hands was proper, inasmuch as it sought to avoid a judicial resolution of the internationalist-nationalist dispute. But the Court's chosen method, having produced a questionable conclusion in *Medellín*, paved the way to continued uncertainty and unavoidable judicial discretion. In the absence of clear presumptions, both sides of the debate will use a treaty provision's interpretive leeway to argue for their preferred result on a case-by-case basis — precisely the consequence the Court professed to avoid. That the Court adopt *a* presumption is therefore more important than *which* presumption it chooses. Such a step would truly clear the way for the self-execution debate to continue in the political arena where the Court has insisted it belongs.

III. FEDERAL STATUTES AND REGULATIONS

A. Age Discrimination in Employment Act

Retaliation. — The Supreme Court has been known to entertain the occasional "benign fiction."[1] One such fiction, the context canon,[2] attributes legal acumen to the legislature: Congress is presumed to be aware of judicial precedents and to incorporate the judiciary's gloss on statutes sharing common language, origins, or purpose.[3] The Court's fiction lacks empirical support[4] but remains attractive because it promotes values associated with the rule of law.[5] Last Term, in *Gómez-Pérez v. Potter*,[6] the Supreme Court applied this fiction to hold that the Age Discrimination in Employment Act[7] (ADEA) prohibits retaliation against federal employees who complain of age discrimination. The Court's opinion harmonizes and regularizes antidiscrimination

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[1] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment).

[2] Nancy Eisenhauer, Comment, *Implied Causes of Action Under Federal Statutes: The Air Carriers Access Act of 1986*, 59 U. CHI. L. REV. 1183, 1193 (1992).

[3] *See, e.g.*, *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring in the judgment); Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); The "Abbotsford," 98 U.S. 440, 444 (1878).

[4] *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 245 (2000) ("Due to the complexities of the legislative process and Congress's collective nature . . . even a single statute is unlikely to be drafted with such interpretive conventions in mind."); Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983) (noting "how little research" has been done to ascertain whether or not Congress is aware of judicial canons of construction).

[5] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 16–17 (Amy Gutmann ed., 1997) (arguing that courts seek "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*," in order to match citizens' reasonable expectations and to promote "[a] government of laws, not of men").

[6] 128 S. Ct. 1931 (2008).

[7] 29 U.S.C.A. §§ 621–634 (West 2000 & Supp. 2008).

law.[8] Yet, because reliance on a fiction obscures the issues and frustrates potentially fruitful debate, the Court would do better to follow the approach of its stare decisis jurisprudence and openly discuss competing rule-of-law concerns.

Myrna Gómez-Pérez, a window distribution clerk for the United States Postal Service, was forty-five years old when she requested a transfer between Dorado and Moca, Puerto Rico.[9] The Postal Service granted her request and, after her departure, filled her full-time position in Dorado with a younger, part-time employee.[10] When Gómez-Pérez sought to transfer back to Dorado and was denied, she filed an age discrimination complaint with the Postal Service.[11] According to Gómez-Pérez, her supervisor and coworkers in Moca then engaged in numerous acts of retaliation: her work hours were cut, she was subjected to "groundless complaints" and false accusations of sexual harassment, and she was told to "'go back' to where she 'belong[ed].'"[12]

Gómez-Pérez filed suit in the United States District Court for the District of Puerto Rico.[13] Among other things, she alleged that retaliation by her supervisor and coworkers violated the ADEA's prohibition of "discrimination based on age."[14] Applying a clear-statement rule drawn from sovereign immunity doctrine, the district court understood the question to be whether the antidiscrimination provision of the ADEA constituted an "unequivocal" waiver of immunity for claims based on retaliation.[15] The district court found that it did not and granted the government's motion for summary judgment.[16]

The First Circuit affirmed on separate grounds.[17] Rejecting the district court's application of a clear-statement rule,[18] the First Circuit relied on the "clear difference" between discrimination and retaliation to find that the "plain text" of the ADEA did not encompass retalia-

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[8] This is particularly true when *Gómez-Pérez* is viewed in conjunction with the Court's decision the same day in *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008). *See infra* p. 450.

