THE CONTEXTUAL TEXTUALISM OF JUSTICE ALITO

JOHN O. MCGINNIS*

INTRODUCTION

Justice Samuel Alito is one of the best craftsmen of statutory interpretation opinions on the Court. The Chief Justice certainly thinks so: the Chief has often assigned him the majority opinion in statutory cases when the Court is closely divided. His analyses of legislation are particularly comprehensive and clear. Like most judges, he has not offered a theoretical defense of a particular approach, content to let his opinions speak for themselves.

Nevertheless, Alito does have a consistent approach, which would best be described as "contextual textualism." He is a textualist and frequently resorts to dictionaries to help determine the meaning of words.[1] He is also willing to enforce the plain meaning of a text as against justices who would like to create ambiguities from whole cloth.[2] Nevertheless, the most important characteristic of Alito's brand of textualism is his recognition that the text of a statute, like all language, cannot always be understood by combining the semantic content of individual words, but must be enriched by context. That context includes the overall context of the statute as well as the social context in which the words are written. But importantly, it also regularly includes the legal context. The most important context for a legal text is often the law itself because most statutes are written in light of the language of the law. As a result, the text is not created *ex nihilo* but against a rich background of legal tools of interpretation and thus must be interpreted to reflect that tradition.

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* George C. Dix Professor in Constitutional Law at Northwestern University. The author is grateful for Mark Movsesian's comments on an earlier draft. This is a lightly footnoted version of speech given at conference on Justice Alito's jurisprudence at the American Enterprise Institute on March 24, 2022. The views on legal interpretation presented here draw on ideas from joint work of over a quarter of century by Michael Rappaport and me.

[1] *See, e.g.*, Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 460–61 (2007) (Alito, J., concurring) (using dictionary to show that a "component" of a physical device is most likely a physical part of that device).

[2] *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 333–34 (2007) (Alito, J., concurring) (the plain meaning of a law requiring pleading "with particularity" facts gives rise to a strong inference that the defendant acted with the required state of mind precludes inferences from facts that are not particular); *see also* Fowler v. United States, 563 U.S. 668, 688 (2011) (Alito, J., dissenting) (refusing to require that a statute, which penalized murders of informer added a requirement that the kill prevented "a reasonable likelihood" of information about a possible federal crime being communicated, when "reasonable likelihood" appeared nowhere in the statute); Corley v. United States, 556 U.S. 303, 325–26, 331 (2009) (Alito, J., dissenting) (enforcing plain meaning of provision that admitted "voluntarily given" testimony against majority who found it ambiguous); Begay v. United States, 553 U.S. 137, 158–59 (2008) (Alito, J., dissenting) (refusing to limit the plain meaning of the residual clause of the Armed Career Criminal Act); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 381 (2007) (Alito, J., dissenting) (refusing to read requirement of good faith into debtor's decisions to switch type of bankruptcy proceeding where no such requirement is in the statute).

Jurists must thus understand the legal gloss on the meaning of words, phrases, and provisions. These glosses include Court precedent that interpreted words in similar statutes. Moreover, interpretative rules, both linguistic and legal, can clarify text. They also provide part of the context of the statute.

Alito may seem to resemble Justice Antonin Scalia, to whom he was compared at the time of his appointment, to the point of being called "Scalito." Like Scalia, he is a textualist. And, like Scalia, he is open to using the context, particularly the legal context, including the context of legal interpretative rules, to ascertain meaning. He has even cited Scalia's book, *Reading Law*, with approval.[3] But there are subtle differences between the two Justices. For instance, Alito does not completely oppose the use of legislative history,[4] although he gives it low priority and sometimes goes out of his way to dismiss its relevance.[5] And he is more explicit than was Scalia that canons of interpretation cannot be applied by rote. Instead, context determines the appropriate weight to give them.[6]

Both his points are well taken. Assuming that, as appears to be the case, legislative history has traditionally been deployed as a legal resource to clarify ambiguity in text, it too is part of the legal context and a rule of legal interpretation. Scalia's attempt to banish legislative history is an effort at law reform rather than the proper aim of legal interpretation—to recover the meaning of the words at the time of enactment. Alito is also right that rules of interpretation are rules of thumb that provide evidence of meaning whose weight itself depends on the context. Even effective tools of legal contextualism are themselves creatures of context. Above, all, Alito recognizes that what is often scarce in statutory interpretation is context.

