

# Word Games: Language, Intent, and Gender Discrimination Law Under the New Court

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[P]urpose reinforces what language already indicates, namely, that the anti-retaliation provision [of Title VII], unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment . . . . Context matters.

—Justice Stephen Breyer<sup>1</sup>

After six years of predictions and nervous waiting for Court-watchers of all ideological stripes, President George W. Bush appointed two new Justices to the Supreme Court less than two years into his second presidential term. The confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito may be a sign of more than just an ideological shift on the Court; they may also signal a shift away from pragmatic statutory interpretation that allows federal anti-discrimination laws to work. The new Court will be asked to determine the scope and meaning of landmark statutes affecting the rights of women.<sup>2</sup> If the Court fails to consider how the language of a statute can serve the purpose of that statute, the Court will undermine anti-discrimination laws instead of letting them work. As a result, women's equality may suffer.

## I. INTRODUCTION

Last year's change in the composition of the Court alters the calculus of prior, well-established statutory interpretation doctrine. Before this change, appellate lawyers generally had significant success predicting the outcomes of politically divisive cases.<sup>3</sup> The new Justices, however, are not

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<sup>1</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2412–15 (2006).

<sup>2</sup> See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169 (11th Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006) (examining whether a Title VII plaintiff alleging wage discrimination can only challenge salary decisions made within 180 days of her complaint).

<sup>3</sup> See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).

entirely unknown quantities. In fact, what was known about the Justices prior to their confirmations led to political debate and partisan outcry.<sup>4</sup> Many believe they can discern these new Justices' opinions on hot-button political issues, but it is the Justices' approach to the value and purpose of laws that ultimately will prove most significant.

The use of legislative purpose as an interpretive tool is often derided,<sup>5</sup> including by members of the Court.<sup>6</sup> Justice Antonin Scalia in particular is an ardent supporter of textualist interpretation of laws. In his book *A Matter of Interpretation*, he states “[m]y view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.”<sup>7</sup> Justice Stephen Breyer rebuts Scalia’s dismissal of legislative history and intent, pointing out that textualism fails when “existing canons [of statutory interpretation] conflict with each other” and noting previous scholarship demonstrating that “some two dozen pairs of canons . . . could justify opposite conclusions.”<sup>8</sup>

Members of the Court often reach equally valid but contradictory conclusions about how a statutory word or turn of phrase can be read. When weighing more than one valid interpretation, the context of the law should be considered. In many ways, this principle is parallel to—and not irreconcilable with—the canon of statutory interpretation requiring that meaning be given to every word.<sup>9</sup> Laws are written to serve purposes: to solve a problem, to provide a person or organization with an ability to act, to prevent a person or organization from acting, and so on. If every word matters in statutory interpretation, then reading a word to exclude a statutory purpose when instead it can reasonably be read to serve that purpose subverts the will of Congress.

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<sup>4</sup> See Mike Allen, *Conservatives Remain Steady in Support of Roberts*, WASH. POST, Aug. 8, 2005, at A02; Tom Brune, *Court Nominee Judge Samuel Alito: Both Sides Fixin’ for a Fight over Samuel Alito*, NEWSDAY, Nov. 1, 2005, at A4 (noting that Alito “won quick praise from Republicans and conservatives” while Democrats “rais[ed] red flags of concern over Alito’s judicial record”).

<sup>5</sup> See, e.g., Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner’s Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 470 (2002) (“In the current interpretive milieu, any resort to statutory purpose as a source of legislative meaning independent of text is likely to be met with a chilly reception.”).

<sup>6</sup> See, e.g., *United States v. O’Hagan*, 521 U.S. 642, 689 (1997) (Thomas, J., dissenting) (criticizing the majority’s reliance on legislative purpose and stating: “[I]t is not illegal to run afoul of the ‘purpose’ of a statute, only its letter.”). *But see* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 83 (1994) (Scalia, J., dissenting) (decrying the majority’s “insist[ence] that the demands of syntax must prevail over legislative intent”).

<sup>7</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–30 (Amy Gutmann ed., 1997).

<sup>8</sup> Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 869 (1992).

<sup>9</sup> See *Potter v. United States*, 155 U.S. 438, 446 (1894) (“[A word’s] presence . . . cannot be regarded as mere surplusage; it means something.”).