[9] Gómez-Pérez v. Potter, No. Civ. 03-2236(DRD), 2006 WL 488060, at *3–4 (D.P.R. Feb. 28, 2006).

[10] *Id.*

[11] *Id.* at *4.

[12] *Gómez-Pérez*, 128 S. Ct. at 1935. In particular, male employees complained that Gómez-Pérez would greet them with a kiss on the cheek. *See Gómez-Pérez*, 2006 WL 488060, at *4.

[13] *Gómez-Pérez*, 2006 WL 488060.

[14] 29 U.S.C.A. § 633a(a) (West 2000 & Supp. 2008); *see Gómez-Pérez*, 2006 WL 488060, at *6. Gómez-Pérez also alleged age discrimination under the ADEA, as well as discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000). *Gómez-Pérez*, 2006 WL 488060, at *5.

[15] *See Gómez-Pérez*, 2006 WL 488060, at *6–7.

[16] *Id.* at *10–11.

[17] Gómez-Pérez v. Potter, 476 F.3d 54, 56 (1st Cir. 2007).

[18] The First Circuit found that the government waived sovereign immunity in a separate statutory provision giving the postal service authority to "sue and be sued in its official name." *Id.* at 57 (citing 39 U.S.C. § 401(1) (2006)).

tion.[19] The First Circuit distinguished *Jackson v. Birmingham Board of Education*[20] — holding that Title IX's prohibition of discrimination includes retaliation[21] — on the grounds that Title IX's private right of action is judicially implied and affords greater latitude to the courts.[22] Observing that the ADEA provisions governing private employers expressly prohibit retaliation,[23] the First Circuit drew a contrary inference with regards to the ADEA's public sector provisions on the grounds that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of language from a statute.[24]

In an opinion by Justice Alito, the Supreme Court reversed and remanded.[25] Rather than rely on the ADEA's plain meaning, the Court stated that it was "guided by [its] prior decisions interpreting similar language in other antidiscrimination statutes."[26] In particular, the Court relied on two decisions finding retaliation encompassed within a ban on discrimination: *Jackson*, interpreting Title IX, and *Sullivan v. Little Hunting Park, Inc.*,[27] interpreting § 1982.[28] Because Congress enacted the public sector provisions of the ADEA five years after *Sullivan*, the Court reasoned that "Congress was presumably familiar with *Sullivan* and had reason to expect that [the ADEA] would be interpreted 'in conformity' with that precedent."[29] The Court also noted that *Jackson* relied on the same context canon and found "no

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[19] *Id.* at 57–58.

[20] 544 U.S. 167 (2005).

[21] *Id.* at 171.

[22] *See Gómez-Pérez*, 476 F.3d at 58–59. The Court also distinguished Title IX on grounds of policy and legislative history. *Id.* at 59–60.

[23] *Id.* at 59.

[24] *Id.* (quoting Rusello v. United States, 464 U.S. 16, 23 (1983) (internal quotation mark omitted)). Although courts have deemed Title VII's prohibition of "discrimination" in the public sector sufficiently broad to encompass conduct enumerated in that law's private sector provisions, Porter v. Adams, 639 F.2d 273 (5th Cir. Unit A Mar. 1981), the First Circuit observed that the ADEA, unlike Title VII, provides that public employers "shall not be subject to, or affected by" the Act's private sector provisions. *Gómez-Pérez*, 476 F.3d at 60 (quoting 29 U.S.C. § 633a(f) (2000)).

[25] *Gómez-Pérez*, 128 S. Ct. at 1943. Justice Alito was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.

[26] *Id.* at 1936. With regards to sovereign immunity, the Court found that the ADEA's grant of a private right of action clearly and expressly waived immunity for "[a]ny person aggrieved." *See id.* at 1943 (quoting 29 U.S.C. § 633a(c)).

[27] 396 U.S. 229 (1969).