Alito is thus an exemplar of a textualism that might be better seen as a statutory analogue to originalism because both methods of interpretation share positive and normative premises. Positively, like constitutional originalism, Alito's form of statutory interpretation considers the object of interpretation contextually, often requiring an understanding of the social context of the statute.[7] Moreover, the statute and the Constitution share a salient similarity: they are both legal texts, requiring an understanding of a distinctively legal context, including the interpretive rules

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[3] *See* Nielsen v. Preap, 139 S. Ct. 954, 965, 969 (2019).

[4] *See,* e.g., Zedner v. United States, 547 U.S. 489, 501, 510 (2006) (citing legislative history over Justice Scalia's objections).

[5] Samantar v. Yousuf, 560 U.S. 305, 326 (2010) (Alito, J., concurring) (observing that the majority's "citations to legislative history are of little if any value."); *see also* Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy, 548 U.S. 291, 304 (2006) (rejecting reference to legislative history that other courts had found persuasive); Corley v. United States, 556 U.S. 303, 329–30 (Alito, J., dissenting) (dismissing legislative history on the which the majority relied); *see generally Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 504 (2006) (statement of then-Judge Samuel Alito) ("I think [reference to legislative history] needs to be done with caution. Just because one member of Congress said something on the floor, obviously that doesn't necessarily reflect the view of the majority who voted for the legislation.").

[6] Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring); *see also* Richlin Sec. Service Co. v. Chertoff, 553 U.S. 571, 589–90 (rejecting sovereign immunity canon because of compelling other contextual evidence). Alito makes the same points about rules of grammar. In *Flores-Figueroa v. United States*, 556 U.S. 646, 659 (2009) (Alito, J., concurring), he expresses concern about possible misinterpretation of the majority's statement that "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." This may be a presumptive rule, but other contexts can overcome its presumptive force.

[7] *See infra* note 14 and accompanying text.

applicable to such texts. To be sure, it is possible that statutes and the Constitution, a kind of superstatute, may be subject to slightly different interpretative rules on account of their somewhat different contexts and traditions, but these differences are a matter of empirical investigation, like the rest of original meaning. Normatively, the moral and political justification for textualism is also similar to originalism. We believe that something like majority legislative rule is best for producing ordinary law, just as we think that supermajority rule—a consensus-making process—is needed to make a good constitution.[8] Thus, in both cases, the meaning that attracted the support for passage, necessarily a full contextual meaning, should be the object of interpretation.

And there is one more parallel to constitutional originalism in Alito's kind of statutory interpretation. He has called himself a "practical originalist"[9] by which I believe he means that interpretation should consider the practical working of law when context and other methods of disambiguation do not yield a clear answer. Analogously, he is a strong supporter of *Chevron* in the context of statutory interpretation, criticizing the Court for ignoring it,[10] and is in fact arguably the Justice who joined positions giving Chevron deference to agencies more than any other Justice.[11] After all, judges do not always hold the best understanding of the law's practice. Per *Chevron*, agencies with their expertise can give a practical interpretation to a statute when the traditional tools of statutory interpretation cannot provide an answer.