While legislative purpose is often opaque, in the realm of anti-discrimination law, there should be little question of congressional intent. Judges of all ideologies have concluded that Congress enacted statutes such as the Individuals with Disabilities Education Act (IDEA), Americans with Disabilities Act (ADA), and Title VII of the Civil Rights Act of 1964 to reduce harm against, or ensure meaningful opportunities for, specific groups of people in specific contexts.<sup>10</sup> What is in doubt in cases involving these statutes is the scope of the statutes' words and phrases—for example, how much they enable or prohibit a person's or organization's actions. In these cases, then, decrying legislative purpose in the name of textualism is hollow. When the text of these statutes can be construed reasonably to either support or thwart legislative purpose, a court mindful of the counter-majoritarian potential of judicial review will construe the statute in a manner that remains true to congressional intent.

Anti-discrimination law applied as originally intended by Congress can change the lives of women facing discrimination. In 1976, the Supreme Court's decision in *General Electric v. Gilbert* held that workplace discrimination against pregnant women was not gender-based discrimination under Title VII of the Civil Rights Act of 1964.<sup>11</sup> The *Gilbert* Court read the law in a way that caused it to fail rather than to serve Title VII's purpose of protecting individuals against discrimination in the workforce.<sup>12</sup> This result, which caused a public outcry, defied common sense; it ignored the reality that pregnancy-based discrimination uniquely affects women. Congress responded by passing the Pregnancy Discrimination Act of 1978, which defined pregnancy discrimination as sex discrimination.<sup>13</sup> Congress wanted its law to work, so it made a clear legislative statement that the meaning of Title VII had been ignored by the Court.

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<sup>10</sup> See, e.g., *Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005) (“[The IDEA] is a Spending Clause statute that seeks to ensure that ‘all children with disabilities have available to them a free appropriate public education . . . .’”) (O’Connor, J., writing for the majority, consisting of Stevens, Scalia, Kennedy, Souter, and Thomas, JJ.); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 446 (2003) (noting the ADA’s “statutory purpose of ridding the Nation of the evil of discrimination”) (Stevens, J., writing for the majority, consisting of Rehnquist, C.J., and O’Connor, Scalia, Kennedy, Souter and Thomas, JJ.); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (“The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”) (O’Connor, J., writing for majority in part, with Rehnquist, C.J., and Scalia, Thomas, and Kennedy, JJ., joining the same part).

<sup>11</sup> 429 U.S. 125 (1976).

<sup>12</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“What is required by Congress [via Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).

<sup>13</sup> Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(K) (2000)); see also U.S. Equal Employment Opportunity Commission, Facts About Pregnancy Discrimination, <http://www.eeoc.gov/facts/fs-preg.html>.

As the Court undergoes its first personnel change in a decade, the continuing ability of existing laws to combat sex discrimination is far from certain. Justice O'Connor was often labeled a pragmatist.<sup>14</sup> In her opinions and through her votes, she regularly advocated positions that allowed laws to serve their intended purpose.<sup>15</sup> Today, as is discussed below, a majority of the Court has voted or advocated in gender discrimination cases against making the law work, even when the text allows it to do so. Ignoring the reasons for which laws were originally enacted, Justices tout other interests—such as federalism—while skewing the principles of comity and respect for legislative action.<sup>16</sup>

To illustrate how the new Court could reshape gender discrimination law, this Essay first examines *Jackson v. Birmingham Board of Education*,<sup>17</sup> a Title IX decision by the Rehnquist Court during its last full term in October Term 2004. This Essay then examines the past work of Chief Justice Roberts and Justice Alito as indications of whether the new Justices will let equality-driven laws work when the laws' text supports such an interpretive path.

## II. JACKSON V. BIRMINGHAM BOARD OF EDUCATION— ALLOWING THE LAW TO WORK

“We reach this result based on the statute’s text,” wrote Justice O'Connor in her five-vote majority opinion in *Jackson*.<sup>18</sup> The case centered around Roderick Jackson, a girls' high school basketball coach, who was removed from his paid coaching position after complaining to his supervisors about the lack of equal facilities and treatment for the girls' basketball team.<sup>19</sup> Claiming that the school board fired him as retaliation for his complaints, he sued the board for gender-based discrimination under Title IX.<sup>20</sup>

Jackson's claim was novel in the Supreme Court but not in federal courts generally. Title IX was created to prohibit gender discrimination in education.<sup>21</sup> The opening passage of the law reads “[n]o person in the

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<sup>14</sup> See Charlie Savage, *Pragmatist Used Swing-Vote Clout*, BOSTON GLOBE, July 2, 2005, at A11 (“As a pragmatist on a bench filled with more predictable liberal and conservative purists, O'Connor wielded far more power than her official standing.”).