[28] *Gómez-Pérez*, 128 S. Ct. at 1936–37. The Court found the ADEA's prohibition of "discrimination based on age" to be "not materially different" from Title IX's prohibition of "discrimination" "on the basis of sex," 20 U.S.C. § 1681(a) (2000), and "the functional equivalent" of § 1982's guarantee of the "same" right "as is enjoyed by white citizens," 42 U.S.C. § 1982 (2000). *Gómez-Pérez*, 128 S. Ct. at 1936–37. The Court also observed that all three statutes were "remedial provisions aimed at prohibiting discrimination." *Id.* at 1937.

[29] *Gómez-Pérez*, 128 S. Ct. at 1941 (quoting Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 176 (2005)).

reason to think that Congress forgot about *Sullivan* during the two years" between the drafting of Title IX and the ADEA.[30]

The Court rejected the government's attempts to distinguish *Jackson* and Title IX from the ADEA. The Court stated, first, that the fact that Title IX's private right of action was judicially implied was "analytically distinct" from the law's prohibition of retaliation.[31] A contrary rule, the Court observed, would produce "strange results": Congress's decision to provide a "strong remedy," in the form of a private right of action, would narrow the scope of the law's substantive provisions.[32] The Court also declined to rely on the lack of legislative history indicating that Congress intended to incorporate *Sullivan* in the ADEA.[33] The Court noted that *Jackson* did not rely on legislative history, but rather found it "not only appropriate but also realistic to presume" that Congress would have had *Sullivan* in mind.[34]

The Court also rejected arguments premised on differences between the ADEA's private and public sector provisions. Although a private sector ban on retaliation would normally lead the Court to draw a contrary inference from Congress's silence as to the public sector, the Court observed that "the two relevant provisions were not considered or enacted together."[35] The Court reasoned that the public and private sector provisions were "couched in very different terms":[36] the private sector provisions enumerate instances of prohibited conduct, whereas the public sector provisions declare a "broad, general ban" on discrimination sufficient to encompass retaliation.[37]

Chief Justice Roberts dissented on the basis of "statutory language and structure."[38] Writing only for himself, Chief Justice Roberts stated that *Sullivan* and *Jackson* correctly established that "antidiscrimination provisions *may* also encompass" retaliation.[39] Given that Congress sometimes expressly prohibits retaliation, however, "it cannot be

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[30] *Id.* at 1939. The Court also rejected the contention that policy considerations argued less forcefully for prohibiting retaliation under the ADEA than under Title IX, stating that *Jackson* was based on text, rather than policy. *See id.* at 1938–39.

[31] *Id.* at 1938.

[32] *Id.*

[33] *Id.* at 1939.

[34] *Id.* (quoting *Jackson*, 544 U.S. at 176) (internal quotation mark omitted).

[35] *Id.* at 1940. In fact, seven years elapsed between the enactments of the two provisions. *Id.*

[36] *Id.*

[37] *Id.* at 1941. The Court suggested that Congress patterned the public sector provisions after Title VII's broad ban on discrimination in the public sector. *See id.* The Court also declined to rely on the ADEA's provision that federal entities "shall not be subject to, or affected by" the private sector provisions; the Court stated that it was interpreting the ADEA's public sector provisions — not extending the private sector prohibition on retaliation. *See id.*

[38] *Id.* at 1943 (Roberts, C.J., dissenting). Chief Justice Roberts was joined in part by Justices Scalia and Thomas. *Id.*

[39] *Id.* at 1944 (emphasis added).

— contrary to the majority's apparent view — that *any* time Congress proscribes 'discrimination based on X,' it means to proscribe retaliation as well."[40] This was particularly true, he suggested, in light of the Court's prior statements acknowledging that discrimination and retaliation are "conceptually distinct."[41]