Alito also believes that one should consider the practical implications of interpretations when ambiguity cannot be otherwise resolved. He has thus been a consistent and strong critic of the Court's categorical rule for interpreting what crimes warrant sentence enhancement under the Armed Career Criminal Act—a notoriously poorly-written statute, because the test is so difficult to apply that it will confuse lower courts. For instance, he notes the Court's metaphysical distinctions in interpreting that statute requires lower courts to "decide whether entering or remaining in a building is an "element" of committing a crime or merely a "means" of doing so," sardonically wishing these courts "good luck" in doing so.[12] Whatever the correctness of the "practicality approach", this is yet another parallel between Alito's brand of originalism and his brand of statutory interpretation.

Some have suggested Alito's pragmatism indicates his willingness to prioritize facts over theory, but his statutory interpretation approach shows this claim is an exaggeration.[13] He is committed to following plain meaning and looking to context to resolve ambiguity. But he acknowledges that there may be irreducible ambiguities that call for an interpretation that takes account of the facts—what will best work in the real world.

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[8] *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 12 (2012).

[9] *See* Matthew Walther, *Sam Alito: A Civil Man*, AMERICAN SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man [https://perma.cc/XD92-CVGH] ("I think I would consider myself a practical originalist.").

[10] Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (saying "[b]ut unless the Court has overruled Chevron in a secret decision that has somehow escaped my attention, it remains good law.").

[11] *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 840 (2010).

[12] *See* Mathis v. United States, 579 U.S. 500, 539 (2016) (Alito, J., dissenting).

[13] *See* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito,* 87 GEO. WASH. L. REV. 507, 511 (2019).

A BRIEF THEORETICAL DEFENSE OF ALITO'S APPROACH

Because Alito, like most judges, does not mount a full defense of his approach to statutory interpretation, it is worth sketching out what such a defense would resemble. Briefly, legal contextual textualism is superior to what might be termed "four corners textualism" which looks more narrowly to the literal meaning of words, because language depends on context and because the context of a language in a legal enactment—at least the complex ones that now comprise the United States Code—is often presumptively legal.

Philosophers of language understand the meaning of words to depend not only on semantics and syntax but also on context which they describe as pragmatics.[14] Pragmatics focuses on usages of language in contexts that depart from the literal meaning of the language. In many contexts, a person asserts something that differs from the literal meaning of their words. If I tell my daughter not to hit her sister, she would violate my injunction if she instead kicked or bit her, despite an acontextual argument (popular, as it happens, with young children) to the contrary.

Alito himself provides an excellent example and effectively similar defense of contextualism in his concurrence in *EEOC v. Abercrombie & Fitch Stores*.[15] The question there was whether Title VII, which forbids an employer to discriminate in hiring because of an individual's religion, required the employer to know of her religion when it refused to hire her. In that case, Abercrombie and Fitch refused to hire a female applicant who wore a head scarf. Although the statute did not expressly require the company to know that the reason for wearing a headscarf was because of her religion, Alito concluded that knowledge was a requirement:

> It is entirely reasonable to understand the prohibition against an employer's taking an adverse action because of a religious practice to mean that an employer may not take an adverse action because of a practice that the employer knows to be religious. Consider the following sentences. The parole board granted the prisoner parole because of an *exemplary* record in prison. The court sanctioned the attorney because of a *flagrant* violation of Rule 11 of the Federal Rules of Civil Procedure. No one is likely to understand these sentences to mean that the parole board granted parole because of a record that, unbeknownst to the board, happened to be exemplary or that the court sanctioned the attorney because of a violation that, unbeknownst to the court, happened to be flagrant. Similarly, it is entirely reasonable to understand this statement—"The employer rejected the applicant because of a *religious* practice"—to mean that the employer rejected the applicant because of a practice that the employer knew to be religious.[16]

Alito then bolstered this argument using the legal context of the statute. Title VII forbids intentional discrimination. But without knowledge, a company could be held liable without

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[14] The leading theory of how context can contribute to meaning is that of Paul Grice. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 22–40 (1st ed. 1991). Geoffrey Miller was the first to explore the implications of Grice for legal interpretation. *See* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1182–84 (1990). Mike Rappaport and I have together developed these ideas more fully and applied them to constitutional interpretation. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law,* 59 WM. MY. L. REV. 1321, 1347-1353 (2018). This brief discussion of a view of statutory interpretation is an application of that joint work in constitutional theory to statutes and Professor Rappaport deserves equal credit or blame for an extension that we have discussed over the years.