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 644–45 (2000) (Souter, J., dissenting) (“Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit.”).

<sup>17</sup> 544 U.S. 167 (2005).

<sup>18</sup> *Id.* at 178.

<sup>19</sup> *Id.* at 171–72.

<sup>20</sup> *Id.* at 172.

<sup>21</sup> Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 373 (codified

United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>22</sup> Typical plaintiffs in Title IX claims were girls whose sports teams had been treated worse than a boys’ team in the same sport,<sup>23</sup> or whose teachers had sexually harassed them,<sup>24</sup> or in some cases the parents of girls who suffered some other discrimination at school.<sup>25</sup> In 1997, however, a women’s basketball coach at a small college succeeded on a Title IX claim after she was denied a promotion and stripped of her managerial role following her continued complaints that the women’s team was not receiving the same treatment and benefits as the men’s team.<sup>26</sup>

In Jackson’s case, after he filed his claim the school board moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Jackson had failed to state a claim under Title IX.<sup>27</sup> The district court agreed with the school board,<sup>28</sup> and the Eleventh Circuit affirmed.<sup>29</sup> The majority of the Supreme Court, however, saw a flaw in the lower courts’ logic. Justice O’Connor wrote: “[I]f retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”<sup>30</sup> The law had a purpose, and the majority, when faced with two reasonable ways to read the text of Title IX, found the best reading to be the one that gave meaning not only to the words but also to the purpose of the law.

The majority found the statutory text to be critical to its analysis. Title IX covers everyone; it begins: “No person in the United States . . . .”<sup>31</sup> The scope of prohibited action in Title IX is similarly expansive, as it prohibits “discrimination” without limiting what acts are or are not considered “discrimination.”<sup>32</sup> Justice O’Connor’s opinion pointed out that the circuit court had “ignore[d] the import of our repeated holdings construing ‘discrimination’ under Title IX broadly.”<sup>33</sup> The Court had previously held that when Congress uses a broad term such as “discrimination” in a law like Title IX, the courts must respect that use and accord it

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as amended 20 U.S.C. § 1681 (2000)); *see also* 118 CONG. REC. 5806-07 (Feb. 28, 1972) (statement of Sen. Bayh) (“[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . .”).

<sup>22</sup> 20 U.S.C. § 1681(a) (2000).

<sup>23</sup> *See, e.g.*, *Ridgeway v. Mont. High Sch. Ass’n*, 858 F.2d 579, 582 (9th Cir. 1988).

<sup>24</sup> *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 63–65 (1992).

<sup>25</sup> *Communities for Equity v. Mich. High Sch. Athletic Ass’n*, 377 F.3d 676, 679 (6th Cir. 2006).

<sup>26</sup> *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 244 (5th Cir. 1997).

<sup>27</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 172 (2005).

<sup>28</sup> *Jackson v. Birmingham Bd. of Educ.*, No. 01-01866, 2002 U.S. Dist. LEXIS 27597, at \*2 (N.D. Ala. Feb. 25, 2002).

<sup>29</sup> *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002).

<sup>30</sup> *Jackson*, 544 U.S. at 180.

<sup>31</sup> 20 U.S.C. § 1681(a) (2000).

<sup>32</sup> *Id.*; *see also* 14 C.F.R. § 1253.400 (2000).

<sup>33</sup> *Jackson*, 544 U.S. at 174.

“a sweep as broad as its language.”<sup>34</sup> Just as it would have been wrong to ignore specific words used in a statute by interpreting the statute to give them no meaning, it was equally wrong for the circuit court to ignore the expansive scope created by broad statutory language.

