IN THE SUPREME COURT OF TEXAS

444444444444
NO. 10-0245
444444444444

PATRICK O. OJO, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

FARMERS GROUP, INC., FIRE UNDERWRITERS ASSOCIATION,
FIRE INSURANCE EXCHANGE, FARMERS UNDERWRITERS ASSOCIATION,
AND FARMERS INSURANCE EXCHANGE, APPELLEES

4444444444444444444444444444444444444444444444444444
ON CERTIFIED QUESTION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
4444444444444444444444444444444444444444444444444444

Argued October 14, 2010

CHIEF JUSTICE JEFFERSON, concurring.

Legislative history is not always a villain. It is central to the process by which the Legislature enacts the laws that govern society. Yet a statute's pedigree is not itself law. For that reason, this Court usually applies a text-centric model when it construes a statute. We look first to the text. When the text is not clear, we explore extrinsic aids, including legislative history. *See, e.g.*, *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008). That we have reached some methodological agreement,[1] even if inconstant,[2] is itself impressive, particularly in light of the difficulties other

[1] One scholar has described methodological agreements of this type as "methodological stare decisis," which is the "practice of giving precedential effect to judicial statements about methodology." *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE

courts have experienced when attempting to accomplish this same task.[3] Textualism is easy to advocate. The difficulty lies in its implementation.

We start with the text because it is the best indication of the Legislature's intent. *See Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893, 901 (Tex. 2010) ("Our ultimate purpose when construing statutes is to discover the Legislature's intent. Presuming that lawmakers intended what they enacted, we begin with the statute's text, relying whenever possible on the plain meaning of the words chosen." (citations and quotations omitted)). Thus, when we can interpret a statute by reference to its language alone, we generally do so. *Id.* In this way, we mean to avoid sacrificing a clear textual command to conflicting language in an extrinsic, non-authoritative source.[4] The animating principle behind this standard is a reluctance to use legislative history to *interpret* a clear statute. Accordingly, our cases consistently tie a discomfort with extrinsic aids to the language of construction. *See City of Rockwall*, 246 S.W.3d at 626 ("When a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids *to construe* the

---

L.J. 1750, 1754 (2010).

[2] *See id.* at 1789 (noting that, compared to the Court of Criminal Appeals, the Texas Supreme Court is "inconsistent but often reaches the same result, albeit more diplomatically").

[3] *See id.* at 1765 ("[T]he U.S. Supreme Court is simply not in the practice of picking a single interpretive methodology for statutes. Indeed, the Court does not give stare decisis effect to *any* statements of statutory interpretation methodology."); Nicholas Quinn Rozenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002) (noting that the Supreme Court "do[es] not seem to treat methodology as part of the holding").

[4] The Supreme Court most infamously did this in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), when it ignored the text of a statute on the basis of a Congressional report and its beliefs about the statute's general purpose. This decision has been frequently criticized. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 19 (Amy Gutmann, ed. 1997) (deriding the Court's "utterly inexplicable" reasoning); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 84 (2000) ("[T]he Supreme Court blundered badly in [*Holy Trinity*] by incautiously equating the contents of a Senate committee report with Congress's intention. In fact, the committee report proved highly misleading . . . .").

language." (emphasis added));[5] *see also Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) ("Therefore, our practice *when construing a statute* is to recognize that the words [the Legislature] chooses should be the surest guide to legislative intent. Only when those words are ambiguous do we resort to rules of construction or extrinsic aids." (alteration in original; emphasis added; quotations and citations omitted)).

Our general rule, then, is that extrinsic aids are inappropriate "to construe" an unambiguous statute. And while the Court today does cite several pieces of legislative history, none are used to construe the relevant statute, and thus the Court follows our standard practice. Indeed, the Court states that its construction is based on the statute's language: "The Texas Insurance Code is void of any language creating a cause of action for a racially disparate impact." ___ S.W.3d at ___. The Court's opinion could begin and end with those nineteen words, just as our Constitution, without the *Federalist Papers*, has a first and last word. We engage in a larger discourse, however, because it is useful to understand what options were available when our representatives in government enacted policy.[6]

---

[5] We have relied on this language from *Rockwall* multiple times. *See Molinet v. Kimbrell*, 54 Tex. Sup. Ct. J. 491, 493(Jan. 21, 2011); *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010).