In a portion of his dissent joined by Justices Scalia and Thomas, Chief Justice Roberts argued that Congress did not intend the ADEA to prohibit public sector retaliation. Because the bill enacting the public sector provisions also amended the private sector provisions, the Chief Justice argued that "Congress obviously had the private sector ADEA provision prominently before it."[42] The Chief Justice also relied on Congress's stipulation that the private sector provisions should not be extended to public employers, reasoning that "Congress was aware that there were significant differences" between the two parts of the ADEA and intended to preserve those distinctions.[43] Finally, in light of the government's long history of addressing retaliation through civil service procedures, Chief Justice Roberts stated that it would not be "anomalous" for the ADEA to draw such a distinction between the public and private sectors.[44]

Justice Thomas also wrote separately, joined by Justice Scalia, in order to "reiterate" his disagreement with the Court's holding in *Jackson*.[45] According to Justice Thomas, the "text of the federal-sector provision . . . [was] clear": a ban on discrimination does not reach retaliation.[46] Given that *Jackson* "incorrectly conflated the concepts of retaliation and discrimination," Justice Thomas saw no reason to extend its logic from Title IX to the ADEA.[47]

The Supreme Court in *Gómez-Pérez* spoke of Congress's intent but approached that elusive target through a legal fiction. The Court's

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[40] *Id.*

[41] *Id.* at 1945 (citing Burlington N. & S.F.R. Co. v. White, 126 S. Ct. 2405 (2006)). In *White*, the Court observed that discrimination consists of harms inflicted on the basis of status, whereas retaliation consists of harms inflicted on the basis of conduct. *See White*, 126 S. Ct. at 2412.

[42] *Gómez-Pérez*, 128 S. Ct. at 1946 (Roberts, C.J., dissenting). The Chief Justice criticized the majority's "odd" assumption that Congress was more likely to have been aware of *Sullivan* than the other provisions of the ADEA. *See id.*

[43] *Id.* at 1947.

[44] *Id.* at 1949. The Chief Justice acknowledged that Congress may not have intended to rely on the executive branch remedies available at the time the ADEA was drafted, but he found his interpretation confirmed by Congress's inclusion of a "detailed . . . antiretaliation provision" in the Civil Service Reform Act of 1978. *Id.* at 1949–50 (citing Pub. L. No. 95-454, 92 Stat. 1111 (1978)). In light of the "classic judicial task of reconciling many laws enacted over time," Chief Justice Roberts suggested it was proper to interpret the ADEA in light of that later enactment. *Id.* at 1950 (quoting United States v. Fausto, 484 U.S. 439, 453 (1988)) (internal quotation mark omitted).

[45] *Id.* at 1951 (Thomas, J., dissenting); *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184–96 (2005) (Thomas, J., dissenting).

[46] *Gómez-Pérez*, 128 S. Ct. at 1951 (Thomas, J., dissenting).

[47] *Id.*

holding will serve to harmonize and regularize antidiscrimination law, and the Court's context canon finds support in similar jurisprudential values. As a proposition about legislative intent, however, the context canon is of dubious value. The Court would do well to abandon its fiction in favor of an open discussion of the jurisprudential values that appear to underlie the canon. Such candor, modeled on the Court's approach to stare decisis, would foster judicial restraint, promote reasoned debate, and better ensure the rule of law.

The Court's decision in *Gómez-Pérez*, taken together with its decision the same day in *CBOCS West, Inc. v. Humphries*,[48] effectively established that federal antidiscrimination laws prohibit retaliation unless their texts indicate the contrary.[49] In *CBOCS West*, the Court relied on stare decisis to extend the holding of *Sullivan* horizontally — to a statute enacted contemporaneously with § 1982.[50] In *Gómez-Pérez*, the Court extended *Sullivan* forward in time, reasoning that Congress would have "expected" statutes to be interpreted in conformity with *Sullivan*.[51] To the extent that any antidiscrimination laws escape that chronology,[52] the Court suggested it is appropriate to interpret statutes alike so long as their language is "functional[ly] equivalent" and they appear in the "context" of "remedial provisions aimed at prohibiting discrimination."[53] The Court thus appears to have ensconced *Sullivan* as the definitive word on retaliation.

