rozner v. Bellevue*.[2] The use of legislative history to determine legislative intent in statutory analysis has garnered an enormous amount of commentary over the last thirty years. While much of this commentary has focused on the use of legislative history by federal courts, there has been a robust discussion about the use of legislative history at the state court level as well.

Within Washington State, there is a considerable amount of case law, stretching back to the years after statehood, discussing the proper use of legislative history in statutory analysis and construction.[3] This case law provides a structure for thinking about and working with legislative history in statutory analysis in Washington. This is particularly relevant when looking at statutes like the Insurance Fair Conduct Act (IFCA) due to the rich legislative history material available for that enactment. This material provides considerable information to enable lawyers, scholars, public policy analysts, and judges to understand the background and aim of the law. The availability of these records brings the question to the fore: how are courts in Washington likely to process the legislative history in analyzing and applying the law as found in the Revised Code of Washington?

2. 804 P.2d 24, 29 (Wash. 1991).
3. *See* Scouten v. City of Whatcom, 74 P. 389, 391 (Wash. 1903).

This question is relevant not only in regards to IFCA but also when engaging in general statutory analysis under Washington law. With the advent of the Internet and efforts by the legislature to provide legislative history materials online through the official Washington State Legislature homepage,[4] access to what would previously have been arcane and isolated legislative records has significantly increased.[5] Law libraries within the state routinely post how-to guides on legislative history research on their websites, detailing not only the available print and Internet sources for legislative history but also the process by which researching those sources can be carried out.[6] The presence of this information online—both the raw legislative history materials and the research process by which those materials can be mined for data—enables anyone with Internet access and the time to spare the ability to compile legislative history research from the comfort of their local coffee shop or living room couch. While much legislative history from prior to the 1970s remains difficult to compile, more recent legislative records are becoming more and more accessible online as time passes. The relevant legislative history for IFCA has been compiled and published in a companion article in this symposium volume of the Gonzaga Law Review.

This article provides an overview of the Washington judiciary's approach to the use of legislative history in statutory analysis and construction by the state courts. The goal is to assist readers in understanding how the courts are likely to approach the legislative history of IFCA in understanding and applying the statute going forward. The article begins its examination by looking at two previous studies of the use of legislative history by the

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4. The official website of the State Legislature may be found at http://www.leg.wa.gov/pages/home.aspx. (last visited April 11, 2014).

5. For an overview of the process and sources of legislative history research for Washington, including research for initiatives and referenda, *see* JULIE HEINTZ-CHO, TOM COBB & MARY A. HOTCHKISS, WASHINGTON LEGAL RESEARCH 151-68 (2d ed. 2009).

6. *See, e.g.*, GONZAGA UNIVERSITY SCHOOL OF LAW CHASTEK LIBRARY, *Washington Legislative History Research Guide* (March 25, 2013) http://libguides.law.gonzaga.edu/waleghistory; SEATTLE UNIVERSITY SCHOOL OF LAW LAW LIBRARY, *Washington Legislative History Research* (updated April 9, 2013), http://www.lawlibguides.seattleu.edu/content.php?pid=149580&sid=2869286, (last visited Mar. 1, 2014); UNIVERSITY OF WASHINGTON SCHOOL OF LAW GALLAGHER LAW LIBRARY, *Washington State Legislative History* (updated October 9, 2013), https://wwwlib.law.washington.edu/content/guides/washleghis,(last visited Mar. 1, 2014); PUBLIC LAW LIBRARY OF KING COUNTY, *Legislative History Guide* http://kcll.org/guides/legislative-history-guide, (last visited Mar. 1, 2014). For a glimpse of what the process of legislative history research prior to the advent of computer assisted legal research via the Internet was like see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 862-64 (2006) (explaining how the author researched the legislative history behind Washington State's 1977 ballot access law).

Washington courts, one by Philip A. Talmadge and the other by Arthur C. Wang. The article then identifies some of the different types of legislative materials that Washington courts have considered constituting legislative history and how a representative sample of some of those sources have been employed in the case law for purposes of statutory analysis. Third, the article discusses the Washington courts' general approach to statutory analysis and the use of legislative history, noting the key role played by the presence of textual ambiguity in functioning as a triggering mechanism for deployment of legislative history in statutory analysis. Fourth, the article examines prudential limits in the use of legislative history recognized by the Washington courts, limits that emphasize relevance and reliability in identifying the proper legislative history record for a given statute. Finally, this article concludes with some thoughts on the proper use of legislative history to provide context and background information regarding statutes like IFCA.

II. TWO PREVIOUS STUDIES OF THE USE OF LEGISLATIVE HISTORY BY WASHINGTON COURTS

A. *A New Approach to Statutory Interpretation in Washington*

In 2001, former state senator and Washington Supreme Court Justice Philip A. Talmadge wrote a detailed article proposing a set of reforms for both the courts and the legislature to improve statutory interpretation in Washington State.[7] In setting out the context for his reform proposals, Talmadge provides a detailed overview of the rules as of 2001 regarding statutory analysis and construction by Washington courts, including discussion of the use of legislative history by the courts.[8] Describing the legislative record as "[t]he ultimate extrinsic canon of statutory interpretation," Talmadge brings to his presentation the close eye of one who is both a former justice and a former legislator.[9]

After observing that "the courts have not been entirely consistent in their treatment" of legislative history materials, Justice Talmadge provides an overview of each of the major sources of legislative history in Washington, arranging them in order of most to least persuasive.[10] Covering materials that provide substantive background to the ideas contained with statutes, as well as materials dealing with specific drafts and edits of proposed statutory text,

7. Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 SEATTLE U. L. REV 179, 180, 211 (2001).

8. *Id.* at 183-190.

9. *Id.* at 203.

10. *Id.* at 203-06.

Talmadge pays attention to committee work and to the place of floor debates in understanding legislative intent.[11] At one point he draws express attention to the state supreme court's inconsistent rulings on the value of floor colloquies as evidence of legislative intent.[12] After completing his overview, Talmadge provides sage advice that the courts are constrained by "no statute or case law" regarding the relative persuasive value of any of the legislative record materials relative to each other.[13] In other words, if a court finds a particular piece of legislative history persuasive, then so it is.

At the close of his overview of the use of legislative history, Talmadge makes a strong point about the legitimate interests that the legislature itself has in preserving its views in the statutory interpretation process. Noting that the absence of recognition of such an interest is "[t]he apparent flaw" in proposed interpretive theories, Talmadge recognizes that "[t]he legislative branch certainly has a stake in how its views are interpreted."[14] Building from that concern, Talmadge calls on the legislature and courts to improve their method of approaching statutes, with the legislature doing a better job of preserving its views in the legislative record and in the statutory text itself, and the courts taking better care to approach statutory interpretation "in a more coherent and less results driven" fashion.[15] Finding the existing distinction between clear and ambiguous language "highly artificial," Talmadge calls for the courts to engage the text primarily, looking for statutory guidance to resolve uncertainty and from the various canons of construction, "but the courts should articulate which canons have primacy in the interpretation of statutes."[16] Interestingly, in his proposals for reform Talmadge nowhere expressly discusses the role legislative history should play in judicial construction of uncertain statutory language. The use of legislative history is simply subsumed under the broader category of the canons of construction.

B. *Legislative History in Washington*

In his article Talmadge writes highly of the work on legislative history published in 1984 by Arthur C. Wang, then a member of the Washington House of Representatives from Tacoma.[17] Wang's study, published as a

11. *Id*. at 204-05.
12. *Id*. at 206.
13. *Id.*
14. *Id.* at 207-08.
15. *Id.* at 208.
16. *Id*. at 210.
17. Arthur C. Wang, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571, 606 (1984).

comment in the University of Puget Sound Law Review, is an exhaustive overview of the topic, covering the usage of legislative history up to that point,[18] then-current methods of researching legislative history,[19] and possible reforms by the legislature to "improve the accessibility and usefulness of state legislative history."[20] Wang begins his comment that overviews common problems with the Washington judiciary's approach up to that time in applying legislative history, focusing on three primary concerns: the lack of consistency in the courts' approach to the use of legislative history, the faults in the system at that time of preserving legislative records, and the need for reform.[21] Of particular relevance to the present article is Wang's presentation of the patterns of usage of legislative history by state courts.

Wang's research, going back to the decade after Washington achieved statehood, demonstrates that the courts in this state "have consistently relied on legislative history to determine legislative intent when construing an ambiguous statute."[22] The legislative history used by the state courts includes both textual history to better understand the meaning of statutory language as well as broader contextual and background information to understand the ideas and principles at work in legislative enactments.[23] While the primacy of statutory language is a principle affirmed by the state supreme court, the presence of ambiguity is, as Wang notes, "often inherent in even the most precisely drafted statutes because of the difficulties in translating an idea into written words."[24] Legislative history is viewed by the courts as the "most compelling indication of the legislature's intent," of value when analyzing the text, background and scope of an ambiguous statute.[25]

Nonetheless, the state supreme court has emphasized that textual ambiguity is normally a requirement for the examination of extrinsic sources of evidence of legislative intent, and further that legislative history must meet a threshold requirement of relevance before the courts use it to construe statutory text.[26] Additionally, "courts distinguish between questions based on procedural history" and those involving substantive statutory content.[27] Limiting the examination of legislative history still further, a court in Washington "will not

18. *Id.* at 574.
19. *Id.* at 596.
20. *Id.* at 574.
21. *Id.* at 573-74.
22. *Id* at 574.
23. *Id.* at 574-75.
24. *Id.* 575-76.
25. *Id.* at 576 quoting *In re* Bale, 385 P.2d 545, 547 (1963).
26. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 9 (Wash. 2002).
27. Wang, *supra* note 17, at 577.

turn to the history of how passage complied with internal procedures of the legislature, nor will it consider the internal rules of legislative bodies to be relevant to legislative intent."[28]

Wang goes on to identify the ways in which courts in Washington use legislative history. The first step that Wang identifies is the determination of the applicability of legislative history, including whether the record "should be scrutinized liberally or restrictively."[29] Once that step has been taken, the next step is to determine which materials in the record are of value.[30] At that time in Washington, there was only a very generalized approach to the evaluation of legislative history records.[31] Discussing the case of *State v. Turner* from 1983, he characterizes the decision as clearing the way for the judiciary to "consider almost any aspect of legislative history as potentially relevant."[32] The decision, Wang contends, allows for use of legislative history "without indicating any limits to credibility and relevance and without indicating the relative weight that should be given to any particular legislative materials."[33]

After discussing some of the shortfalls in the availability and clarity of legislative records in general, Wang then goes on to discuss the various types of legislative history that the courts have used as evidence of legislative intent.[34] Observing that courts "need flexibility in determining relevance or according weight to any particular evidence of legislative history," he notes that "there are few clear limits as to what aspects of legislative history will be accepted as relevant evidence."[35] The types of legislative history that can be used by the courts are not easy to categorize— "materials may change with each legislative session, making fixed rules undesirable."[36] Wang identifies and provides detailed reviews of the major sources of legislative history that the courts have used in construing statutes:

> [C]hanges in the language of the bill itself, bill introductions and comments by the authors or proponents of a bill, committee work, floor action, events and testimony subsequent to legislative passage, and the legislature's failure to act.[37]

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28. *Id.* at 577-78.
29. *Id.* at 578.
30. *Id.* at 578-79.
31. *Id*. at 579.
32. *Id.*
33. *Id.* at 579-80.
34. *Id.* at 581-82.
35. *Id*. at 581.
36. *Id*.
37. *Id*. at 581-82.

