

Employment Discrimination Law in the Wake of *Ledbetter*: A Recommended Approach

“Under [the position the Supreme Court adopted in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹] meritorious claims will be dismissed whenever an employee, through no fault of her own, fails to discover the disparity in her pay or grounds for believing that the disparity was discriminatory, within 180 or 300 days of the pay-setting decision, even when the delay imposes no prejudice upon the employer.”²

I. INTRODUCTION

In 2001, American women earned significantly lower salaries than men, with a greater percentage of women in the lowest pay bracket and a larger percentage of men at the opposite end of the earnings spectrum.³ According to a 2006 United States Census report, the median income for full-time, year-round workers was \$42,261 for men, compared with \$32,515 for women.⁴ The issue of unequal pay is not a novel one; indeed, it has biblical antecedents.⁵ Recent studies, however, have shown that the discrepancy between male and female earnings—sometimes termed the “gender pay gap”—has decreased considerably.⁶

The Equal Pay Act of 1963 prohibits sex-based wage discrimination.⁷

1. 127 S. Ct. 2162 (2007).

2. Reply Brief for the Petitioner at 1-2, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074) [hereinafter Reply Brief for Petitioner].

3. See RENÉE E. SPRAGGINS, U.S. CENSUS BUREAU, WOMEN AND MEN IN THE UNITED STATES: MARCH 2002 4 (2003) (providing annual earning statistics for men and women in 2001). In 2002, 4.4 percent of women and 2.8 percent of men reported earning less than \$10,000, while 5.5 percent of women and 15.8 percent of men earned \$75,000 or more. *Id.*

4. See U.S. DEP’T OF COMMERCE, INCOME, POVERTY & HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006 6 (2007) [hereinafter 2006 CENSUS REPORT] (providing earnings of male and female workers in 2006). In 2006, females earned seventy-seven cents for every dollar that their male counterparts earned. *See id.*; see also S. 1087, 110th Cong. § 2 (2007) (quoting 2000 U.S. Census Bureau Report). According to a 2000 Census Report, women earned less than their male counterparts in every field, except hazardous material removal, telecommunications line installation and repair, meeting and convention planning, food preparation, and construction trade assistant work. S. 1087, § 2.

5. See *Leviticus* 27:3-4 (determining human worth in terms of money). Males were valued at fifty shekels, while females were worth only thirty shekels. *Id.*

6. See generally Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 9/22/00 J. ECON. PERSPECTIVES 75, 75-99 (2000) (exploring possible explanations for decrease in gender pay gap).

7. See 29 U.S.C. § 206(d) (2006) (prohibiting wage discrepancy on basis of sex). An employer, however, will be protected if the differential is based on “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” *Id.*

Similarly, Title VII of the Civil Rights Act of 1964 (Title VII) forbids employment discrimination on the basis of sex.⁸ The United States Equal Employment Opportunity Commission (EEOC) established federal guidelines that impose the procedure for filing a claim under Title VII.⁹ According to the *EEOC Compliance Manual*, a plaintiff must file a charge within either 180 or 300 days of the unlawful employment practice, depending upon whether the practice occurred in a jurisdiction with a state fair employment practices agency.¹⁰

Many jurisdictions apply a discovery rule with respect to statutes of limitations in tort law causes of action.¹¹ These jurisdictions toll the statute until the plaintiff learned, or reasonably should have learned, that the defendant's conduct caused harm.¹² The Supreme Court has expressly declined to determine whether a discovery rule applies in Title VII claims.¹³ In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that a plaintiff employee must bring suit against his employer within either 180 or 300 days of the intentional discriminatory act.¹⁴

This Note addresses the problems in the *Ledbetter* decision. The first section discusses Title VII, the predominant statute under which plaintiffs may file employment discrimination actions.¹⁵ The following section reviews the policies underlying statutes of limitations and related equitable remedies.¹⁶ The Note then traces the development of employment discrimination law as interpreted by the Supreme Court prior to the 2007 *Ledbetter* decision.¹⁷ Next,

8. See 42 U.S.C. § 2000e-2 (2006) (proscribing sex discrimination in employment). Title VII forbids discrimination in hiring, discharging, and salary decisions. See *id.* Because Title VII prohibits sex-based employment discrimination, including discrimination in pay, it partially overlaps with the Equal Pay Act. See *id.*; 29 U.S.C. § 206.

9. See generally EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL (2005), available at www.eeoc.gov/policy/docs/threshold.html [hereinafter EEOC COMPLIANCE MANUAL] (providing guidance for employees filing charges with EEOC); see also 42 U.S.C. § 2000e-4 (indicating Congress created EEOC pursuant to Title VII).

10. See EEOC COMPLIANCE, *supra* note 9, at 37-38 (providing time limits for parties filing complaints pursuant to Title VII). The filing period is tolled until a potential plaintiff has sufficient information to determine that a valid claim exists. *Id.* Thus, a party suspecting discrimination would be well-advised to file a complaint when the party believes that there is a claim, even if uncertain of the claim's validity. See *id.* at 44.