[6] And we engage in this wider discourse regularly. In 2010 alone, we repeatedly cited legislative history absent a finding of ambiguity. For example, in *Robinson v. Crown Cork & Seal Co. Inc.*, 54 Tex. Sup. Ct. J. 71, 72-90(Oct. 22, 2010), we delved deeply into legislative history despite finding no statutory ambiguity, looking even to floor statements and defeated amendments. Similarly, in *Klein v. Hernandez*, we cited legislative history, noting, without regard to questions of ambiguity, that it was a proper subject for consideration in statutory interpretation. *Klein*, 315 S.W.3d 1, 6 (Tex. 2010) ("The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. When determining that intent, the Code Construction Act further guides our analysis, listing a number of relevant factors including . . . legislative history . . . ." (citation omitted)). *See also Franka v. Velasquez*, 332 S.W.3d 367, 381 n.66 (Tex. 2011) (finding no statutory ambiguity, but citing and quoting at length Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH. L. REV. 169, 290-93 (2005)); *Tex. Comptroller of Pub. Accounts v. Atty. Gen. of Tex.*, 54 Tex. Sup. Ct. J. 245, 255 (Dec. 3, 2010) (finding no ambiguity, but citing, for background and contextual information, OFFICE OF CONSUMER CREDIT, LEGISLATIVE REPORT REVIEWING

An appellate opinion is not a mere recitation of legal standards and conclusions. It *is* that, to be sure, but it is also, perhaps more importantly, one part of a dialogue between parties, citizens, legislators, and judges—a dialogue that provides a historical record of the relevant controversy. Even where our decision is purely legal, it begins with an account of the case's facts—the story of how the case arose, and how it came to be in front of us. Many times, we could give our conclusions of law without reference to any of this, but we choose to include this "extraneous" information because it gives context to our decision, making it more approachable to our readers and more easily integrated into our social fabric. In this sense, we as judges act as storytellers and historians.[7]

We tell these stories because doing so is crucial to our legitimacy. Our judgments carry with them a threat of state authority.[8] As justification for the coercive impulse behind our decisions, we

---

IDENTITY THEFT AND SENATE BILL 473 (2004)); *Univ. of Tex. v. Herrera*, 322 S.W.3d 192, 198 n.39 (Tex. 2010) (citing legislative history to determine "whether Congress validly abrogated the State's immunity" because that inquiry is "mandated by controlling caselaw"); *City of Waco v. Kelley*, 309 S.W.3d 536, 548 (Tex. 2010) (despite not finding ambiguity, noting that "[n]othing in the current language of the statute or the legislative history indicates legislative intent to change the disciplinary options that were originally available to the commission in cases of indefinite suspension"); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384-85 (Tex. 2010) (citing legislative history absent a finding of statutory ambiguity).

[7] *Cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (2005) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."). *See also Interview by Bryan A. Garner with Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. LEGAL WRITING 6, 16 (2010) ("Every lawsuit is a story. I don't care if it's about a dry contract interpretation; you've got two people who want to accomplish something, and they're coming together—that's a story."), *available at* http://legaltimes.typepad.com/files/garner-transcripts-1.pdf (all Internet materials as visited May 25, 2011 and copy available in Clerk of Court's file).

[8] Max Weber famously described the state as "the form of human community that . . . lays claim to the monopoly of the legitimate physical violence within a particular territory." Max Weber, *Politics as a Vocation*, *in* THE VOCATION LECTURES 33 (David Owen & Tracy B. Strong, eds., Rodney Livingstone, trans. 2004). This principle also applies to the courts, the arm of the state tasked with interpreting the law. Our pronouncements are therefore law, and the law is enforced through the threat of the state's authority; thus, one scholar notes that "legal interpretation is as a practice incomplete without violence—because it depends upon the social practice of violence for its efficacy." Robert

give not only a conclusion but also a narrative,[9] by which we seek to legitimize our decision by placing it in historical context, demonstrating that it is consistent with our notions of justice—and, indeed, that it comports with the state of the law.

When used in this contextual manner, there is little reason to think legislative history inappropriate for citation.[10] An exhortation that extrinsic sources *never* be cited for *any* purpose gives such sources too much power and judges too little credit. A legislative report, for example, frequently will provide useful information about the period in which the statute was enacted.[11] It can

---

M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613 (1986). Indeed,

> Legal interpretation takes place in a field of pain and death. . . . Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.

Id. at 1601.

[9] *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) ("[L]aw and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral." (footnote omitted)).

[10] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 38-39 (2006) ("Legislative history may or may not have any bearing on the outcome of the case, even when it is considered. . . . [I]n some circumstances even textualists themselves will look to legislative history. Of course they will not use it to try to construct the intent of a statute's authors. That is precisely the offense that textualism has been rallying against for decades. But textualists will sometimes use legislative history to gain a background understanding of the problems Congress was trying to address." (citations omitted)).