Within each of these major categories of legislative history, other more specific forms of evidence may also be present. For example, in his discussion of bill introductions, Wang describes the use of "comments by nonlegislative initiators or authors of [a] bill as relevant aspects of legislative history," including statements from the head of an administrative agency, an inaugural address by a state governor, and official comments to both uniform and model acts.[38]

III. WHAT IS LEGISLATIVE HISTORY?

A. *Textual History*

Talmadge and Wang provide solid overviews of the various types of legislative history that the courts in Washington have traditionally relied upon to discern legislative intent. This article suggests that a helpful way to think about the diversity of legislative records available is to categorize those records into two separate types, based on the kind of legislative activity that undergirds a particular record. The first type of legislative history under this approach looks at the records tracking the textual development and amendment of a statute, both within the internal processes of the legislature and within the formal versions of enacted statutes published within the Laws of Washington.[39] For IFCA, much of the relevant legislative history consists of these kinds of records.

The use of legislative records reflecting the drafting of specific language in a statute, what this article will call textual legislative history, has a lengthy record of use by the courts.[40] The 1909 case of *Burdick v. Kimball* is an example of the supreme court relying on revisions to the language of the applicable statute to discern whether the inclusion of a particular word in the statute was inadvertent.[41] The court stated that in order to determine whether the word in question was deliberately included, it was permissible to examine the legislative history of the statute.[42] The court proceeded to do so by examining the legislative record contained in the official Laws of Washington, tracking the changes made to the statute as the legislature amended the act over

38. *Id*. at 587.

39. *See infra* Part II.B.

40. *See* Waggoner v. Ace Hardware Corp., 953 P.2d 88, 91 (Wash. 1998) ("[t]he historical development of a statutory scheme, through a succession of amendments, has always been judicially employed to illuminate the meaning of statutory language") (*citing* White v. State, 49 Wash.2d 716, 722-25, 306 P.2d 230 (1957), appeal dismissed 355 U.S. 10 (1957)).

41. 101 P. 845, 846 (Wash. 1909).

42. *Id*.

time.[43] After looking at that legislative history, the court concluded that the changes made to the statute had been so "radical" that it was unbelievable that the legislature's use of the word in question was a mistake.[44] While the court noted that the policy judgment behind the use of the word might be debatable, that was a choice for the legislature to make, and the court would not seek to reshape that judgment: "Courts may not declare the policy: they simply construe the law."[45]

The kind of textual legislative history analysis carried out by the court in *Burdick* has an obvious advantage from a researcher's perspective. The Laws of Washington are widely available as the official statutory compilation of the State of Washington, while the Revised Code of Washington is only evidence of the law. Using the citations contained within each statute contained in the Laws of Washington, as the court did in *Burdick*,[46] it is possible to easily dig through the sequential changes that occur over time in a statute's language without having to rely on the records that are purely internal to the legislative process.

A type of textual legislative history that reflects the internal legislative process is the record of sequential drafts of legislation. *Lewis v. Dep't of Licensing* discusses the use of sequential drafts of legislation to discern legislative intent.[47] That case involved the applicability of Washington's privacy statute to conversations between law enforcement and people detained during traffic stops.[48] The court also examined the proper remedy if a law enforcement officer does not communicate to the person detained that the conversation is being recorded.[49] The court ruled that while the conversations themselves were not private, Washington's privacy statute required that officers inform detainees that the conversations were being recorded.[50] The remedy for failure to do so, the court held, was the exclusion of any improperly recorded conversations.[51] In making its ruling, the court examined the sequential drafts of a statute to determine the meaning of a specific word in the statute requiring officers to inform detainees that the detainees were being recorded.[52] The court compared earlier drafts of the statute while still in the bill process, noting that

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. 139 P.3d 1078, 1089 (Wash. 2006).
48. *Id*. at 1079.
49. *Id*. at 1080.
50. *Id.*
51. *Id.*
52. *Id.* at 1088-89.

the interpretation indicted by the legislative history was "consistent with the plain language of the statute."[53]

Another approach to the use of textual legislative history is seen in *Jongeward v. BNSF R. Co*., which used textual legislative history to provide background information on a statute.[54] That case involved a question to the Washington Supreme Court certified from the District Court for the Eastern District of Washington.[55] Three questions were certified to the supreme court, the first of which asked whether a specific state statute applied in a case where a defendant negligently caused a fire that spread to a neighbor's property, damaging or destroying the neighbor's trees.[56] The supreme court reviewed the basic rules of statutory analysis in Washington State, noting its "fundamental objective is to ascertain and carry out the legislature's intent."[57] The court provided background legislative history prior to engaging in analysis "consider[ing] the statute's plain meaning, canons of construction and Washington case law."[58] The court used the textual history to explain the development of the applicable statute from its original enactment by the territorial legislature down to an amendment passed by the state legislature in 2009.[59] The court particularly noticed to the legislature's inclusion of relevant punctuation in the 2009 revision.[60] Yet, for all that attention, the court did not rely directly on the legislative history to resolve ambiguity in the applicable statutory scheme, choosing instead to resolve the ambiguity by resorting to canons of construction and relevant precedent.[61]

B. *Legislative Background*

1. Pre-Enactment Materials

While textual history can help explain the development of the structure and wording used in a statute, the textual history may not always be sufficient to resolve problems in discerning legislative intent in ambiguous statutes. Another type of legislative history available for examination is legislative material preserving the ideas or concepts undergirding the language used by the

53. *Id.* at 1089.
54. 278 P.3d 157, 160 (Wash. 2012).
55. *Id*. at 159.
56. *Id*.
57. *Id.*
58. *Id.* at 160.
59. *Id*.
60. *Id*.
61. *Id*. at 164.

legislature. Examples of these materials include, but are not limited to, final legislative reports;[62] committee hearings,[63] testimony before committees,[64] and committee reports; memoranda by committee staff;[65] floor notes;[66] floor debates[67] and colloquies; and statements by legislators. One justice of the state supreme court emphasized the importance of committee materials, including those produced by formal members of the committee and those produced by committee staff.[68] Dissenting in the case of *Tobin v. Department of Labor & Industries*, Justice Fairhurst provided a short list of relevant committee materials that a court may choose to examine to discern legislative intent, noting that "[a] broad range of evidence can be probative of the legislature's intent."[69] That range of evidence may include "discussion among committee members" and "committee staff's explanations of a bill's effects."[70] At the end of the day, as one opinion makes plain, the court may consider virtually any legislative record that is "sufficiently probative" regarding legislative intent.[71]

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62. State v. Catlett, 945 P.2d 700, 705 (Wash. 1997); Noble Manor Co. v Pierce County, 943 P.2d 1378, 1382-83 (Wash. 1997); State v. Bash, 925 P.2d 978, 981 (Wash. 1996); *see, e.g.*, State v. Silva-Baltaxar, 886 P.2d 138, 142 (1994).

63. State v. Evans, 298 P.3d 724, 731 (Wash. 2013).

64. *Id.* at 732; *see also* State v. Turner, 658 P.2d 658, 662 (Wash. 1983).

65. *Turner*, 658 P.2d at 661-662.

66. Philippides v. Bernard, 88 P.3d 939, 945 (Wash. 2004).

67. *Evans*, 298 P.3d at 731-32.

68. Tobin v. Department of Labor & Industries, 239 P.3d 544, 553-44 (Wash. 2010) (Fairhurst, J., dissenting).

69. *Id.* at 553.

70. *Id*.

71. Lutheran Day Care v. Snohomish Cnty., 829 P.2d 746, 752 (Wash. 1992); *see also Evans*, 298 P.3d at 731; *see also* State v. Aitken, 905 P.2d 1235, 1241 (Wash. Ct. App. 1995) (noting that legislative history is broader than the official House and Senate Journals). "In the absence of a more substantial record of the legislative history," Washington courts may take judicial notice of relevant materials related to the legislative history in discerning legislative intent. Knack v. Dep't of Retirement Systems, 776 P.2d 687, 693 (Wash. Ct. App. 1989). There are limits to the scope of judicial investigation of statutory background, as demonstrated in State *ex rel.* Bugge v. Martin, 232 P.2d 833, 837 (Wash. 1951) ("[w]e will not go behind an enrolled enactment to determine the method, the procedure, the means or the manner by which it was passed in the houses of the legislature.") (citing State *ex rel.* Reed v. Jones, 34 P. 201, 202 (Wash.1893)); State *ex. rel* Dunbar v. State Board of Equalization, 249 P. 996, 999 (Wash. 1926) (superseded on other grounds); Morrow v. Henneford, 47 P.2d 1016, 1020 (Wash. 1935); Shelton Hotel Co. v. Bates, 104 P.2d 478, 481-82 (Wash. 1940); Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 586 P.2d 1149, 1154 (Wash. 1978) ("[w]e are unaware of any authority and none has been shown which holds that a house rule is legislative history or a proper source to examine when looking for legislative intent"); State v. Cronin, 923 P.2d 694, 697 (Wash. 1996) ("[a]s a general principle, we are loathe to ascribe any meaning to the [l]egislature's failure to pass a

As a result, a court employing legislative history may undertake a multi-source search for legislative intent when dealing with unclear statutory language.

Washington case law provides numerous examples of the use of these types of legislative history to resolve questions of legislative intent in the face of statutory ambiguity. A final legislative report was consulted in the case of *Kadorian v. Bellingham Police Dep't*,[72] where the state supreme court relied in part on the report to guide its reading of the plain language of a disputed statutory provision. In *Lewis v. Dep't of Licensing,* the court discussed a statement by a member of a legislative committee during a formal hearing, as well as the official Washington House of Representatives bill report.[73] Questions to and answers by a legislative committee chairperson on the floor of a legislative chamber have been relied on by the courts in Washington when construing legislation,[74] even though, as one court pointed out, "statements and opinions of individual legislators generally are not considered" for that purpose.[75] As one decision explains, a committee chair's statement on the floor may be accorded significant weight because of the particular role a chair plays as a voice for the entire committee:

> While the comments of individual legislators are insufficient to establish legislative intent, statements made on the floor by the chairman of the committee in charge of the bill may be taken as the opinion of the committee as to the meaning of the bill.[76]

Statements by sponsors of legislation, while considered relevant to the determination of legislative intent, have been considered "noteworthy, but not conclusive" in statutory construction.[77]

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bill into law") (citing Spokane Cnty. Health Dist. v. Brockett, 839 P.2d 324, 331 (Wash. 1992)).

72. 829 P.2d 1061, 1065 (Wash. 1992).

73. Lewis v. State Dep't of Licensing 139 P.3d 1078, 1085 (Wash. 2006).

74. Snow's Mobile Homes, Inc. v. Morgan, 494 P.2d 216, 220-21 (Wash. 1972).

75. *Id*. at 221; *see also* State *ex rel*. Citizens Against Tolls (CAT) v. Murphy, 88 P.3d 375, 381 (Wash. 2004) ("[t]he interpretation of a statute by an individual legislator does not show legislative intent."); Spokane Cnty. Health Dist. v. Brockett, 839 P.2d 324, 331-32 (Wash. 1992) ("we have cautioned that a legislator's comments from the floor are not necessarily indicative of legislative intent.") (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 821 P.2d 18, 26 (1991)); North Coast Air Servs., Ltd. v. Grumman Corp., 759 P.2d 405, 410 (Wash. 1988); Scott v. Cascade Structures, 673 P.2d 179, 182 (Wash. 1983).