[15] 575 U.S. 768 (2015) (Alito, J., concurring).

[16] *Id.* at 778.

fault—a legal concept alien to intentional culpability—which would thus be an anomalous reading of the statute.[17]

A modern statute of any complexity has a formal style and a legal context. The vocabulary and structure do not track that of ordinary conversation or indeed the prose of a newspaper or a novel, but have a distinctively legal feel. The legal language employed of course includes ordinary language, but does not stop there: it incorporates a background context made up of legal meanings and interpretive rules that resolve the ambiguities left in the ordinary language.

Thus, when people use the language of the law in statutes and indeed in constitutions, they are drawing on a rich corpus juris that has preceded the statute and of which the new statute becomes a part. Precedents attributing legal meaning to terms and legal interpretive rules are part of the context of that language. Thus, any theory that takes context into account should apply the legal interpretive rules and relevant linguistic precedents to utterances made in the language of the law. Such "precisified" meaning is the meaning that law prizes more than ever in the modern era because it allows for planning in a complex world.[18]

CONTEXTUAL TEXTUALISM IN ACTION

This section offers salient examples of Alito's contextual textualism. It discusses both obscure and important decisions, showing that Alito's approach is consistent whatever the stakes. Moreover, it is worth noting that these interpretations come on behalf of shifting majorities, showing that Alito applies his brand of textualism regardless of ideology.

The most important context for any statutory interpretation is the rest of the statute. Alito is a devotee of reading statutes holistically. In *Ledbetter v. Goodyear Tire & Rubber*, the question was whether Ledbetter could sue based on the past actions that occurred before the charging period in which employees may bring complaints before the Equal Employment Opportunity Commission.[19] Alito held for Goodyear. Much of his analysis centered on the structure of the act, noting that the reason for the unusual integrated, multistep procedure was Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation. He concluded that allowing plaintiffs to base complaints on acts beyond the charging period would undermine that structure.[20]

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[17] *Id.*

[18] Of course, as Alito also recognizes, this does not necessarily result in all terms being given legal meanings. The language of law in which statutes are written incorporates much ordinary language and in some cases the law itself may prefer ordinary meanings. *See* Mac's Shell Serv., Inc. v. Shell Oil Products Co., 559 U.S. 175, 182–83 (2010) (reading "termination" in its ordinary meaning before concluding that its technical reading would be the same).

[19] 550 U.S. 618 (2007).

[20] *Id. See also* Kellogg Brown & Root Services, Inc. v. United States, 575 U.S. 650, 656–57 (2015) (reading offenses as limited to criminal wrongs in light of past structure of the Act in which it appeared); Jones v. Harris Associates L.P, 559 U.S. 335, 345–46 (2010) (defining the nature of the fiduciary standard in the Investment Company Act in light of the role the shareholder action for breach of that duty plays in the rest of the Act); Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. 271, 281–82 (2009) (Alito, J., concurring) (interpreting the opposition required to an illegal discrimination practice to trigger protection from retaliation to be active rather than silent opposition, because the other conduct triggering such protection under the statute is active and purposive); United States v. Santos, 553 U.S. 507, 532–535 (2008) (Alito, J., dissenting) (disambiguating "proceeds" as "total amount [of money] brought in" in a money laundering statute by referring to other statutes, international law, and model money laundering statute).