Thus, the *Jackson* Court’s opinion, as opinions of Justice O’Connor and a majority of the Court had done before,<sup>35</sup> did not merely do justice to the text of the law but to the purpose of the law as well. The Court allowed the law to keep working. It ensured that teachers or coaches, whose tenures outlast those of their students, would be able to act as complainants and stand up on behalf of their students to root out inequality. The need for such parties to act as complainants is particularly acute given the reality that legal remedies for discrimination in education are too slow. After all, Jackson first complained of discrimination in 2000, suffered his retaliation in 2001, and saw final resolution of his legal battle in 2005.<sup>36</sup> If a high school basketball player goes through the steps of recognizing discriminatory treatment, officially notifying her school of the problem, waiting for a reply, realizing no changes are coming, and filing a claim in court, she may be well into her college years before the case reaches resolution. Without the ability to realize a personally beneficial outcome, many, if not most, student plaintiffs might shy away from such a path.

The dissenting Justices ignored this reality. Without a trace of irony, Justice Thomas, writing for the dissent in *Jackson*, pointed to the “availability” of a remedy for students and parents as support for the dissent’s conclusion that Coach Jackson could not make a claim under Title IX. Justice Thomas wrote that “[n]othing prevents students—or their parents—from complaining about inequality in facilities or treatment.”<sup>37</sup> However, the examples cited by the dissent undermined its reasoning. Justice Thomas cited *Franklin v. Gwinnett County Public Schools*<sup>38</sup> and *Davis v. Monroe County Board of Education*<sup>39</sup> as support for his proposition. In *Franklin*, the student filing suit was in high school from 1985 until 1989. The alleged Title IX violation began in 1986, she filed suit in 1988, and the Supreme Court finally issued its opinion in 1992, three years after the stu-

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<sup>34</sup> *Id.* at 175 (referring to *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

<sup>35</sup> *See, e.g., Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) (O’Connor, J., writing for the majority) (holding that educational institutions “violate Title IX’s plain terms when they remain deliberately indifferent to this form of misconduct”); *Morse v. Republican Party of Va.*, 517 U.S. 186, 236 (1996) (Breyer, J., concurring, joined by O’Connor, J.) (“Congress did not want to enact a statute with that loophole, and it did not do so.”). *But see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (criticizing Justice O’Connor’s majority opinion denying a private right of action for some victims of sexual harassment in schools and stating “[w]e should . . . seek guidance from the text of the statute and settled legal principles rather than from our views about sound policy”).

<sup>36</sup> *Jackson*, 544 U.S. at 171–72.

<sup>37</sup> *Id.* at 195 (Thomas, J., dissenting).

<sup>38</sup> 503 U.S. 60 (1992).

<sup>39</sup> 526 U.S. 629 (1999).

dent had graduated from high school.<sup>40</sup> In *Davis*, the alleged Title IX violation began in 1992, the student's parents brought suit in 1994, and the Supreme Court issued its opinion in 1999, five years after the student had left high school.<sup>41</sup> These cases demonstrate that exclusion of a remedy supported by statutory language cannot be plausibly defended by disingenuous reference to remedies of limited and uncertain availability.

Justice Thomas's dissent further stated that the majority's "holding is contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex."<sup>42</sup> Yet Justice Thomas pointed to no "plain language" in the text specifying that gender-based discrimination could not include retaliation against plaintiffs like Coach Jackson. Instead, Justice Thomas wrote that such a conclusion was against "the natural meaning of the phrase 'on the basis of sex.'"<sup>43</sup> For support, Justice Thomas cited to *Leocal v. Ashcroft*.<sup>44</sup> Yet although the *Leocal* Court did hold that "[w]hen interpreting a statute, we must give words their 'ordinary or natural' meaning," the Court went on to use this principle to read into the statute at issue a specific *mens rea* requirement that was *not* required by the statute's text.<sup>45</sup> Thus, *Leocal* itself was not a pure textualist interpretation; the *Leocal* Court chose one plausible construction of a statute over another.

Given a similar choice between plausible constructions, the *Jackson* majority chose the proper, pragmatic interpretation. By thus allowing for an expansive remedy, the Court provided a significantly strengthened mechanism through which the anti-discrimination law could work.

### III. WILL THE NEW COURT ALLOW TITLE IX AND OTHER ANTI-DISCRIMINATION LAWS TO WORK?

We no longer have the *Jackson* Court. The opinion's author announced her retirement just months after the 5-4 decision was handed down, which created an opportunity for the dissenters' argument to prevail. If a case like *Jackson* made its way to the current Court, either Chief Justice Roberts or Justice Alito would be a necessary vote to reach the same text- and purpose-driven result of the majority opinion. Although neither Justice has authored significant opinions on Title IX, their advocacy and U.S. Court of Appeals votes may provide some clues to their view on such anti-discrimination laws. These suggest neither has shown much willingness to favor purpose in interpretations of civil rights law.