76. Howell v. Spokane & Inland Emp. Blood Bank, 785 P.2d 815, 819 (Wash. 1990).

77. Wash. State Legislature v. Lowry, 931 P.2d 885, 894 (Wash. 1997) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979); Spokane Cnty Health Dist. v. Brockett, 839 P.2d 324, 331-32 (Wash. 1992); North Coast Air Servs., LTD v. Grumman Corp., 759 P.2d 405 (Wash. 1988); *see also* Wilson v. Key Tronic Corp., 701 P.2d 518, 523 (Wash. Ct.

Low value is also ascribed to statements by individual legislators at variance with a committee report, with the state supreme court stating, "[T]he answer of a single legislator should not create an intent different from that in the official committee report if the answer is inconsistent with the report."[78] However, if a single legislator's statements relate to an amendment which he or she proposed, and the language of the amendment is "essentially identical" to the language eventually incorporated into the enactment, and the legislator's statements are consistent with the legislative record as a whole, and there is no other specific discussion of the relevant provision aside from that legislator's comments, then the supreme court has considered relevant a single legislator's statements in the legislative history.[79]

The supreme court's concern with the use of a single legislator's statements reflects the key role that the effectuation of legislative intent plays in Washington's approach to statutory analysis. As the supreme court made plain in *Woodson v. State*, its concern in examining legislative history is with discerning legislative intent, not "with the intent of some independent or isolated legislators."[80] The supreme court has explained that a concern for accuracy underlies the prohibition on the use of statements of single legislators: "[w]hat may have been the intent of an individual legislator may not have been the intent of the legislative body that passed the Act."[81] Commentary by a single legislator published in a law review may be "instructive" for "historical background," and the legislature's subsequent intention in the legislation in light of further support in the official legislative history found in the journal for the state senate, but it cannot be relied upon.[82] Likewise, the supreme court has found that "statements of individual lawmakers and others" in front of an official legislative committee are not conclusive evidence of "the intent of the legislature as a whole," although such statements "can be instructive" in demonstrating the rationale behind changes to legislation.[83] This is especially so in cases where "the legislative record does not reflect any contrary intent."[84]

App. 1985) ("[l]egislative history may be considered in ascertaining intent . . . and may be evidenced by statements from the bill's sponsor.").

78. North Coast Air Servs., LTD v. Grumman Corp., 759 P.2d 405, 410 (Wash. 1988).

79. Duke v. Boyd, 942 P.2d 351, 354 (Wash. 1997).

80. 623 P.2d 683, 687 (Wash. 1980).

81. Johnson v. Cont'l West, Inc., 663 P.2d 482, 485 (Wash. 1983); *see also* Pannell v. Thompson, 589 P.2d 1235, 1239 (Wash. 1979) ("[w]hat one legislator may have believed does not establish that the [l]egislature intended something contrary to its express declaration in [the statute].").

82. *Id.*

83. *In re* Marriage of Kovacs, 854 P.2d 629, 636 (Wash. 1993).

84. *Id.*

However, a statement by a committee staff member, even during a committee hearing, has been held not to constitute legislative history according to the state supreme court.[85]

2. Post-Enactment

The supreme court has emphasized that legislative intent cannot be shown by the affidavit of a single legislator, referring to that limitation as "well settled"[86] while declaring the affidavit by the legislator in that specific case relevant but inadmissible.[87] In *State v. Leek*[88] the court of appeals addressed limitations on the use of statements by legislators made once the legislative process on a given statute is past. In that case the court was faced with an assertion of ambiguity in the language of the statute regarding the sale of controlled substances.[89] One of the supports that the defendants had offered in their argument for statutory ambiguity was affidavits from two members of the state legislature regarding the intent of the legislature; however, the affidavits were created "5 years after the enactment of the statute . . . ."[90] In support of the relevance of the affidavits to the discernment of legislative intent, the defendants cited two Washington Supreme Court cases, *State v. Zuanich* and *State v. Coma*.[91] The court of appeals, however, found the cases distinguishable[92]:

> In *Coma*, the court considered the report of the legislative council explaining the purpose of the bill recommended by it to the legislative session which adopted the bill. In *Zuanich*, the dissenting opinion of Justice Stafford referred to the remarks made on the floor of the senate by the then chairman of the senate judiciary committee which had charge of the bill. In each instance the report or comments were during

85. *See* Louisiana-Pac. Corp. v. Asarco, Inc., 934 P.2d 685, 691 (Wash. 1997) (statement by staff counsel at a committee hearing "does not measure up to any reasonable definition of legislative history as a basis for determining 'legislative intent'").

86. City of Yakima v. Int'l Ass'n of Firefighters, AFL-CIO, Local 469, Yakima Fire Fighters Ass'n, 818 P.2d 1076, 1087 (Wash. 1991) (citing Woodson v. State, 623 P.2d 683 (Wash. 1980); Pannell v. Thompson, 589 P.2d 1235, 1239 (Wash. 1979)).

87. *Id.*

88. 614 P.2d 209, 213 (Wash. Ct. App. 1980).

89. *Id.* at 210, 211.

90. *Id.* at 212.

91. *Id.*

92. *Id.*; *see also* Woodson v. State, 623 P.2d 683, 687 (Wash. 1980) ("[l]egislative intent in passing a statute cannot be shown by depositions and affidavits of individual state legislators") (citing Pannell v. Thompson, 589 P.2d 1235, 1239 (Wash. 1979); Spokane v. State, 89 P.2d 826, 828-29 (1939)).

> the consideration of the measure by the legislature. While remarks of the chairman of the committee in charge of the bill or reports of the committee itself may be resorted to in the search for "legislative intent," statements or opinions of individual legislators are not an authoritative guide in determining such intent.[93]

The court of appeals went on to explain, through a lengthy citation to a treatise on statutory construction, the reasoning behind the relatively low value attributed to statements by individual legislators. It boils down to concerns about the reliability, accuracy, and precision of statements by individual legislators.[94] In light of such considerations, statements by individual legislators are "not a safe guide" to legislative intent.[95] The court also commented specifically on the gap in time between the creation of the affidavits and legislature's earlier consideration of the statute when it was a bill, stating that the gap was "[a]n added reason for rejecting the offered statements of the individual legislators in the instant case . . . ."[96]

In *Western Telepage, Inc. v. City of Tacoma*, the state supreme court ruled that "[a] noncontemporaneous understanding of legislative intent is not reflective of the [l]egislature's rationale" in enacting a statute seventeen years previously.[97] Building from its stated "reluctance to discern legislative intent from the testimony of a single legislator," the supreme court has found a statement by a lobbyist "to be of even less utility in discerning" legislative intent, especially given a seventeen-year gap in time between the statement and the legislature's enactment.[98]

As Arthur C. Wang points out, "[w]ith rare and unexplained exceptions, the courts have refused to consider post-enactment statements by participants as to what the legislative intent was at the time of enactment."[99] He further notes that the courts "have considered other post-enactment documents from committee staff or other legislative sources . . . ."[100] The state supreme court

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93. *Leek*, 614 P.2d at 212.

94. *Id.* at 213 (quoting 2A C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.13, at 216 (4th ed. 1973)).

95. *Id.*

96. *Id.*

97. 998 P.2d 884, 891 (Wash. 2000).

98. *Id.*

99. Wang, *supra* note 17, at 593-94; *see also* Nelson v. McClatchy Newspapers, 936 P.2d 1123, 1127 n. 5 (Wash. 1997) ("The fact that a legislator or a staffer interpreted a statute to create rights and obligations several years after its popular passage should not be viewed as a reflection of legislative intent."); State v. Leek, 614 P.2d 209, 212-13 (Wash. Ct. App. 1980).

100. Wang, *supra* note 17, at 595.

has also found that subsequent action by the legislature is a legitimate source of information entitled to "significant weight" regarding the legislative intent of an earlier enactment.[101] Critically, when examining the legislative history of statutes that are formally enacted by voters through the referendum or initiative process, as was the Insurance Fair Conduct Act, the arguments published to the voters as part of that process may be considered by the courts.[102] Such an approach follows from the nature of the initiative and referendum power as set out in the Washington State Constitution.[103] The initiative and referendum powers are expressly reserved to the people as a form of legislative authority that stands above and distinct from that held by the state legislature proper.[104] The state constitution also mandates that in any legislative action referred directly to the people, the legislature working with the secretary of state's office are required to provide each place of residence in the state with a published statement of the arguments both in favor and opposed to the matters submitted to the judgment of the citizenry.[105] Given the nature of the state constitution's provisions, it is of no surprise that when construing a statute formally enacted through the referendum process, Washington courts may look to both the formal history of a law first enacted by the legislature and the "explanatory statements and arguments in the official voters pamphlet" submitted to the voters.[106]

The case that best demonstrates Washington's approach to the use of formal materials submitted to the voters to determine the intent behind a law enacted via referendum is *Lynch v. State*.[107] There, the Washington Supreme Court looked at what was then known as the state Workman's Compensation Act to evaluate a pension claim by a surviving spouse made after the death of her husband.[108] The court determined that an examination of legislative intent was warranted in light of the parties' "divergent interpretations" of the statutes'

101. Rozner v. City of Bellevue, 804 P.2d 24, 27 (Wash. 1991).

102. Wang, *supra* note 17, at 593; Lynch v. State, 145 P.2d 265, 270 (Wash. 1944). For a general overview of using extrinsic evidence in construing laws enacted through popular vote, see Elizabeth A. McNellie, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157 (1989). For a critical take on the use of voter intent in interpreting statutes enacted via referendums, see Ethan J. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L. J. 49 (2008).

103. WASH. CONST. art. II, § 1.

104. *Id.*

105. *Id*. at (e).

106. Port of Longview v. Taxpayers of Port of Longview, 533 P.2d 128, 129 (Wash. 1975) (citing Lynch v. State, 145 P.2d 265, 270 (Wash. 1944).

107. Lynch v. State, 145 P.2d 265 (Wash. 1944).

108. *Id.* at 266.