The Court's holding will promote the consistency and predictability of federal antidiscrimination law. Those concerns predominated at oral argument, where the Justices focused on the uncertain relationship between the ADEA and Title VII,[54] asked why Congress would provide a right to sue for retaliation for some groups but not others,[55] and questioned the government in its attempt to hold private sector em-

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[48] 128 S. Ct. 1951 (2008).

[49] *See Gómez-Pérez*, 128 S. Ct. at 1944 (Roberts, C.J., dissenting) (criticizing the majority on these grounds).

[50] *See CBOCS West*, 128 S. Ct. at 1957–58.

[51] *See Gómez-Pérez*, 128 S. Ct. at 1939 (majority opinion).

[52] In particular, laws enacted prior to *Sullivan*, but after § 1982, might escape the Court's logic.

[53] *See id.* at 1937.

[54] *See, e.g.*, Transcript of Oral Argument at 9, *Gómez-Pérez*, 128 S. Ct. 1931 (No. 06–1321) (Ginsburg, J.) (observing that the Court has not addressed the issue of retaliation under Title VII), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1321.pdf; *id.* at 52 (Scalia, J.) (asking whether the Court will have to resolve the issue of Title VII).

[55] *See, e.g.*, *id.* at 48–49 (Breyer, J.) (questioning why Congress would provide a judicial remedy for retaliation on the basis of some characteristics but not others); *id.* at 49 (Souter, J.) (same). *But see id.* at 53 (Roberts, C.J.) (suggesting that inconsistency could be explained by Congress's incentives, as "this is an unusual situation where you have the employer writing the law").

ployers to a higher standard than the federal government.[56] Although the Court declined to reach Title VII,[57] it's opinion will ease the burden of uncertainty with regard to that law. The opinion will also promote similar treatment of public and private sector employers, as well as employees in different protected groups.

The Court's opinion reached this result through a fiction of legislative intent. The Court deemed it "appropriate" and "realistic" to presume that Congress would have anticipated both *Jackson* and *Gómez-Pérez* on the basis of *Sullivan*,[58] but *Sullivan* reads like an opinion about third-party standing and not the right to sue for retaliation.[59] Moreover, the texts of § 1982 and the ADEA are sufficiently distinct that Congress might reasonably expect their interpretations to diverge.[60] The *Gómez-Pérez* Court in fact ascribed a degree of insight to Congress that surpassed some members of the majority; while the Court suggested that Congress would have foreseen *Jackson*, one member of the majority dissented from that opinion.[61] Even putting aside the question of whether Congress intends any one interpretation of its laws,[62] the Court's fiction may be "appropriate," but it is not "realistic."

The Court's context canon may still be "appropriate" because it promotes the same rule-of-law values served by the Court's holding. The Court's canon supports stability, as it measures the current case against past decisions and ensures "minimal disruption of existing [legal] arrangements."[63] Incorporation of precedent also constrains judicial discretion by providing guidance to judges who might otherwise

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[56] *See id.* at 27 (Alito, J.) (asking whether, given the government's position in *CBOCS West*, it would "be unkind to say that the government's position seems to be that a general ban on discrimination includes a ban on retaliation except when the government is being sued").

[57] *See Gómez-Pérez*, 128 S. Ct. at 1941 n.4.

[58] *Id.* at 1939 (quoting Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 176 (2005)); *see also id.* at 1941, 1942 n.6.

[59] *See* Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) ("[T]here can be no question but that Sullivan has standing to maintain this action."); *see also Jackson*, 544 U.S. at 194 (Thomas, J., dissenting) (adopting this interpretation of *Sullivan*).

[60] *Compare* 29 U.S.C.A. § 633a(a) (West 2000 & Supp. 2008) (prohibiting "discrimination based on age"), *with* 42 U.S.C. § 1982 (2000) (guaranteeing the "same right . . . as is enjoyed by white citizens").

[61] Justice Kennedy joined Justice Thomas's dissent, stating that *Sullivan* "says nothing about" the proper interpretation of Title IX. *Jackson*, 544 U.S. at 195 (Thomas, J., dissenting).