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<sup>40</sup> *Franklin*, 503 U.S. at 63.

<sup>41</sup> *Davis*, 526 U.S. at 633.

<sup>42</sup> *Jackson*, 544 U.S. at 184 (Thomas, J., dissenting).

<sup>43</sup> *Id.* at 185.

<sup>44</sup> 543 U.S. 1 (2004).

<sup>45</sup> *Id.* at 9–10.

Although Title IX does not limit the remedies available to plaintiffs filing Title IX actions in court, the first Bush Administration once argued for such a limitation.<sup>46</sup> Then-Deputy Solicitor General John Roberts co-authored the government's amicus brief that claimed Title IX should be interpreted to allow equitable remedies but not monetary damages.<sup>47</sup> That case centered on the sexual harassment and abuse of a high school girl by her teacher,<sup>48</sup> alleging that teachers and administrators knew of the problem but failed to take action.<sup>49</sup> The government argued in favor of enjoining the teacher from sexually harassing his student but against the imposition of monetary sanctions against the school. This lone equitable remedy was particularly worthless in that case, because the harassing teacher no longer taught at the school and the plaintiff no longer attended the school.<sup>50</sup> Thus, if the government's position, as presented by Roberts, had prevailed, the law would have been useless in protecting students against sexual harassment. Instead, the Court refused "to abandon the traditional presumption in favor of all available remedies" absent statutory language to the contrary; it held that damages were an appropriate remedy in this type of case because "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."<sup>51</sup>

Justice Alito has less direct history with Title IX, but he has voted to narrow students' rights against their harassers in schools.<sup>52</sup> After an *en banc* sitting of the Third Circuit, a majority, including then-Judge Alito, affirmed the district court's dismissal of the complaint of several high school girls against their school for failing to state a claim under 42 U.S.C. § 1983.<sup>53</sup> The students claimed that the school was complicit in allowing them to be sexually harassed and assaulted by male classmates.<sup>54</sup> The facts of this case were horrific. As the dissent noted, the complaint alleged:

[The] student teacher put in charge of that classroom, Susan Peters, witnessed daily the chaotic behavior that took place in her classroom and was present when the male students grabbed at [plaintiff] D.R., touched her breasts, pushed her down, and dragged her into the bathroom . . . . The teacher's general reac-

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<sup>46</sup> *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 62 (1992).

<sup>47</sup> *Id.* at 68–71.

<sup>48</sup> *Id.* at 62–64.

<sup>49</sup> *Id.* at 64.

<sup>50</sup> *Id.* at 76.

<sup>51</sup> *Id.* at 72, 75. *But see id.* at 78 (Scalia, J., concurring) (concurring because Congress ratified such a conclusion in its 1986 amendments to the law, not because of the original statute).

<sup>52</sup> *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992).

<sup>53</sup> *Id.* at 1376–77.

<sup>54</sup> *Id.* at 1366–67.

tion was to ignore the behavior or walk away . . . . The other school officials also knew about the situation in the graphic arts classroom and did not try to remedy it.<sup>55</sup>

The students' claim failed because the Third Circuit majority held that the state had no duty to protect students while they are in school; the court based its opinion on a reading of a Supreme Court decision as requiring twenty-four hour custody before such a duty is triggered, even though the court never concluded such a requirement was necessary.<sup>56</sup> Judge Sloviter, in her dissent, responded that "we owe immature school children attending public school who are seriously injured as a result of a policy of deliberate indifference to their danger no less a remedy than we are willing to provide to incarcerated criminals."<sup>57</sup>

The implication of the majority opinion in *D.R.* is clear: when faced with statutory text (there, the Supreme Court's custody requirement) that reasonably could be interpreted in different ways, the purpose of the underlying statute carried no weight in selecting the appropriate interpretation. The language of § 1983 is broad. It prescribes liability against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."<sup>58</sup> To read such a significant custody requirement into this language is beyond the plain meaning of the text. In *D.R.*, however, the Third Circuit, including then-Judge Alito, refused to let § 1983 work. Such an approach is in sharp contrast to the pragmatic approach of many Rehnquist Court opinions, particularly those joined by Justice O'Connor.<sup>59</sup>