Text in other statutes may be relevant for Alito as well, if not dispositive. Thus, when Congress refers to "person" in the Religious Restoration Act, Alito understands person to include corporations, because the Dictionary Act contains a cross-cutting definition of persons to include corporations.[21] But even when a statute does not refer to directly to another law, that law when enacted previously may provide a guide to the subsequent act's interpretation. Thus, Alito interprets Title IX as not precluding section 1983 gender discrimination suits against universities, because it was modeled on Title VI, and Title VI had permitted discrimination suits under section 1983.[22] Moreover, the context can include the anomalous effects that choosing one of two interpretations would have on other ambiguous statutes.[23]

A striking example of Alito's reading statutory language against the general corpus juris that extends beyond a particular statute is *Nielsen* v. *Preap*, which concerned a category of deportable aliens who may not be released on bail.[24] The alien argued that although the statute directs the Secretary to arrest certain classes of alien "when the alien is released from jail," the statute nevertheless did not apply to him because he was not arrested immediately upon release. Alito disagreed that this was the best reading of the statute even based on the rules of grammar. But he also argued that such a reading would conflict with the established legal rule that "an official's crucial duties are better carried out late than never."[25] That principle was a "legal backdrop" when Congress enacted the statute, and should be controlling here.[26] *Preap* thus exemplifies Alito's consistent view is that statutes should be read as part of complex woof and web of law.[27]

Another example comes in *Global-Tech Appliances, Inc. v. SEB S.A.*[28] There, the question was the degree of knowledge required to hold a defendant liable for inducing infringement. The statutory language simply stated that "whoever induces infringement of a patent shall be liable as an infringer."[29] Alito noted that while the word "induce" suggested that some degree of intent was necessary, it remains ambiguous whether the requirement of intent also required knowledge that the product has a patent capable of infringement. After careful parsing of prior case law on similar statutes, Alito concluded that some degree of knowledge was required.

But even that initial resort to the corpus juris did not resolve the case, because the question then turned on the requisite degree of knowledge. Here, Alito concluded that the level of knowledge required could be inferred from the long-standing legal doctrine of willful blindness. Courts and commentators had long asserted "that defendants cannot escape the reach of . . .

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[21] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–08 (2014).

[22] *See* Fitzgerald v. Barnstable, School Committee, 555 U.S. 246, 258–259 (2009).

[23] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2124–2125 (2018) (Alito, J., dissenting) (showing that narrow interpretation of meaning of the word "notice" in one immigration provision would cause confusion in the enforcement of the rest of immigration law).

[24] Nielsen v. Preap, 139 S. Ct. 954 (2019).

[25] *Id.* at 967.

[26] *Id.*

[27] *Id*. Other cases in which Alito relies on legal meanings to resolve ambiguities include Kellogg Brown & Root Services, Inc. v. United States, 575 U.S. 650, 658 (noting that Black's Law Dictionary defines offenses to be criminal, not civil wrongs). *See* F.A.A. v. Cooper, 566 U.S. 284, 292 (2012) (interpreting "actual damages" as a "legal term of art"); *see also* Nken v. Holder, 556 U.S. 418, 441–42 (2009) (Alito, J., dissenting) (relying on Black's Law Dictionary, statutes, and legal decisions to conclude that a stay was a form of injunction.)

[28] 563 U.S. 754 (2011).

[29] *Id.* at 760.

statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by circumstances."[30] Resort to the background principles of law makes otherwise vague or ambiguous statutory language more precise.[31]

Drafting conventions recommended to legislative assistants in Congress are also relevant parts of the corpus juris. Since those conventions suggest that a statute should be written generally in the present tense and have effect whenever it was read, Alito argued that the majority was mistaken to take the present tense of "travel" to mean that the only interstate traveling after the enactment of Sex Offender Registration and Notification Act triggered the responsibility to register.[32]

Another example of reading a term within the corpus juris comes in *Woodford v. Ngo*.[33] There, the question concerned the requirement in the Prison Litigation Act that prisoners exhaust their administrative remedies before going to Court. Alito looked to administrative law's use of the term "exhaustion" and thus concluded over the dissent of three other Justices that failures to meet administratively set deadlines should be understood as a failure to exhaust remedies.[34]

One result of his general efforts to read the law against the background of the corpus juris is to preserve the status quo unless Congress has clearly indicated a change. For instance, in *Hamilton v. Lanning*, Alito, over dissent by Justice Scalia, declined to adopt a possible, but not compelled, mechanical reading of "projecting" future earnings because it would have greatly changed bankruptcy law, putting debtors in a worse position than before: Prior bankruptcy practice is telling because we "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[35] The corpus juris reading of legislation is also generally a traditional reading.