[62] *See, e.g.*, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 249 (1992); *cf. In re* Wagner, 808 F.2d 542, 546 (7th Cir. 1986) (Posner, J.) ("[T]he United States Code is not the work of a single omniscient intellect.").

[63] David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992). Professor Shapiro refers specifically to the interpretation of new statutes, but his reasoning applies as well to new interpretations of existing laws.

be confronted with ambiguous statutory text.[64] Finally, the Court's fiction brings coherence and symmetry to laws enacted piecemeal by shifting legislative coalitions.[65] While not necessarily consonant with a search for legislative intent, these values are foundational to our legal system[66] and provide a sound basis for judicial decision.

The Court at times appeared to acknowledge that its opinion rested on such jurisprudential values, but it failed to engage in a sensitive analysis of those values' implications. The Court opened its analysis with the observation that it was "guided by" the Court's prior opinions.[67] Even as the Court spoke of intent, moreover, it bolstered its contentions with citations to *Jackson* — as if to suggest that the context canon is itself a product of precedent.[68] By relying on precedent, the Court indirectly invoked the rule-of-law values underlying its stare decisis jurisprudence. Yet the Court also failed to engage in a sensitive analysis of whether and why the jurisprudential values underlying respect for precedent should have applied in this particular case.

Instead, the Court and the Chief Justice framed their debate in terms of legislative intent, and at times the Justices seemed to believe their own fictions. Both opinions pursued Congress's intent through judicially imposed presumptions.[69] For a moment, however, each opinion attributed a degree of empirical strength to its chosen canon. The majority critiqued the interpretation adopted by the dissent on the grounds that there was "no direct evidence that Congress actually took [that] approach,"[70] while the Chief Justice responded that "it seem[ed] far more likely" that his interpretation conformed with Congress's intent.[71] In these passages, the Court's rhetoric treated legislative intent as the touchstone of its analysis, rather than the subject of a judicially created fiction.

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[64] *Cf.* Buzbee, *supra* note 4, at 225 (arguing that the in pari materia canon is a "logical doctrine (even if aspirational) that at its core constrains courts and forewarns legislators"); Scalia, *supra* note 5, at 16–17 (justifying reliance on the "fiction" that "the enacting legislature was aware of all those other laws" on the grounds that it "is the *law* that governs, not the intent of the lawgiver").

[65] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1039 (1989) (observing how interpretation of like statutes alike provides an occasion for the Court to "harmonize statutory policy").

[66] *Cf.* Shapiro, *supra* note 63, at 960 (arguing that a "tilt towards continuity" is "consistent with values that lie at the heart of our constitutional system and the role of courts").

[67] *See Gómez-Pérez*, 128 S. Ct. at 1936. Indeed, the Court sometimes draws analogies between the ADEA, § 1982, and Title IX on the grounds of precedent alone, without any reference to intent. *See id.* at 1937 (stating that it is "[f]ollowing the reasoning of *Sullivan* and *Jackson*").

[68] *See id.* at 1941 (citing *Jackson* for the proposition that Congress was "presumably familiar with *Sullivan* and [expected] this ban would be interpreted 'in conformity' with that precedent").

[69] The majority invoked the context canon, *id.* at 1939, 1941, 1942 n.6, while the Chief Justice countered that it is "presumed that Congress acts intentionally" when it includes language in one part of a law but not another, *id.* at 1945–46 (Roberts, C.J., dissenting).

[70] *Id.* at 1942 (majority opinion).

[71] *Id.* at 1947 (Roberts, C.J., dissenting).

To avoid these rifts and inconsistencies, the Court would do well to cast off the fiction of a legally cognizant legislature. If the Court's opinion rests on rule-of-law values, the Court ought to refer directly to those values.[72] If the Court's opinion rests on the legislature's intent, the Court ought to eschew wooden canons in favor of a sensitive inquiry into the "historic process of which . . . legislation is an incomplete fragment."[73] If the Court's opinion rests on some combination of those or other values — including a focus on the statute's objective meaning in the legal context[74] — the Court should likewise make its reasoning explicit. By relying instead on a fiction of legislative intent, the Court opens itself up to the charge that other interpretations appear "more likely" to reflect Congress's state of mind. A straightforward explanation of the Court's reasoning, by contrast, would at least clarify the terms of the debate.