These examples indicate that the new Court is much less likely to seek pragmatic results—that is, choosing between two reasonable interpretations of a statute by favoring the one that allows the law to serve its purpose. In one example from last Term, Justice Alito's majority opinion, joined by Chief Justice Roberts, concluded that parents prevailing in litigation are not entitled to recover expert witness fees under the language of the IDEA.<sup>60</sup> Justice Breyer, however, interpreted the same statutory language differently. In his dissent he stated: "I can find no good reason

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<sup>55</sup> *Id.* at 1378 (Sloviter, J., dissenting).

<sup>56</sup> *Id.* at 1369–72 (citing *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989)).

<sup>57</sup> *Id.* at 1384.

<sup>58</sup> Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000).

<sup>59</sup> Justice Alito has not rejected all gender discrimination cases before him. In *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313 (3d Cir. 2000), then-Judge Alito joined a Third Circuit panel concluding that gender discrimination is an issue of material fact and reversing summary judgment for the employer.

<sup>60</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459–60 (2006).

for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.”<sup>61</sup> Justices Alito and Breyer, in two readings of the same words, reached two logically valid conclusions. Justice Alito’s conclusion stripped the statute of some of its purpose by placing a larger financial burden on parents attempting to vindicate their child’s rights under the Act. Justice Breyer’s conclusion, on the other hand, would have ensured that parents who would otherwise succeed in an IDEA suit would not be dissuaded from filing suit by the costs of necessary experts. The pragmatic result lost.

#### IV. CONCLUSION: THE DANGER OF LAWS THAT DO NOT WORK

Society changes. “Context matters.” When “purpose reinforces what language already indicates,” the Court better serves the law and society by allowing that language to serve the statutory purpose. Title IX cases provide just one illustration of how courts read the plain text of a statute to either advance or stymie its purpose. When choosing between these modes of construction, it is only proper to respect Congress and presume that it has enacted the law so that it will work.

To fail to choose a reasonable interpretation of a statute that better serves the purpose of that statute shows no “due respect” to Congress’s decisions. This seemingly violates the Supreme Court’s oft-repeated holding that “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”<sup>62</sup> In essence, such failure rebukes the policy determinations of Congress and the ability of Congress to address problems of social urgency. If the government’s view in *Jackson* or *Franklin* had carried the day, the result would have prevented individuals from seeking redress and reformation of gender-based discrimination, even though giving individuals that ability—empowering individuals to redress discrimination against them—was the purpose of Title IX.

Only time will tell whether the new Court will continue to follow the previous Court and allow laws that intend to serve equality to do just that. When Justice Breyer wrote “[c]ontext matters” in *Burlington Northern Santa Fe Railway Co. v. White* last Term, no Justices dissented.<sup>63</sup> Justice Alito’s concurrence, however, complained that “[t]he majority’s interpretation has no basis in the statutory language.”<sup>64</sup> This view contrasts with a very different vision of the Court’s role in statutory interpretation laid out by Justice Breyer in *Murphy*:

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<sup>61</sup> *Id.* at 2466 (Breyer, J., dissenting).

<sup>62</sup> *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>63</sup> 126 S. Ct. 2405, 2415 (2006).

<sup>64</sup> *Id.* at 2418 (Alito, J., concurring).

[O]ur ultimate judicial goal is to interpret language in light of the statute's purpose. Only by seeking that purpose can we avoid the substitution of judicial for legislative will. Only by reading language in its light can we maintain the democratic link between voters, legislators, statutes, and ultimate implementation, upon which the legitimacy of our constitutional system rests.<sup>65</sup>

This approach would not ignore statutory language. Rather, when alternative interpretations of text are available, the Court's role is to choose the one serving the statute's purpose.

The new Court, however, seems poised to disregard Justice Breyer's call for reason by failing to follow Justice O'Connor's previous practice of pragmatic statutory interpretation. The Court places its preferred interpretation over Congress's when it refuses to acknowledge that other reasonable interpretations can exist, particularly those that serve the purpose of the statute. The tragic result for women and other victims of discrimination is that the Court undermines anti-discrimination laws in the name of justice.

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<sup>65</sup> *Murphy*, 126 S. Ct. at 2474 (Breyer, J., dissenting).