"true meaning."[109] Since the state Workman's Compensation Act was enacted via the referendum process and depended upon the validating referendum "for its effectiveness,"[110] the court examined not only the history of the statute internal to the legislature itself, but also the history of the statute as part of the referendum process.[111] In this regard, the court looked at a range of information, including history from the legislature, a statement of the attorney general regarding the scope of the bill, the assumption of the governor's reliance on the attorney general's statement in approving the bill, and the arguments contained in the voters materials.[112]

In its discussion of the arguments contained in the voters materials, the court emphasized the validity of examining that information when construing a statute enacted through the referendum process. Noting that the operation of the referendum power by voters is an exercise in the "reserved power of legislation" under the state constitution, the court in *Lynch* stated plainly that the courts have "the right to look to, and may consider, the published arguments made in connection with the submission of such measures to the vote of the electorate."[113] While continuing to look at the history of the act as developed within the legislature, as well as the governor's actions in approving the act, the court characterized the referendum materials for the Workman's Compensation Act as "positive evidence of what the people intended when they voted to adopt the referendum measure."[114] Such evidence was "concrete" in discerning the intent of the voters "in subsequently adopting the referendum measure."[115]

IV. BASIC APPROACH BY THE WASHINGTON COURTS

A. *Statutory Analysis and Legislative Intent*

Washington courts have the ultimate duty to "declare the law and effect of [a] statute."[116] In so doing the courts follow as much as possible the language provided by the legislature in the statutory enactment for guidance and direction. The priority in statutory construction is on discerning legislative

109. *Id*. at 267.
110. *Id*.
111. *Id*. at 268-69.
112. *Id*. at 269.
113. *Id*. at 270.
114. *Id*.
115. *Id*.
116. McFadden v. Elma Country Club, 613 P.2d 146, 151 (Wash. Ct. App. 1980) (citing Hearst Corp. v. Hoppe, 580 P.2d 246, 250 (1978)).

intent;[117] as a result, legislative intent is the lodestar of statutory analysis and interpretation by the Washington courts.[118] This principle is stated time and time again in the case law, in decisions rendered by the divisions of the court of appeals and by the state supreme court. "The aim of statutory interpretation is 'to discern and implement the intent of the legislature.'"[119] As the court of appeals has put it, "Our fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature."[120] A court looks first to a statute's plain language, and if the statute's language is clear, the court simply follows the statute's plain language.[121] Absent ambiguity or a lack of clarity, a court is to discern legislative intent via the language chosen by the legislature and incorporated into the statutory text without resort to legislative history.[122] "If the language of the statute is plain," as the Washington Court of Appeals has explained, "that ends the court's role."[123] This is true even if a court is convinced that the legislature intended something other than what the statutory text expresses, so long as the statutory text is "clear and unambiguous."[124]

As much as possible, statutory analysis requires courts to effectuate all the words contained in a statute, meaning "[a]ll language in a statute should be given effect."[125] The language used by the legislature binds the courts, and if the plain meaning of the text provides clear guidance to the court the court is bound to follow that plain meaning "as an expression of legislative intent."[126] Plain meaning, as the courts have held, is to be discerned not only from the text of the statute immediately before a court, but also from "related statutes or

117. Belleau Woods II, LLC v. City of Bellingham, 208 P.3d 5, 11 (Wash. Ct. App. 2009) ("[t]he court's fundamental objective is to ascertain and carry out the intent of the legislative body.").

118. *See* State v. Armendariz, 156 P.3d 201, 203 (Wash. 2007); State v. W.S., 309 P.3d 589, 592 (Wash. Ct. App. 2013).

119. City of Olympia v. Drebick, 126 P.3d 802, 804 (Wash. 2006) (quoting State v. J.P., 60 P.3d 318, 320 (Wash. 2003)).

120. Dep't of Ecology v. City of Spokane Valley, 275 P.3d 367 (Wash. Ct. App. 2012).

121. State v. Armendariz, 156 P.3d 201, 203 (Wash. 2007); Belleau Woods II, LLC v. City of Bellingham, 208 P.3d 5, 11 (Wash. Ct. App. 2009); for an example of a court declining to examine legislative history due to the absence of statutory ambiguity, see Lacey Nursing Ctr. v. Dep't of Rev., 11 P.3d 839, 841-43 (Wash. Ct. App. 2000).

122. Blueshield v. State Office of Ins. Com'r, 128 P.3d 640, 644-45 (Wash. Ct. App. 2006).

123. Bellaeu Woods II, LLC v. City of Bellingham, 208 P.3d 5, 11 (Wash. Ct. App. 2009).

124. *In re* Custody of E.A.T.W., 227 P.3d 1284, 1288 (Wash. 2010); *see also* Homestreet, Inc. v. Dep't of Revenue, 210 P.3d 297, 302 (Wash. 2009).

125. State v. W.S., 309 P.2d 589, 592 (Wash. Ct. App. 2013).

126. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 9 (Wash. 2002).

other provisions of the same act in which the provision is found. . . ."[127] Legislative intent is determined by examining everything that the legislature has said "in the statute and related statutes which disclose legislative intent about the provision in question."[128] Statutory provisions "must be read in relation to other statutory provisions."[129] As one decision explains, "The purpose of interpreting statutory provisions together is to 'achieve a harmonious and unified scheme that maintains the integrity of the respective statutes.'"[130] In determining the intent of the legislature through the statutory text it has been a consistent principle of Washington law from territorial days that the "[t]he ordinary use of words at the time when used, and the meaning adopted at that time, is usually the best guide for ascertaining legislative intent."[131] If the intent of the legislature cannot be determined by the plain meaning of a statute, it is suitable to "resort to aids to construction, including legislative history."[132] Both the state supreme court and the court of appeals have used legislative history to support their readings of statutory language.[133] If both the language of the statute and the legislative history fail to provide clarity, then the court should adopt "the interpretation which best advances the objects and purposes of the legislation."[134]

The reasoning behind the Washington courts' approach to statutory analysis is set out in two key cases. The first is the state supreme court

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127. *Id.*

128. Dep't of Ecology v. City of Spokane Valley, 275 P.3d at 372.

129. *W.S.*, 309 P.3d at 592.

130. *Id.* (quoting State v. Chapman, 998 P.2d 282, 288 (Wash. 2000)); *see also* State v. Sanchez, 306 P.3d 935, 939 (Wash. 2013) (quoting Peninsula Neighborhood Ass'n v. Dep't of Transp., 12 P.3d 134, 142 (Wash. 2000)).

131. Jongeward v. BNSF R. Co., 278 P. 3d 157, 161 (Wash. 2012) (quoting Bloomer v. Todd, 19 P. 135 (Wash. Terr. 1888).

132. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 10 (Wash. 2002); *see* Berrocal v. Fernandez, 121 P.2d 82, 84 (Wash. 2005) (quoting Burton v. Lehman, 103 P.3d 1230, 1234 (Wash. 2005)); Cashmere Valley Bank v. Dep't of Revenue, 305 P.3d 1123, 1128 (Wash. Ct. App. 2013); State v. Avila, 10 P.3d 486, 490 (Wash. Ct. App. 2000) (quoting State v. Bash, 925 P.2d 978, (Wash. 1996)); *see, e.g.*, Ropo, Inc. v. City of Seattle, 409 P.2d 148, 150-51 (Wash. 1965) where the court stated:

> It is an elementary principle of statutory interpretation that legislative intention may be inferred from extrinsic evidence such as the legislative history of prior enactments, the legislative history of the enactment itself, the interpretation given the statute by administrative officials, etc. But the language of the statute is the point at which we begin our inquiry[.]

133. *See* State v. Catlett, 945 P.2d 700, 705 (Wash. 1997); State v. Thomas, 665 P.2d 914, 916 (Wash. Ct. App. 1983).

134. Drollinger v. Safeco Ins. Co. of Am., 797 P.2d 540, 542 (Wash. Ct. App. 1990).

decision in *North Coast Air Serv., Ltd. v. Grumman Corp*.[135] The court was called upon to answer a certified question from the Federal District Court for the Western District of Washington regarding the running of the state statute of limitations on a product liability claim.[136] In its decision, the state supreme court undertook an extensive examination of the legislative history in order to address the arguments of one of the parties to the case.[137] Before doing so, the court explained the basic approach behind the judicial focus on discerning the intent of the legislature. Observing a possible distinction in approach between discerning the "meaning" of a statute and the "intent" of the legislature, the court noted that Washington's approach "combine[s] these approaches by holding that the [l]egislature's intentions 'is to be deduced, if possible, from what it said.'"[138] At the same time, the court limited the power of evidence of legislative intent relative to actual text of the statute: "Intent, if ascertainable, may be of assistance, but cannot override an otherwise discernable, plain meaning."[139] The language of the statute controls its interpretation.

The emphasis in Washington on the plain meaning of the text in statutory analysis left open the question about how that plain meaning is ascertained. This question came to the fore in the second key case, *Dep't of Ecology v. Campbell & Gwinn, L.L.C*. There, the state supreme court was called upon to review a grant of summary judgment in a case centering on a dispute over the application of section 90.44.050 of the Revised Code of Washington. In its decision, the court examined Washington's rules regarding statutory analysis, finding that "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."[140] After stating that general rule, the court addressed a division in prior authority regarding the determination of plain meaning. The court described two lines of approach in precedent to understanding the plain meaning of statutory language. The court described the first track as follows:

> If the meaning of the language is ambiguous or unclear, this line of cases directs that examining the statute as a whole, or a statutory scheme as a whole, is then appropriate as part of the inquiry into what the [l]egislature intended. Thus, some of our cases indicate that consideration of a statutory scheme as a whole, or related statutes, is part of the inquiry into legislative intent only if a court determines that

135. *See* 759 P.2d 405 (Wash. 1988).

136. *Id.* at 405.

137. *Id.* at 409.

138. *Id.* at 407 (quoting Lynch v. State, 145 P.2d 265, 267 (Wash. 1944)); *see also* State v. Wilbur, 749 P.2d 1295, 1296 (Wash. 1988).

139. *North Coast Air*, 759 P.2d at 407.

140. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 43 P.3d 4, 9 (Wash. 2002).

> the plain meaning cannot be derived from the statutory provision at issue and ambiguity necessitates further inquiry.[141]

The court contrasted this line of cases with another line that employed a broader and more expansive understanding of plain meaning and the statutory sources that can legitimately be used to determine it. As the court summarized, this second line of cases held that "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained."[142] Examining this second line of cases, the court explained that plain meaning is still linked to the statutory text as crafted by the legislature, "but that meaning is discerned from all that the [l]egislature has said in the statute and related statutes which disclose legislative intent about the provision in question."[143]

The supreme court then went on to embrace the second line of cases as a "better approach because," in the court's judgment, "it is more likely to carry out legislative intent."[144] Yet, even with a broadened scope of inquiry regarding the plain meaning of statutory language as a guide to legislative intent, the court recognized that there would be situations where looking at the plain text of a statute would be insufficient to properly effectuate the intent of the legislature: "Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history."[145] The court then proceeded to find that the plain meaning of section 90.44.050 resolved the legal point in dispute in the case,[146] and that other related statutes supported the court's reading of section 90.44.050.[147]

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141. *Id.* (internal citations omitted).

142. *Id.*

143. *Id.* at 10.

144. *Id.*

145. *Id.* (citing Cockle v. Dep't of Labor & Indus., 16 P.3d 583, 586 (Wash. 2001); Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc., 884 P.2d 920, 924 (Wash. 1994)).

146. *Id.*

147. *Id.* at 12.