If, as it appears, the Court's opinion rests on jurisprudential values, the Court might find a model for candor and open debate in its stare decisis jurisprudence.[75] Moreover, as in the stare decisis context, candor would enable the Court to weigh the application of rule-of-law values to the case at hand in order to ensure that those values in fact support the proposed result.[76] Concerns such as reliance and predictability may carry less force in the context of antidiscrimination law, where individual actors rarely plan their conduct with litigation in mind.[77] The desirability of treating like cases alike may also be outweighed by legitimate differences between protected groups and between public and private sector employers.[78] Because reasoned debate is part of the methodology by which the legal process arrives at appro-

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[72] *Cf.* Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147, 154 (1917) (observing that, if a legal fiction "represents — in part at least — some clumsily concealed legal truth, then it is capable of being translated into the language of truth").

[73] United States v. Monia, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting); *see also id.* at 444 (criticizing the interpretive conceit of a "single draftsman").

[74] *See* Scalia, *supra* note 5, at 17 (suggesting that the Court should interpret laws as they would be understood by a legally-informed third party observer).

[75] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2722–24 (2007) (applying rule of law values to determine that stare decisis should not apply).

[76] In *CBOCS West*, for instance, the Court acknowledged the possibility that *Sullivan* might not be decided the same way if it came before the Court today. *See* CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008). The Court, however, defended adherence to stare decisis in the face of changing interpretive methods since, otherwise, stare decisis "would fail to achieve the legal stability . . . upon which the rule of law depends." *Id.* The majority's candor invited a similarly candid response from the dissent. *See id.* at 1968 (Thomas, J., dissenting).

[77] On the other hand, institutional defendants like the government may have a significant interest in stability and predictability.

[78] *See* Transcript of Oral Argument at 53, *Gómez-Pérez*, 128 S. Ct. 1931 (No. 06–1321) (Roberts, C.J.) (suggesting reasons Congress might want to draw such distinctions).

priate legal rules,[79] open discussion of the values underlying *Gómez-Pérez* would do much to ensure that the Court's opinion was, in fact, rightly decided.

Greater candor would also help to temper the risk of judicial overreaching presented by cases like *Gómez-Pérez*. Adherence to precedent has much to commend it, but the extension of a wrongly-decided precedent into new spheres of law may take adherence to precedent a step too far.[80] If *Sullivan* relied on a discredited mode of interpretation,[81] the Court's context canon may become "a vehicle of change whereby an error in one area metastasizes into others."[82] If little in the ADEA's text or context indicates that Congress intended the ADEA to prohibit retaliation, what justifies the Court's creation of such a ban? By invoking a fiction of legislative intent, the Court papers over these difficulties.[83] By contrast, when judges make their reasoning known, they ensure their rationale can survive the rigors of public scrutiny.[84]

Heightened candor would, in fact, serve the same rule-of-law values advanced by the Court's opinion. Greater candor signals respect for the public and encourages a reciprocal respect for the judiciary and the rule of law.[85] Candor also provides litigants with notice of judges' true rationales and promotes transparency and predictability.[86] To be sure, candor may complicate the task of building a majority for a single opinion, but a single opinion may be worth less when it does not fully convey the rationale of the Court.[87] Ultimately, candor ensures

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[79] *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (stating that "reasoned response to reasoned argument is an essential aspect of" the judicial process); Smith, *supra* note 72, at 153 (criticizing fictions on the grounds that they "retard the framing of a statement of the rule in strictly accurate terms").

[80] *Cf.* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429 (1988) (observing how judicial departure from legislative bargains may impede the legislative process); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217 (2007) (describing how erroneous precedents may spread from one statute to another, even when the original decision is overridden by Congress).

[81] *Cf. CBOCS West*, 128 S. Ct. at 1961 (alluding to this possibility).