Despite his recognition that canons of interpretation are not necessarily skeleton keys for unlocking legal meaning, Alito often relies on them to provide evidence for statutory meaning. In *Husted v. A. Philip Randolph Institute*, he read a provision about removing voters from the rolls more narrowly than the plaintiffs would like in part to prevent the provision from violating the canon that provisions should not be read to be redundant of other parts of the statute.[36] He also accepted the canon against surplusage urged by the dissent to argue for its reading of the statute but shows as a matter of fact that the provision would not be superfluous.[37]

Alito has also deployed legal canons as well as linguistic canons to resolve ambiguities. In *Cooper*, over the dissent of three Justices, he applied the canon that waivers of sovereign immunity must be unequivocally expressed to be effective and thus interpreted the term "actual damages"

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[30] *Id.* at 766.

[31] *Id.*; *see also* James v. United States, 550 U.S. 192, 210 (2007) (tentatively suggesting that extortion in the Armed Career Criminal Act should be given its common law definition).

[32] *See* Carr v. United States, 560 U.S. 438, 462 (2010) (Alito, J., dissenting).

[33] 548 U.S. 81 (2006).

[34] *See also* Chambers v. United States, 555 U.S. 122, 131–345 (2009) (Alito, J., concurring) (suggesting that the Armed Career Criminal Act should have been interpreted against the background of a previous case in which enhanced sentences were determined on the basis of the individual facts of the crime rather than the crime's categorical nature).

[35] 130 S. Ct 2464, 2467 (2010) (quoting Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., 549 U.S. 443, 454 (2007)).

[36] 138 S. Ct. 1833, 1844 (2018).

[37] *Id.* at 1845.

narrowly to exclude mental and emotional distress.[38] While a broader reading was not "inconceivable" the traditional canon was dispositive.[39] These legal canons also include clear statement rules that the Court has applied to protect constitutional values, like the clear statement rule on conditions that limit state spending of federal funds.[40]

As a textualist, Alito does not believe in divining a general purpose of a statute untethered to specific text. In *Ledbetter*, in dissent, Justice Ruth Bader Ginsburg argued that the Court has not been faithful to Title VII's core purpose, because it did not permit Ledbetter to use for past acts outside that charging period that may have a current effect. But Alito's response is the classic textualist counter: statutes are compromises. Thus, even if purpose can furnish part of the context that disambiguates a text, it is wrong to infer that a general purpose can override something more specific like a charging period since that was part of the legislative compromise.[41]

It would be unfair to say that Alito reads statutes in contested cases simply to reach conservative results. For instance, in *Gomez-Perez*, he interprets the Age Discrimination Act to encompass a retaliation cause of action, writing for six-person majority, with the Chief Justice and Justices Antonin Scalia and Clarence Thomas in dissent.[42]

BOSTOCK

Bostock is the most well-known statutory interpretation case decided during Alito's time on the Court. His approach was consistent with that of his opinions in cases, like many discussed above, receiving no popular attention. He considered the context of the words, including their legal context, to conclude that the 1964 act did not cover discrimination based on sexual orientation.

Indeed, his dissent contains the best theoretical description of his contextual approach in any of his opinions:

> Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.[43]

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[38] F.A.A. v. Cooper, 566 U.S. 284, 299 (2012).