B. *Plain Meaning and the Trigger of Ambiguity*

1. Presence of Ambiguity

Washington's approach discerns plain meaning from a broad range of statutory texts in order to best effectuate legislative intent. Absent ambiguity, courts discern a statute's meaning "from its language alone."[148] When legislative intent is not plain from the language of the statute, courts may examine legislative history as an aid or tool for discerning the legislative intent that stands behind ambiguous or otherwise unclear statutory language.[149]

This approach by the Washington judiciary to statutory analysis places great emphasis on the presence of ambiguity in the meaning of a statute's text in order to trigger the use of other aids to construction, including legislative history. Helen A. Anderson describes the presence of ambiguity as a "threshold" that divides efforts to resolve statutory questions via a plain meaning approach to the language of the enacted text from efforts that resort to "extrinsic sources or canons."[150] If a statute is ambiguous, the courts may then look to legislative history. Plain meaning analysis remains at the center of the court's work in applying and construing statutes, but the presence of ambiguous language opens the door for statutory construction, allowing examination of additional sources that can evidence legislative intent.[151] As one opinion puts

148. State v. Avila, 10 P.3d 486, 489 (Wash. Ct. App. 2000) (citing State v. Azpitarte, 995 P.2d 31, 33 (Wash. 2000).

149. *See* State v. Armendariz, 156 P.3d 201, 203 (Wash 2007); Young v. Estate of Snell, 948 P.2d 1291, 1297 (Wash. 1998); Shelton Hotel Co. v. Bates, 104 P.2d 478, 482 (Wash. 1940) ("Legislative history of laws may properly be considered as an aid to ascertaining the legislative intent only when the statute is ambiguous, or its meaning doubtful and obscure."); Griffin v. Super. Ct. for Chehalis Cnty., 127 P. 120, 121 (Wash. 1912); Pac. Cont'l Bank v. Soundview 90, LLC, 273 P.3d 1009, 1014 (Wash. Ct. App. 2012) ("Only where a statute is subject to more than one reasonable interpretation will a court resort to statutory construction, legislative history, and relevant case law for assistance in determining the legislature's intent.").

150. Helen Anderson, Statutory Interpretation in Washington, WASH. ST. B. NEWS, Feb. 2009, at 33.

151. *See* Dioxin/Organochlorine Center v. Pollution Control Hearings Board, 932 P.2d 158, 164-65 (Wash. 1997); State v. Bash, 925 P.2d 978, 981 (Wash. 1996); Cherry v. Municipality of Metro. Seattle, 808 P.2d 746, 748 (Wash. 1991); Wash. Pub. Util. Dists.' Util. Sys. v. Pub. Util. Dist. No. 1, 771 P.2d 701, 704-05 (Wash. 1989) ("In construing a statute, courts may glean legislative intent from a consideration of the legislative history of the statute, as well as from an examination of other statutes dealing with the same subject."); *Avila*, 10 P.3d at 489-90; State v. Bilal, 776 P.2d 153, 155 (Wash. Ct. App. 1989) ("It is only when intent is not clear from the language of the statute that a court may consider the legislative history.").

it, when construing a statute, "[a] court gives effect to the legislative purpose . . . by examining its language as a whole and its legislative history."[152]

The problem of ambiguity in statutory texts arises from the problems inevitably associated with the drafting of any kind of text. As the supreme court has acknowledged, the need to interpret statutes is part and parcel of communication, flowing from "the frailties and uncertainties of language and the inherent difficulties in attempting to convey an idea . . . by means of written or oral verbalizations."[153] Even so, the willingness of the courts to examine legislative history when faced with ambiguous statutory language should not be viewed as an invitation to romp through the legislative record. Legislative history is a secondary source—it is not the law, it is at best evidence of the legislature's intent in enacting law. As the state supreme court has stated, analysis of statutory issues begins with "the language of the statute itself,"[154] and that language "must be interpreted in a manner that will give effect to the [l]egislature's intent."[155] Under such norms, "[w]here the meaning of the statute is clear, [a court] must accept the plain and unambiguous language."[156] Legislative history can be "instructive" in the quest to find legislative intent,[157] but it is only a tool. An "important tool," as the state supreme court has recognized,[158] but still one tool among many to construe statutes to ascertain legislative intent. Critically, Washington courts have recognized that they "are not to read into statutes matters that are not there, or modify statutes by construction."[159]

2. Discerning Ambiguity

Given the key role statutory ambiguity plays as a trigger for the use of legislative history by the Washington courts, determining whether a given statutory text is ambiguous or otherwise lacking in clarity is of central importance in the proper use of legislative history in statutory interpretation. If a statute is ambiguous, a Washington court may look to legislative history "for

152. State v. Hughes, 907 P.2d 336, 338 (Wash. Ct. App. 1995); *see also* Marquis v. City of Spokane, 922 P.2d 43, 54 (Wash. 1996) (Madsen, J., dissenting) ("The meaning of ambiguous statutes must be determined by examining the statutory scheme as a whole and legislative history may serve as an important tool in divining legislative intent.").

153. State v. Coma, 417 P.2d 853, 857 (Wash. 1966).

154. Biggs v. Vail, 830 P.2d 350, 352 (Wash. 1992).

155. *Id.*

156. *Id.*

157. *Id*. at 353.

158. All Seasons Living Ctrs., Inc. v. State, 903 P.2d 443, 445 (Wash. 1995).

159. Western Telepage, Inc. v. City of Tacoma, 974 P.2d 1270, 1274 (Wash. Ct. App. 1999) (citing King County v. City of Seattle, 425 P.2d 887, 889 (Wash. 1967)).

clarification" regarding legislative intent.[160] A recent case that explains the method by which statutory ambiguity is identified and resolved is *Cashmere Valley Bank v. Dep't of Revenue*.[161] In that case, Division II of the Washington Court of Appeals set out the basic structure of analysis in the face of a claim of statutory ambiguity. At the start, the court is to examine the "statute's plain language," and "[i]f the statute is subject to multiple reasonable interpretations, it is ambiguous."[162] It is at that point that a court can look beyond the words of the statute to "statutory context and legislative history, to resolve the ambiguity."[163] The court went on to evaluate the arguments raised by the parties regarding the meaning of statutory language applicable to the case, finding that "the statute's language alone allows for . . . two reasonable interpretations."[164] In such a situation, the court looked beyond the language of the statutory provision before it to other aids in understanding the statute's meaning: to the provision's broader statutory context; the textual legislative history of the drafting of the statute; and to entries in Black's Law Dictionary to clarify the meaning of undefined words.[165] In another case, *In re Bale*,[166] the state supreme court relied on legislative history over the language contained in the preamble within the statutory text itself in order to discern legislative intent.[167] The court observed that when "the preamble is clear, unambiguous and well understood, it is improper to consider legislative history."[168] However, in that case the specific language in the preamble before the court did not meet that test in the judgment of the bench, and as a result "[t]he most compelling indication of the legislature's intent [was] found in the history of the enactment."[169]

A statute's text does not meet the requirements for ambiguity simply because multiple possible interpretations for the statute exist,[170] rather the statute must be "susceptible to more than one reasonable interpretation" in

160. ATU Legislative Council of Washington State v. State, 40 P.3d 656, 660 (Wash. 2002).

161. 305 P.3d 1123 (Wash. Ct. App. 2013).

162. *Id*. at 1128.

163. *Id*.

164. *Id*.

165. *Id*. at 1129.

166. Boeing Airplane Co. v. Emp't Sec. Dep't (*In re Bale*), 385 P.2d 545 (Wash. 1963).

167. *Id*. at 547-48.

168. *See id*. at 546.

169. *Id*. at 547.

170. *In re* Custody of E.A.T.W., 227 P.3d 1284, 1288 (Wash. 2010) (stating that statutory language "is not ambiguous merely because [a court] may conceive of different interpretations" of the text).

order to be classified as ambiguous.[171] If ambiguity can be resolved by harmonizing conflicting statutory provisions, then resort to legislative history is unnecessary; "[o]nly after determining it is impossible to give effect to the legislative intent by harmonizing existing statutory provisions" can a court turn to examine legislative history for guidance.[172]

This approach was discussed in a plurality decision by the state supreme court in a state tax refund case, *Tesoro Refining & Marketing Co. v. Dep't of Revenue*.[173] Summarizing the basic Washington approach to statutory analysis and the use of aids in statutory construction, the decision provides a solid overview of the rules regarding the finding of ambiguity in statutory language. After discussing some of the unique concerns in interpreting state tax law, the court set out the fundamental premise undergirding the judiciary's approach to interpreting statutes in general: "to carry out the legislature's intent."[174] In pursuit of this goal, the *ordinary meaning* of the words in a statute are to be followed so long as those words plainly state the statute's meaning.[175] The court then discussed ambiguity, explaining, "Susceptibility to more than one reasonable interpretation renders the statute ambiguous and allows the court to employ tools of statutory construction such as legislative history to interpret the statute."[176] Critically, however, the court noted that ambiguity is not present simply because differing interpretations of a statute are "conceivable."[177] When looking at statutory language to see if the plain meaning of its wording is sufficient to establish legislative intent, the court noted that the words of specific provisions are to be examined "in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole."[178] In so doing, courts are also to "consider the subject, nature, and purpose of the statute as well as the consequences of adopting one interpretation over another."[179] Even a plausible reading of a statute, if "in isolation" from other relevant statutory provisions, will fail against a reading of a statute that stands integrated into the broader applicable statutory matrix.[180] A mere dispute about the meaning of a statute does not create an ambiguity.

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171. *Id*.

172. State *ex. rel.* Royal v. Bd. of Yakima County Comm'rs, 869 P.2d 56, 64 (Wash. 1994).

173. 190 P.3d 28 (Wash. 2008).

174. *Id*. at 32

175. *Id*.

176. *Id*.

177. *Id*.

178. *Id*. at 33 (quoting Burns v. City of Seattle, 164 P.3d 475, 481 (Wash. 2007)).

179. *Id*

180. *See id*. at 35.

3. Statutory Silence

While overt ambiguity can trigger the use of legislative history, so too can statutory language that is silent in regard to the legislature's intent.[181] In such cases, resort to legislative history is permissible. So ruled the state supreme court in *State v. Komok*, a case dealing with interpreting Washington's statute regarding theft.[182] The issue before the court was whether the theft law retained the common law condition that theft include an intent on the part of the perpetrator to "permanently deprive" the rightful property owner of possession when the statute itself simply stated that the perpetrator had to have the "intent to deprive."[183] The court held the statute did not include the common law condition.[184] After examining precedent and the text of the statute itself, the court concluded that the statutory term "deprive" held "its common meaning."[185] The court then noted with approval that the lower appellate court in the case had examined the legislative history behind Washington's theft statute in making its ruling in the case, stating that inspection of the legislative record "is appropriate where legislative intent is not apparent from the language of a statute."[186] The supreme court then examined the history of the statute's revision, looking closely at the textual changes the legislature had made to the underlying bill prior to passage.[187] The court concluded that "[t]he legislative history indicates an intent to omit the common law concept of intent to 'permanently' deprive."[188] After completing its analysis, the court grounded its ruling expressly on both the language of the statute and the textual legislative history, and stated that both indicate that the legislature intended to deviate from the common law on the question of a theft perpetrator's criminal intent in "theft by taking."[189]

In the 1989 case of *Washington Water Power Company v. Graybar*, the state supreme court dealt with a statute that arguably preempted the common law tort remedies under Washington's Product Liability Act but lacked an

181. *See, e.g.*, *In re* F.D. Processing, Inc., 832 P.2d 1303, 1308 (Wash. 1992); State v. Smith, 266 P.3d 250, 262-63 (Wash. Ct. App. 2011); State v. Moreno, 132 P.3d 1137, 1140-41 (Wash. Ct. App. 2006).

182. State v. Komok, 783 P.2d 1061, 1061 (Wash. 1989).

183. *Id.*

184. *Id.*

185. *Id.* at 1063.

186. *Id.*

187. *Id.* at 1063-64.

188. *Id.* at 1064.