[82] *Id.* at 1968 (Thomas, J., dissenting).

[83] *Cf.* 2 THE WORKS OF JEREMY BENTHAM 466 (1843).

[84] *See* Posner, *supra* note 4, at 816–17 (suggesting that the canons "conceal . . . the extent to which the judge is making new law in the guise of interpreting a statute"). Judge Posner suggests that "[t]he judge who recognizes the degree to which he is free . . . and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act willfully." *Id.* at 817.

[85] *See* Shapiro, *supra* note 79, at 736 (observing that "lack of candor often carries with it the implication that the listener is less capable of dealing with the truth, and thus less worthy of respect"); Smith, *supra* note 72, at 154 (stating that the use of fictions "tends . . . to diminish the respect which would otherwise be felt for the courts and for the law itself").

[86] *Cf.* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (observing that vague laws "may trap the innocent by not providing fair warning").

[87] *See* Shapiro, *supra* note 79, at 743 (questioning whether the gain of a single opinion is "worth the inevitable loss of public regard and self-respect").

that the values promoted by the Court's adherence to precedent are not contradicted by reliance on a legal fiction.

The majority's opinion has much to commend it, but little of that has anything to do with legislative intent. Rather, the majority's opinion may rest on a firm foundation inasmuch as it applies a neutral legal principle — adherence to precedent — in order to promote the symmetry, consistency, and predictability of federal law. It may be appropriate for the judiciary to pursue such frankly jurisprudential ends. However, if that is what the judiciary seeks to do, it should clearly admit its own intentions. Litigants, the public, and the Court may then debate the merits of those rationales, as applied to the individual case, rather than matching fiction with fiction.

B. Federal Magistrates Act

Voir Dire Jurisdiction. — Over the past decade, the increased number of criminal cases on the federal docket[1] has prompted an expansion of federal magistrates' criminal jurisdiction, particularly with regard to voir dire, or jury selection.[2] Federal magistrates, who are Article I judges, are governed by the Federal Magistrates Act of 1968[3] (FMA). The express language of the FMA does not grant magistrates the power to preside over felony jury selection,[4] but courts have increasingly recognized magistrates' power to do so under the "additional duties" clause,[5] when the parties consent.[6] Even so, the growth

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[1] The number of criminal cases filed annually in the federal district courts increased from approximately 51,000 in 1997 to over 62,000 in 2001. In particular, the number of drug case filings increased 31% between 1997 and 2001. OFFICE OF HUMAN RESOURCES & STATISTICS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD: RECENT TRENDS 17 (2001), *available at* http://www.uscourts.gov/recenttrends2001/20015yr.pdf. As of March 31, 2007, there were 69,697 cases pending on federal district court dockets. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2007 58 tbl.D (2007), *available at* http://www.uscourts.gov/caseload2007/tables/D00CMar07.pdf.

[2] The terms "jury selection" and "voir dire" are used interchangeably throughout this comment.

[3] 28 U.S.C. §§ 631–639 (2006). The FMA was amended in 1976 to clarify that magistrates have the power to hear habeas corpus cases and prisoner civil rights actions, and in 1979 to permit magistrates to conduct trials in civil cases upon consent of the parties and to preside over misdemeanor cases rather than only petty offense trials. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 665 (2005).

[4] The FMA grants magistrates full jurisdiction over a series of civil proceedings, but only minimal jurisdiction over minor criminal proceedings. *See* 28 U.S.C. § 636.

[5] 28 U.S.C. § 636(b)(3) ("A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."); *see also* Marla Eisland, *The Federal Magistrates Act: Are Defendants' Rights Violated When Magistrates Preside Over Jury Selection in Felony Cases?*, 56 FORDHAM L. REV. 783, 783–84 (1988) (explaining the relationship between the "additional duties" clause and magistrates' jurisdiction over voir dire).

[6] *See, e.g.*, Grassi v. United States, 937 F.2d 578, 579 (11th Cir. 1991) (holding that magistrates can conduct voir dire in felony cases, provided that parties consent); United States v. Parkin, 917