[39] *See also* Henderson v. Shinseki, 562 U.S. 428, 441 (2011) (applying "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175 (2009) (emphasizing repeals by implication are disfavored); Johnson v. United States, 576 U.S. 591, 631–32 (2015) (Alito, J., dissenting) (urging an application of constitutional avoidance to an ambiguous statute); United States v. Stevens, 559 U.S. 460 (Alito, J., dissenting) (employing same canon to avoid an overbroad reading of statute that would render it unconstitutional).

[40] *See, e.g.*, Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy, 548 U.S. 291 (2006).

[41] *Ledbetter*, 550 U.S. at 629–30. He is also not moved by appeals to purpose on other dissents from these statutory interpretations. *See, e.g.*, Gomez-Perez v. Potter, 553 U.S. 474, 494–95 (2008) (Roberts, C.J., dissenting) (appealing to different purposes of antidiscrimination and retaliation claims).

[42] *Gomez-Perez*, 553 U.S. at 494–95.

[43] Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting).

And then Alito showed persuasively that in historical context, it is impossible to interpret the key language of the Civil Rights Act as encompassing discrimination based on sexual orientation. Discrimination "because of sex" was a well-known concept meaning discrimination because of someone's biological sex. It was also clear from the social context that it did not include discrimination because of sexual orientation even if that was a possible literal meaning of the words—a point on which he disagreed as well.[44]

In part, Alito argued, based on what he called the "painful" facts of widespread and accepted discrimination against homosexuals, that such discrimination was not against social conventions.[45] But he also, as in other opinions, is sensitive to the *legal* context. He notes that in 1964, it was permissible for federal agencies to deny employment based on sexual orientation. Many state laws barred their employment in a variety of situations. No one argued that the 1964 act changed their application. And at the time, homosexuals were also barred from serving in the military and from immigrating to the United States. Thus, if there was some lack of clarity in the ordinary understanding of discrimination on the basis of sex, the legal context makes clear that it did not include discrimination on the basis of sexual orientation.

One of Gorsuch's mistakes in the majority opinion was looking at the provision as a kind of computer code, divorced from its social and legal context. Judge Don Willett of the Fifth Circuit summarized (perhaps approvingly) Gorsuch's mode of analysis with just this analogy: "In the *Bostock* majority's view, language codified by lawmakers is like language coded by programmers."[46]

Alito recognizes that law is emphatically not a computer code, because it is not self-contained. It can be understood only through context. The non-contextual meaning often does fully not capture what the legislature "asserts" in a statute.[47] This fundamental proposition for legal interpretation is not surprising, because linguistic communication depends on the presuppositions and contexts that a speaker or groups of speakers share with their listeners. In this sense, communication in natural language is the opposite of a computer code where *nothing* depends on looking at the context outside the code. Interpreters need to recapture that context. Only then can one understand what the legislature asserted. In hard statutory cases, what separates good from bad opinions is the correct appreciation of context.

Alito's excellence as a jurist is that in hard cases, whether the stakes are large or small, he uses sound contextual judgment to recover the original meaning of a statute. His is the disciplined, but still recognizably humanistic, enterprise of judgment, rather than a calculus that can yet be outsourced to machines.

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[44] It might be objected that Alito is referencing the expected applications of the language of the Title VII rather than their objective meaning. But some of the best evidence of that meaning is often the expected applications, especially when widely held. Words, particularly those with moral content, are slippery things and dictionary definitions do not full capture their meaning in context. Recovering that context is important and the recovery of context can be greatly enhanced by considering how the words would have been applied in the sociopolitical usage of the day. *See*, *e.g.*, John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COM. 371, 379 (2007). Their usage in other statutes is particularly relevant. Once again it is context that is scarce in statutory interpretation.

[45] *Bostock*, 140 S. Ct. at 1769.

[46] Thomas v. Reeves, 961 F.3d 800, 825 (5th Cir. 2020) (Willet, J., concurring).

[47] *See* Scott Soames, *Toward a Legal Theory of Interpretation*, 6 NYU J.L. & LIBERTY 231, 239 (2011).