189. *Id.*

exclusive clause stating such.[190] The court suggested that it would have been possible for the legislature to have more clearly stated its intent by including an express preemption clause, but that such a clause was not strictly necessary in order to trigger preemption of the common law.[191] "Clear statutory language and corroborative legislative history" can sufficiently evidence the legislature's intent to preempt the common law, the court ruled.[192] The court looked at the broad language contained within the statute and the legislative record prepared by the Washington State Senate Select Committee on Tort and Productive Liability Report to support its conclusion that the legislature intended to preempt the common law.[193] As the court put it:

> We might decry the absence from the [statute] of a provision expressly sting the statute's intended preemptive effect on common law remedies. And we might discover among the many canons of statutory construction an arsenal of technical rules that could be deployed to defeat the cause of preemption. However, "[o]verriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the legislature was attempting to achieve."[194]

The use of corroborative legislative history when faced with statutory silence can be found in the 2008 supreme court case, *Potter v. Washington State Patrol*.[195] There, the court examined another statute—this time dealing with procedures to redeem an unlawfully impounded vehicle—that arguably derogated from the common law.[196] The court held that it did not, basing its decision on an examination of "the common law of conversion, the plain language of the redemption statute, and the legislative intent behind the redemption statute."[197] The court went on to discuss each of those components to its examination, noting that "[i]f the language of the statute is inconclusive, the court may look to other manifestations of legislative intent."[198] In doing so, the court "considered[ed] whether the statute in question contains an express statement of exclusivity, the statutory language, and other expressions of

190. Washington Water Power Co. v. Graybar Elec. Co., 774 P.2d 1199, 1202 (Wash. 1989).

191. *Id*. at 1203.

192. *Id*.

193. *Id*. at 1204.

194. *Id*. at 1204-05 (second alteration in original) (quoting State v. Coffey, 465 P.2d 665, 675 (Wash. 1970)).

195. 196 P.3d 691 (Wash. 2008).

196. *Id*. at 696.

197. *Id*.

198. *Id*. at 697.

legislative intent."[199] The court determined that the redemption statute did not have an exclusivity clause,[200] that the text and provisions of the statute did "not indicate that the legislature intended the redemption procedures to be the exclusive remedy for unlawful impoundments,"[201] and "[o]ther manifestations of legislative intent" were not conclusive on the issue of the statute's exclusivity as a remedy for unlawful impoundment.[202] The court examined the nature of the remedies under the statute,[203] the purpose of the statute,[204] and the origin of the right under the statute.[205] Under the second of these three areas of examination, the court looked at the textual history of the statute and concluded that permitting a common law claim to proceed would not frustrate the purpose of the statute.[206]

C. *Judicial Approach to the Use of Legislative History*

1. Status of Legislative History

Washington appellate decisions recognize the applicability of legislative history in statutory analysis in a broad gamut of both civil and criminal cases where legislative intent has been subject to dispute. A small sample of these decisions shows the diversity of cases where courts have employed legislative history in resolving disputes regarding statutory meaning:

- Statutory retroactivity.[207]
- Evaluation of double-jeopardy claims.[208]
- Alleged conflicts between different statutory provisions.[209]
- The scope of the state Consumer Protection Act in regard to residential housing.[210]

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199. *Id*.

200. *Id*. at 697-98.

201. *Id*. at 698.

202. *Id*. at 699.

203. *Id*. at 699-701.

204. *Id*. at 701.

205. *Id*. at 701-02.

206. *Id*. at 701.

207. Barstad v. Steward Title Guaranty Co., 39 P.3d 984, 989 (Wash. 2002); Howell v. Spokane & Inland Emp. Blood Bank, 785 P.2d 815, 818-20 (Wash. 1990).

208. State v. Varnell, 170 P.3d 24, 26-27 (Wash. 2007); State v. Harris, 272 P.3d 299, 306 (Wash. Ct. App. 2012); State v. Marchi, 243 P.3d 556, 559 (Wash. Ct. App. 2010); *see* State v. Cole, 73 P.3d 411, 413 (Wash. Ct. App. 2003).

209. Gorman v. Garlock, Inc., 118 P.3d 311, 318-19 (Wash. 2005).

210. State v. Schwab, 693 P.2d 108, 112-114 (Wash. 1985).

- The scope of an employer exemption under the state Minimum Wage Act.[211]
- Legislative intent to overturn a judicial decision via statutory enactment.[212]
- Determination of whether a statute creates a strict liability crime.[213]

The overwhelming insistence in case law for ambiguity to be present prior to examining legislative history to determine legislative intent has not prevented language in decisions suggesting a broader role for the use of legislative history in statutory analysis.[214] There are several Washington cases where courts have employed legislative history to support a determination of legislative intent based on a plain reading of the statutory text, to confirm or corroborate the accuracy of the court's understanding of the meaning of statutory language.[215] The 2010 state supreme court case *In re Cruze* provides an example of this approach to the use of legislative history.[216] In that case the court examined the application of Washington's "three strikes" criminal sentencing law. Despite finding the plain meaning of the statutory scheme at issue in the case discernable in light of the "text and context of the statute,"[217] the court made a reference to legislative history as a support its reading of the statute's meaning.[218] This was after directly acknowledging that examination of legislative history was "unnecessary" to understanding the statutory language at

211. Stahl v. Delicor of Puget Sound, Inc., 64 P.3d 10, 13 (Wash. 2003).

212. Pudmaroff v. Allen, 977 P.2d 574, 579 (Wash. 1999).

213. State v. Anderson, 5 P.3d 1247, 1250 (Wash. 2000); State v. Semakula, 946 P.2d 795, 797 (Wash. Ct. App. 1997).

214. *See, e.g.*, Simpson Inv. Co. v. Dep't of Rev., 3 P.3d 741, 750 (Wash. 2000); Bellevue Fire Fighters Local 1604 v. City of Bellevue, 675 P.2d 592, 595 (Wash. 1984).

215. *See, e.g.*, Loeffelhotz v. Univ. of Wash., 285 P.3d 854, 857 (Wash. 2012); *In re* Cruze, 237 P.3d 274, 279 (Wash. 2010); Earley v. State, 296 P.2d 530, 531-33 (Wash. 1956); *In re* J.R., 230 P.3d 1087, 1090 (Wash. Ct. App. 2010); *In re* Marriage of C.M.C., 940 P.2d 669, 671 (Wash. Ct. App. 1997); *see also* Young v. Estate of Snell, 948 P.2d 1291, 1297 (Wash. 1998) (examining legislative history to provide additional support for the court's interpretation of the meaning of the statutory language in dispute in the case); Pacific Continental Bank v. Soundview 90, LLC, 273 P.3d 1009, 1016 (Wash. Ct. App. 2012) (using legislative history from floor notes to support the court's plain reading of a statute); Venwest Yachts, Inc. v. Schweickert, 176 P.3d 577, 580-81 (Wash. Ct. App. 2008); State v. Ramirez, 165 P.3d 61, 66 n. 7 (Wash. Ct. App. 2007); Smith v. Spokane County, 948 P.2d 1301, 1307 (Wash. Ct. App. 1997) (concluding that both the text and legislative history of an unambiguous statute supported the court's conclusion).

216. *In re* Cruze, 237 P.3d 274, 279 (Wash. 2010).

217. *Id.* at 278.

218. *Id.* at 279.

issue in the case.[219] *In re Cruze* and other decisions notwithstanding, the Washington courts have not generally abandoned the use of ambiguity as the normal trigger for the use of legislative history in statutory construction.

Once a decision has been made to utilize legislative history as a method of discerning legislative intent behind a statue's language, what is the relative status of the legislative history in resolving that ambiguity? There has been some diversity in approach by the courts in Washington, reflecting the complexity of statutory construction and indicating flexibility in judicial approach. Some cases imply that when dealing with statutory ambiguity, legislative history should be consulted prior to the use of other extrinsic aids to determine legislative intent.[220] One approach reflects such prioritization by mandating the use of legislative history as a method of determining legislative intent. For example, in the case of *State v. Kingen*,[221] Division I of the Washington Court of Appeals wrestled with the application of a defendant's speedy trial rights under Washington Criminal Court Rule 3.3.[222] In its analysis, the court noted that interpreting the court rule at issue in the case requires resort to the legislative history: "When a court interprets a statute, it must look first to the legislative history as evidenced by hearings, comments, or amendments."[223] The court of appeals grounded its prioritization of legislative history with citation to the state supreme court case *Bellevue Firefighters Local 1604 v. Bellevue*.[224]

Another decision requiring the use of legislative history to resolve statutory ambiguity is *State v. Coma*.[225] There, the state supreme court dealt with a dispute regarding the meaning of the statute governing sentencing after conviction of a crime involving the use of a deadly weapon. The court found that under a literal reading the statute could be read in either of two ways,[226] giving rise to ambiguity that "encourages and permits resort to extrinsic aids—i.e., the legislative history of [the statute] in order to properly interpret and apply its provisions."[227] The court went on to hold, "In the light of such

219. *Id*.

220. *See, e.g.*, State v. Eilts, 617 P.2d 993, 996 (Wash. 1980) ("Absent a legislative history to guide us in our interpretation . . . we must resort to traditional rules of statutory construction."); State *ex rel* Farmer v. Edmonds Mun. Court, 621 P.2d 171, 174 (Wash. Ct. App. 1980).

221. 692 P.2d 215 (Wash. Ct. App. 1984).

222. *Id.* at 217.

223. *Id.* at 218.

224. *Id.* (citing Bellevue Fire Fighters Local 1604 v. Bellevue, 675 P.2d 592, 594 (Wash.1984)).

225. 417 P.2d 583 (Wash. 1966).

226. *Id.* at 856-57.

227. *Id.* at 856.

ambiguity, resort to legislative history is not only permissible but necessary as an aid to us in determining the purpose of the enactment, i.e., the so-called 'intent of the legislation.'"[228] For the court in *Coma* examination of the legislative history was not optional, it was mandatory. At the same time, the court was careful to note that legislative history was distinct from the law. Twice the court referred to legislative history as an "aid" to the court's investigation of legislative intent.[229] That court also noted that support for an argument from legislative history about the meaning of a statute was "persuasive."[230] Both characterizations indicate that even if highly prioritized, legislative history is not binding on the courts.

This conclusion is strengthened by other cases in Washington that indicate that the use of legislative history by the courts is permissive rather than obligatory. Most notably, for purposes of this discussion, is the case relied upon as authority by the court of appeals in *State v. Kingen* for the proposition that the courts "must" examine legislative history in cases of statutory ambiguity: *Bellevue Fire Fighters Local 1604 v. Bellevue*.[231] In that case the court had to resolve a dispute involving a state statute governing political activity by public employees. The court found that the language of the statute was insufficiently clear to permit discernment of the legislature's intention. The court then noted that it was permissible to look at legislative history to clarify the ambiguity in the statute's language, but the court declined to mandate such recourse to legislative history. Specifically, the court used the word "may" rather than "must": "Where, as here, intent is not clear form the language of the statute, we may consider the legislative history."[232] *Bellevue Fire Fighters* is not hostile to the use of legislative history—quite the contrary.[233] The court examined the applicable legislative history in evaluating the case,[234] and goes so far as to state that examination of the legislative history of a disputed statute "has long been held to be a legitimate method of determining the [l]egislature's intent."[235] The court specifically noted "the value in appropriate circumstances" of one type of legislative history, the textual record of sequential drafts of a

228. *Id.* at 857.