[11] For example, in *United States v. Fausto*, 484 U.S. 439, 444-45 (1988), Justice Scalia, writing for the Court, cited a Senate Report as evidence of a statute's purpose. *See also* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 42 (2008) ("Reference to legislative history [in judicial opinions] for background and historical context is commonplace."); CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 189 (2002) ("But other kinds of information may also be found in legislative history: factual information about the historical and political context in which the statute was debated and ultimately enacted, expert analysis about the issues implicated by the statute, and even contextual linguistic usage."); NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 48:1 (7th ed. 2007) ("Extrinsic aids consist of background information about circumstances which led to the enactment of a statute, events surrounding enactment, and developments pertinent to subsequent operation.").

give the reader some indication of *why* an issue was before the Legislature, and this information is useful as context even where it is irrelevant to the specific act of interpretation.[12] This "why" may not be important to the result, but it is important to readers—both lay and expert—and the Legislature,[13] all of whom look to our opinions as a complete and fair recording of the case's circumstances. Nothing we do is in a vacuum, and our readers care about more than mere results—background is given not because it controls, but because it contextualizes.[14] And, of course, we as judges frequently make decisions in light of other extraneous information that could, in some circumstances, bear on our decisionmaking. If we are trusted to make fair decisions despite recitations of sympathetic or compelling facts, why should we not also be trusted to give fair interpretations despite looking to legislative history for general background? There is no justification for placing one enormous, useless hole in our consideration of a case's history. That this information can be useful in a non-interpretive manner is well-demonstrated by the fact that all but one justice, aware of and in agreement with our methodological principles, nonetheless join

---

[12] *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 431 (1989) ("Legislative history has in fact provided a valuable sense of context in a number of recent cases.").

[13] The Code Construction Act expressly gives courts permission to consider legislative history even in the absence of statutory ambiguity. TEX. GOV'T CODE § 311.023(3). Thus, a court never acts illegally when it considers legislative history, and to the extent that we believe that history usually should not be considered when construing a clear statute, that belief is the result of pragmatic considerations—a recognition that extrinsic aids will usually be a less reliable guide to legislative intent than the words the Legislature used. But a standard based on pragmatism does not benefit from pronouncements of universality.

[14] *See* MAMMEN, *supra* note 11, at 102 ("[D]iscovering the context in which the statute was enacted seems to be an integral part of the rationale for using extrinsic materials . . . ."); Robin Kundis Craig, *The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach*, 79 TUL. L. REV. 955, 979 (2005) ("[A]llowing courts to consult statutory history, legislative history, and administrative history . . . allows courts to contextualize statutory language."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702 (1997) ("In their search for context, textualist judges routinely draw interpretive insights from sources outside the statutory text." (footnote omitted)).

today's opinion. This is not inconsistency; it is a recognition that commitment to the text is not a commitment to blind ourselves to otherwise useful information solely because of its source.

So what does the Court's survey of legislative history tell us today? The Court makes no attempt to construct the statute's meaning by looking at its history. Instead, it gives us information that, while not essential to our interpretation of the Insurance Code, is far from irrelevant: "The legislative history of the credit scoring bill and the arguments of its opponents indicates that the Texas Legislature was aware of the possibility of a disparate impact on racial minorities, yet did not expressly provide for a disparate impact claim as it did in the Texas Labor Code." ___ S.W.3d at ___. Thus, we are told that the statute says what it says because the Legislature intended that meaning.[15] This fact has no bearing on our interpretation, and we would interpret clear language the same regardless of whether or not the Legislature had given thought to the specific issue before us. The inclusion of this history gives notice to those who feel wronged by the statute. The remedy they seek requires engagement in the political process, on the legislative battlefield. Moreover, it gives

---

[15] Even Justice Scalia would permit reference to legislative history when it is not used to give meaning to statutory terms. Thus, in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), Justice Scalia concurred in the result but wrote separately to criticize the majority for consulting legislative history to "determin[e] what, precisely, the" text at issue meant. *Id.* at 528 (Scalia, J., concurring). But his opposition to legislative history was not without limits, and rather focused only on the link between extrinsic sources and construction:

> I think it entirely appropriate to consult all public materials, including the background of [the statute] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . .

Id. at 527; *see also* Sunstein, 103 HARV. L. REV. at 431 n.96 ("In *Bock* . . . *all* the members of the Court . . . agreed that the legislative history helped to reveal that literalism would lead to inadvertent absurdity. . . . Indeed, even Justice Scalia acknowledged the usefulness of history here . . . ."); Manning, 97 COLUM. L. REV. at 702 (noting that elements of Justice Scalia's interpretive philosophy "require[] judges to resort to extrinsic sources in determining statutory meaning"). Today, the Court engages in exactly this sort of use, consulting historical sources to show that the Legislature was aware of what it was doing.

those same aggrieved citizens some indication of *why* the Legislature would have made the choice that it did, allowing them to hone their advocacy. For those who support the statute, this language's relevance is much the same. This guidance will not harm democracy, our reputation, or the bar, and indeed it may help.

_____

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: May 27, 2011