229. *Id.* at 856-57.

230. *Id.* at 857.

231. 675 P.2d 592 (Wash. 1984).

232. *Id.* at 594. *Bellevue*'s favorable approach to the use of legislative history was discussed in *Cherry v. Municipality of Metro. Seattle*. 808 P.2d 746, 749 (Wash. 1991) (noting that the court in *Bellevue Fire Fighters* examined legislative history "even though" the statute at issue in the earlier case addressed the context of the statute's subject).

233. *See Bellevue Fire Fighters*, 675 P.2d at 594-95.

234. *Id.* at 595.

235. *Id.* (quoting State v. Frampton, 627 P.2d 922, 926 (Wash. 1981)).

statute while still in the bill process.[236] The court nevertheless used language indicating that examination of legislative history is permitted rather than required.

2. Practical Examples

Regardless of whether legislative history is viewed as being a necessary component to the examination of an ambiguous statute or one that is permissible and highly useful in the correct circumstances, the courts in Washington at the very least are allowed recourse to legislative history when faced with statutory language that does not provide clarity regarding legislative intent. A recent case demonstrating the use of legislative history to determine not only the textual background of a statute but the meaning of a legislative change in statutory language is *SentinelC3, Inc. v. Hunt*, decided by Division III of the Washington Court of Appeals.[237] In that case the court was called upon to resolve disputes over the meaning of a provision in Washington's Business Corporation Act defining the term "fair value" in a corporate dissenters' rights action,[238] and the propriety of an award of attorney fees in the case.[239] The court examined the legislative history behind the statutory definition to understand both the effect of legislative changes to the language in the statute over time and the legislative intent behind the statute.[240] Referencing the legislative history as "background," the court proceeded to examine the case in light of the information provided by the record.[241] On one critical point involving the issues of attorney fees, the court specifically relied on information from an outside Washington State Bar Association drafting committee reproduced in the Senate Journal[242]—information that the court accepted as an expression of legislative intent.[243]

Another case dealing with the use of legislative history to assist a court in discerning the legislative intent behind a statutory definition is *Cockle v.*

236. *Id.*

237. SentinelC3, Inc. v. Hunt, 309 P.3d 582 (Wash. Ct. App. 2013).

238. *Id.* at 585.

239. *Id.* at 587.

240. *See id.* at 585-86.

241. *Id.* at 586.

242. *Id.* at 587-88 (quoting Senate Journal, 51st Leg., 2nd Spec. Sess., at 3093 (Wash. 1989)) (explaining that the Senate Journal was "reprinting the comments on the Washington Business Corporation Act prepared by the Corporate Act Revision Committee of the Washington State Bar Association, § 13.31").

243. *Id.* at 587.

Department of Labor and Industries.[244] There the state supreme court took up the examination of the meaning of a state statute defining wages for purposes of calculating appropriate compensation for injuries sustained while on the job.[245] After reviewing the basic rules of statutory construction,[246] the court found the applicable statutory text ambiguous and turned to "principles of statutory construction, legislative history, and relevant case law" for help "in discerning legislative intent."[247] After undertaking an evaluation of the statute's language using canons of construction,[248] the court then looked at the legislative history for guidance as to legislative intent and the meaning of the definition.[249] The court looked at the textual history of the statute and its amendment over time. The court relied on the legislative history to identify "at least three perceived benefits" provided by revision to the statute.[250] The court then looked at other provisions later added to the Revised Code of Washington mandating liberal construction of the broader statutory scheme wherein the definition at issue in the *Cockle* case was found.[251] The court also examined the legislative history to undercut an argument made by the Department of Labor and Industries in the case, inferring that other provisions in the statutory code called for a more restrictive definition of wages for purposes of the case.[252] The court expressly relied on the legislative history of one of the key statutes referenced by the department in its argument, stating, "A more careful review of the legislative history of [the statute] . . . refute[d] the [d]epartment's inference."[253] The court supported that point with a walk through the legislative history of that statute, including a veto message from the governor.[254]

The court's analysis in *Cockle v. Department of Labor and Industries* provides a solid example of the use of legislative history to provide evidence of legislative intent in a specific case. In 2010, the supreme court provided additional guidance to the use of legislative history in *State v. Hirschfelder*.[255] In that case, the respondent had been a thirty-three-year-old high school teacher when he had sexual intercourse with a registered student who was eighteen

244. 16 P.3d 583 (Wash. 2001).
245. *Id.* at 585.
246. *Id.* at 585-86.
247. *Id.* at 586.
248. *Id.* at 586-87.
249. *Id.* at 587.
250. *Id.*
251. *Id.*
252. *Id.* at 587-88.
253. *Id.* at 588-89.
254. *Id.* at 589.
255. 242 P.3d 876 (Wash. 2010).

years old.[256] He was charged under Washington's statute prohibiting school employees from engaging in sexual relations with students.[257] As quoted by the court, that statute then read as follows:

> A person is guilty of sexual misconduct with a minor in the first degree when: . . . the person is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual intercourse with a registered student of the school who is at least sixteen years old and not married to the employee, if the employee is at least sixty months older than the student.[258]

At an earlier stage in the case, the court of appeals had reversed a trial court order denying a motion to dismiss the charges.[259] The appellate court reasoned that the statutory language was ambiguous and the legislative history indicated that the legislature did not intend to criminally sanction sexual contact between adults.[260] The state appealed the ruling, and the Washington Supreme Court granted review.[261] After a review of the applicable principles of statutory analysis,[262] Justice Stephens, writing for the majority, stated that the plain language of the statute was sufficiently clear to provide an answer to the case, without resort to legislative history.[263] In so doing, the court held that the statute "prohibit[ed] sexual relations between school employees and registered students."[264] To exclude eighteen-year-olds from the ambit of the statute would, the court reasoned, "render[] the words 'registered student' in the statute meaningless."[265] Consequently, the court went on to find that a registered student, "up to the age of 21," qualifies as a minor under the statute.[266]

The court rejected the former teacher's argument that the statute was ambiguous, looking at the term "minor," finding that within the overall "context of the statute," the term included students between the ages of sixteen

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256. *Id.* at 878.

257. *Id.*

258. *Id.* (omission in original) (quoting the text of WASH. REV. CODE § 9A.44.093(1)(b) that applied at the time of the incident in question between the teacher and the registered student).

259. *Id.*

260. *Id.*

261. *Id.* at 878-79.

262. *Id.* at 879.

263. *Id.* at 880.

264. *Id.* (citing the text of the former WASH. REV. CODE § 9A.44.093(1)(b)).

265. *Id.*

266. *Id.*

and twenty-one, so long as they were registered at the school where the individual charged under the statute was employed.[267] The court went on in dicta to examine the statute's legislative history.[268] The court noted that the legislative history, while unnecessary to resolve the case, supported the court's reading of the text of the statute.[269] The court found that instead of supporting the teacher's argument, the legislative history evidenced a contrary intent.[270] The court looked at a key change to the text of the statute while still in the legislative process, the removal of the words "under the age of 18" from the requirements of the statute.[271] In addition, the court examined a report from the Washington State House of Representatives that states that the statute as revised during the legislative process did away with a requirement that students be under the age of eighteen.[272] Combined with the text of the statute as enacted by the legislature, the legislative history "suggests that the legislature intended to criminalize sex with any registered student age 16 or older."[273]

The court continued its examination of the legislative history relevant to the age range covered by the statute, examining arguments put forward by the teacher that other parts of the legislative history supported excluding sexual conduct between school employees and eighteen-year-old registered students from the reach of the statute.[274] In the lower court, the teacher argued that other pieces of legislative history supported his contention that the statute was not intended to apply to sexual relations between school employees and registered students who were eighteen years or older.[275] In support of this contention, he referenced a veto message from Governor Locke and legislative history on another, unrelated section of the statute before the court.[276] As the supreme court described, these arguments were compelling to the court of appeals, which characterized the textual history of the removal of the language from the statute limiting its scope to students aged sixteen and seventeen as "'mere surplusage.'"[277]

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267. *Id.* at 881.

268. *See id.*

269. *Id.* at 882.

270. *Id.* at 881.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 881-82.

275. *See id.*

276. *Id.*

277. *Id.* at 882 (quoting State v. Hirschfelder, 199 P.3d 1017, 1027 n.15 (Wash. Ct. App. 2009)).

The supreme court disagreed with the lower court's reading of the legislative history, emphasizing instead that specific information within the legislative history indicated that the legislature intended the statute to apply to sexual conduct between school employees and registered students who were sixteen years of age or older.[278] "An explicit statement" to that effect "stands unchallenged in the legislative history," Justice Stephens wrote, "coupled with the affirmative deletion of an upper age limit in subsequent versions of the bill enacted into law," were more powerful than the other, less relevant forms of the legislative history that the teacher had raised and the court of appeals had found persuasive.[279] "In the face of this, the governor's veto message and statements interpreting the law made during unrelated amendments have little bearing on the question before us."[280] One of the key lessons from the supreme court's opinion is that the use of legislative history is not talismanic—the courts should not uncritically rely on assertions about what the legislative history says or means.

Three years later, the supreme court provided another instructive case on the use of legislative history, *State v. Evans*.[281] That case dealt in part with whether Washington's statute criminalizing identity theft applies when the victim of the crime is the corporate employer of the accused.[282] Specifically, the defendant challenged the applicability of the statute to his alleged conduct in the case, raising the issue of whether the statute's provision requiring that the victim of the crime be a "person, living or dead" precluded prosecution for identity theft when the target of the crime is a corporation.[283] The state supreme court, in an opinion written by Justice Gonzalez, rejected the defendant's arguments, basing its opinion on the plain language of the identity theft statute as well as its legislative history.[284]

Before delving into its analysis of the statute and its history, the court restated the basic rules of statutory construction in Washington.[285] After emphasizing that the goal of statutory construction is to ascertain legislative intent,[286] the court observed that "[w]hen possible," legislative intent was to be discovered "solely from the plain language" of the statute.[287] The text, broader

278. *Id.*
279. *Id.*
280. *Id.*
281. 298 P.3d 724 (Wash. 2013).
282. *Id.* at 726.
283. *Id.*
284. *Id.* at 727.
285. *Id.*
286. *Id.*
287. *Id.*

statutory context, related provisions, and the overall statutory scheme should inform that plain language investigation.[288] If the plain language is clear, then the statutory construction is not undertaken,[289] the plain language controls. However, if an ambiguity is present—"[i]f more than one interpretation of the plain language is reasonable"—then statutory construction is necessary.[290] Once ambiguity is established, then, according to the court, an examination of the legislative history is allowed as a tool of statutory construction.[291] The court's language in describing the resort to legislative history is permissive rather than mandatory: "We *may* then look to legislative history for assistance in discerning legislative intent."[292]

The court found that while the plain meaning of the statute's text was "ambiguous on its own, the relevant legislative history clearly establishe[d] that the legislature intended to protect small business and other corporations from identity theft."[293] After a lengthy examination of the plain language of the statute,[294] the court then turned to the legislative history for guidance,[295] spending significant space in the opinion to set out the background of the statute.[296] Noting at the beginning of its discussion that the relevant history "indicates that the legislature intended to protect small businesses and other corporations from identity theft,"[297] the court looked at both the textual and conceptual history of the statute.[298] The court identified certain sources of legislative history, including "relevant and probative committee hearings and floor debates."[299] In an explanatory parenthetical, the court further specified that when looking at the legislative history for evidence of legislative intent, "all materials that are 'sufficiently probative' of legislative intent" would be considered.[300] After walking through the relevant legislative history the court addressed the appellant's specific contention—whether the inclusion of the phrase "living or dead" in the statute prevented the statute's application in this case:

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288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 727-28.
292. *Id.* at 728 (emphasis added).
293. *Id.*
294. *See id.* at 728-30.
295. *See id.* at 731.
296. *See id*. at 731-32.
297. *Id*. at 731.
298. *Id*. at 731-32.
299. *Id*. at 731.
300. *Id.*

> The legislative history shows that the legislature intended to broaden and strengthen the identity theft provisions, in part to protect small businesses and other corporations, and the phrase "living or dead" was meant to ensure a broad rather than a narrow reading of the identity theft statute. It would be unjustifiable in light of the legislative history to interpret the phrase "living or dead" as narrowing the class of potential victims of identity theft by excluding corporations.[301]

As a result of the legislative history, the court concluded that the language of the statute "must be interpreted to describe corporations as well as natural persons."[302]

D. *Prudence in Application*

Given the Washington courts' approach to legislative history, judges and advocates do well to examine legislative history when dealing with statutory questions. Even when overt ambiguity is absent from the statutory text, consulting the legislative history may provide background information or insight as to the meaning of the plain text. As one writer wisely observes,

> Advocates . . . must argue in the alternative. So the careful advocate will usually include arguments addressing both plain-meaning and "extrinsic" aids to construction. Like a cable, an argument is stronger when it consists of many threads woven together.[303]

At the same time, the use of legislative history calls for prudential reasoning. As one justice of the state supreme court noted, "[E]xtreme caution should be used in resorting to legislative history to determine the meaning of statutes."[304] When legislative history is consulted for guidance, the starting point in any quest for legislative intent is the language used by the legislature in the statute.[305] Even when legislative history is examined, the language of the statute is usually considered conclusive.[306] In the search for legislative intent and the meaning of statutory language, the priority must be on the words chosen by the legislature and enacted into law. It is those words that constitute the statute and it is those words that are authoritative.

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301. *Id*. at 732.

302. *Id*.

303. Anderson, *supra* note 150, at 30, 31.

304. State v. Martin, 614 P.2d 164, 178 n. 2 (Wash. 1980) (Rosellini, J., dissenting).

305. Ropo, Inc. v. City of Seattle, 409 P.2d 148, 150-51 (Wash. 1965).

306. City of Seattle v. Burlington N.R. Co., 41 P.3d 1169, 1171 (Wash. 2002) (quoting City of Auburn v. U.S., 154 F.3d 1025, 1029 (9th Cir. 1998).

The danger is that quick resort to legislative history after findings of statutory ambiguity could pose a risk to the integrity of the analytical process. Philip Talmadge discusses this problem in his article, characterizing Washington's approach to statutory ambiguity as "highly artificial."[307] Talmadge argues the claim of ambiguity is reduced to a mechanism for the courts to assert an ability to impose their own preferences into the law as it comes to them from the legislature. As the former state senator and state supreme court justice writes:

> Perhaps it is best to acknowledge this rule for what it is: a device by which the judiciary can impose its normative choice on the Legislature's act. Favored statutes contain plain and unambiguous language and contrary legislative history materials can be ignored; unfavored ambiguous statutes require in-depth judicial construction of the legislature's true intent.[308]

Talmadge's contention is a serious one, and he raises an issue that courts and advocates need to properly address: the rightful respect that is to be paid to the legislature's work in crafting statutory text. Such respect calls for caution when approaching statutes. This respect is grounded not only in an understanding of the rightful deference that courts should show to the other co-equal branches of government under the state constitution, but also the lived realities of the legislative process. And with this respect comes caution in resorting to legislative history. The state court of appeals, referencing an opinion by well-known opponent of the use of legislative history, U.S. Supreme Court Justice Antonin Scalia, has stated that legislative history should be used with discretion.[309] In commenting on the value of textual history evidenced by sequential drafts of legislation, the Washington Supreme Court in *Hama Hama Co. v. Shorelines Hearings Board* cautioned that while such textual history "may serve as a useful tool under the appropriate circumstances, [it] should not be considered conclusive."[310] The court drew this conclusion after pointing out that the nature of the legislative process is not always tidy:

> [A]s a very pragmatic, starkly realistic fact of life, the time constraints and pressures inherent in the legislative process may operate to prevent the legislature from functioning in such a deliberate and conscious

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307. Talmadge, *supra* note 7, at 210.

308. Talmadge, *supra* note 7, at 192.

309. Baker v. Snohomish County, 841 P.2d 1321, 1324, 1325 n.13 (Wash. Ct. App. 1992) (citing U.S. v. Thompson/Center Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring).

310. Hama Hama Co. v. Shorelines Hearings Bd., 536 P.2d 157, 163 (Wash. 1975).

> fashion. Numerous legal scholars have recognized this and have, therefore, cautioned against over-emphasis and over-reliance upon the fact or happenstance of successive drafts as an *absolute* determinant, rule, or tool for interpreting a statute . . . . Many cases have similarly expressed a disapproval of interpreting a statute by relying completely upon the sequence of its original drafts.[311]

The wisdom in *Hama Hama Co*. is worth recall when dealing with almost any form of legislative history. Legislative history is a limited tool, not one with, to borrow a word from the court, "*absolute"* value.[312] Prudence in approach to legislative history is warranted as well by practical concerns. Legislative history is not always the only means by which questions of statutory ambiguity can be resolved.[313] In any given case, legislative history might not resolve statutory ambiguity.[314] There may be no applicable legislative history for the court to consult.[315] The legislative history before a court to clarify legislative intent may in fact not be helpful for that purpose.[316] The legislative history itself may be ambiguous.[317] There may be an approach to resolving questions of legislative intent that is based more directly on the language found in the statute or in a related statute.[318] Or the court may employ other methods of resolving statutory ambiguity including resort to dictionary definitions, canons of construction, grammatical rules, and avoidance of absurdity in the reading of statutory text.[319]

It is little wonder that the Washington Supreme Court has recognized that it must evaluate the relevance of legislative materials.[320] "Not all types of

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311. *Id*. at 162 (emphasis in the original) (citations and quotation omitted).

312. *Id.*

313. *See, e.g.*, Dep't of Transp. v. James River Ins. Co., 292 P.3d 118, 121-123 (Wash. 2013); State v. W.S., 309 P.3d 589, 592-94 (Wash. Ct. App. 2013).

314. *See* City of Seattle v. Winebrenner, 219 P.3d 686, 691 (Wash. 2009); State v. Bash, 925 P.2d 978, 981 (Wash. 1996) ("Unfortunately, the final bill report does not resolve the ambiguity in the statute."); *In re* Mahrle, 945 P.2d 1142, 1144 (Wash. Ct. App. 1997).

315. *See* State v. Eilts, 617 P.2d 993, 996 (Wash. 1980); Cnty. of King v. Graf, 693 P.2d 738, 740 (Wash. Ct. App. 1985).

316. *See* Louisiana-Pacific Corp. v. Asarco, Inc., 934 P.2d 685, 691 (Wash. 1997); McCarver v. Manson Park & Recreation Dist., 597 P.2d 1362, 1365 (Wash. 1979); State v. Villegas, 863 P.2d 560, 563 (Wash. Ct. App. 1993); State *ex rel*. Farmer v. Edmonds Mun. Court of Snohomish Cnty., 621 P.2d 171, 174 (Wash. Ct. App. 1980).

317. *See* State v. Villanueva, 311 P.3d 79, 81 (Wash. Ct. App. 2013).

318. *See, e.g.*, State v. Sanchez, 306 P.3d 935, 939 (Wash. 2013); *James River Ins. Co.*, 292 P.3d at 123.

319. *See* Anderson, *supra* note 150, at 31-32.

320. *See* Woodson v. State, 623 P.2d 683, 687 (Wash. 1980) ("[W]e are not concerned with the intent of some independent or isolated legislators.").

legislative history are of equal weight," and caution is warranted in regard to the reliability of legislative records.[321] There is a concern that a too-trusting reliance on legislative records could lead to deliberate distortion of the legislative record with an eye towards future litigation.[322] For that reason, as Arthur C. Wang explains, the ability of courts to evaluate legislative history is critical:

> [T]he courts need flexibility in determining relevance or in according weight to any particular evidence of legislative history, depending on the circumstances of each case. Otherwise, the potential exists for participants in the legislative process to take undue advantage in manufacturing evidence for court consideration.[323]

An example of prudential restraint in the use of legislative history can be found in *Crabtree v. Dep't of Retirement Systems*.[324] In that case the state supreme court was faced with a case of first impression regarding a set of amendments to the Teachers' Retirement System for the State of Washington.[325] The court started with the plain language of the relevant applicable statutes as well as policy considerations that had been recognized by Washington case law to resolve the legal issue before the court. The court brushed aside the appellants' use of legislative history, noting that their argument conceded that "[t]he legislative history . . . offers no conclusive insight into the legislature's intent."[326] The court stated, "Given the uncertainties involved in relying upon even clear legislative history, we are unwilling to rely upon legislative history which merely 'suggests' an answer. Reason and justice here require the opposite result."[327]

V. CONCLUSION: LEGISLATIVE HISTORY AND THE INSURANCE FAIR CONDUCT ACT

The legislative history materials available for the Insurance Fair Conduct Act are not particularly extensive, but what is available is informative to discern: (1) the textual development of the statute as it went through the legislative process; (2) the legislature's determination of the background and

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321. *See* Anderson, *supra* note 150, at 33; Wang, *supra* note 17, at 581.

322. *See* Wang, *supra* note 17, at 581.

323. *Id*.

324. 681 P.2d 245 (Wash. 1984).

325. *Id*. at 246.

326. *Id*. at 247-48 (alteration and omission in original) (quoting Brief of Appellants at 17).

327. *Id*. at 248.

effect of the final statutory language; and (3) the analysis and arguments submitted to the voters through the formal guide prepared for the referendum that finally authorized the Act through the vote of the people of Washington State. As this article has demonstrated, the examination of legislative history has an established and crucial role to play in the way Washington courts analyze statutes. While not a formal source of law, legislative history can provide crucial evidence for judges, advocates, and other analysts regarding legislative intent when statutory language reflecting that intent is either ambiguous or absent. Legislative history can also function often to provide helpful background information regarding a statute's origins, structure and purpose to support judicial resolution of disputes involving the meaning of statutory language. Washington courts take a broad, but not uncritical, approach to the use of legislative history when appropriate, examining a variety of legislative materials when necessary or helpful in discerning legislative intent.

As with any subject of legal analysis and interpretation, the use of legislative history in statutory construction requires both discernment and prudence. Despite the limitations and questions about reliability that come with legislative history, its use has an important place in the work of judges and advocates, meriting a practical and cautious embrace of legislative history materials when necessary. At the same time, when necessary to resort to legislative history as an aid in statutory interpretation, its use should be undertaken as an aid to discern the legislative intent behind the words of the statutory text, not to explain the words away. Legislative history is a tool to be used by the courts to uphold the rightful place of the legislature's work, not undermine it through construction. This is as true when working with the Insurance Fair Conduct Act as it is with any other statute.