11. See AM. L. PROD. LIAB. 3D § 47:33 (2007) (discussing rationale behind extending statute of limitations).

12. See *id.* (stating when statute begins to run). The statute will not be tolled if a reasonably diligent person would suspect discrimination. *Id.*

13. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 n.7 (2002) (declining to rule on application of discovery rule to Title VII claims); see also *id.* at 123 (O'Connor, J., concurring) (agreeing determination of whether discovery rule should apply unnecessary). In her concurring opinion, however, Justice O'Connor stated that a discovery rule should be applied to discrete act claims. *Id.* (O'Connor, J., concurring).

14. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2172 (2007).

15. See *infra* Part II.A (discussing Title VII and EEOC interpretation of applicable statutory time period).

16. See *infra* Part II.B (describing statutes of limitations and discovery rule).

17. See *infra* Part II.C (analyzing Supreme Court precedent pertaining to employment discrimination and

it explores the majority and dissenting opinions of the *Ledbetter* decision.¹⁸ Finally, this Note will analyze the pending legislation proposed in the wake of this decision¹⁹ and recommend that Congress revise Title VII to include the discovery rule and address the effects such legislation would have on future employee plaintiffs and employer defendants.²⁰

II. HISTORY

A. Title VII

Title VII prohibits an employer from discriminating against an employee on the basis of race, color, religion, sex, or national origin.²¹ The EEOC—the agency responsible for enforcing federal employment discrimination laws—maintains a compliance manual (*EEOC Compliance Manual*) that provides guidance for handling many of the threshold issues often addressed in Title VII claims.²² Under Title VII, a plaintiff must file a charge with the EEOC within a specified time—either 180 or 300 days—following the unlawful employment practice.²³

Title VII statutory interpretation).

18. See *infra* Parts II.D and III.A (reviewing facts, questioning *Ledbetter* decision, and praising dissenting opinion).

19. See *infra* Part II.E and III.B (summarizing and evaluating Congress's proposed legislation).

20. See *infra* Part III.B (suggesting Congress amend Title VII to incorporate discovery rule).

21. See 42 U.S.C. § 2000e-2 (2006) (providing impermissible bases for distinguishing between employees). In addition, an employer may not segregate or otherwise classify his employees, based on the same impermissible bases, in a way that would result in limited opportunities for those segregated employees. See *id.*; see also *id.* § 2000e (defining “employer” and other terms used in Title VII statute). An employer is considered to have discriminated “on the basis of sex” if he or she discriminates based on either an employee’s pregnancy or childbirth. See *id.* § 2000e(k).

22. See generally EEOC COMPLIANCE MANUAL, *supra* note 9 (providing instructions for filing and responding to Title VII claims). Employees, applicants for employment, and former employees are all protected under Title VII and may file employment discrimination claims with the EEOC. *Id.* at 16; see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding considerable weight and deference should be afforded to executive agency’s statutory interpretation). “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.” *Chevron*, 467 U.S. at 866. But see *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002) (concluding EEOC’s interpretive guidelines should not receive *Chevron* deference); John S. Moot, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213, 219-20 (1987) (stating Congress did not provide EEOC additional authority to issue regulations with force of law).

23. See EEOC COMPLIANCE MANUAL, *supra* note 9, at 37. Whether the 180-day or the 300-day filing period applies depends upon whether the plaintiff is filing suit within a jurisdiction that has a fair employment practices agency with authority to grant relief; the longer time period applies in states that have such agencies. See *id.*; see also Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 7 (1996) (indicating most plaintiffs have 300 days to file their claim because most states have agencies).

When the statutory clock begins to run depends on the type of discriminatory act alleged.²⁴ A claim of discrimination for a discrete act, such as a failure to promote or termination, must be filed within 180 or 300 days of the date the plaintiff received unequivocal notification of the action.²⁵ On the other hand, discriminatory paychecks and other repeated occurrences of the same discriminatory employment action can be challenged as long as a single act occurred within the 180- or 300-day filing period.²⁶

To protect victims of subtle discrimination, the *EEOC Compliance Manual* further provides that the period within which a claim must be filed may be tolled in instances in which the charging party was unaware of facts that should have led the party to suspect discrimination.²⁷ When an employee has no reason to suspect wrongdoing, then the limitations period will not start running unless the individual has gathered enough information to reasonably believe that a viable claim exists.²⁸ Plaintiffs, however, must exercise reasonable diligence in seeking information pertaining to the claim or risk losing the benefit of a tolled filing period.²⁹

B. Statutes of Limitations and Discovery Rules

Statutes of limitations are “heralded bastions of legal certainty” that “are found and approved in all systems of enlightened jurisprudence.”³⁰ In effect, they are designed to further two competing policy interests: providing plaintiffs with a reasonable period of time to present their claims and protecting defendants from having to defend stale claims.³¹ Furthermore, these statutes

24. See EEOC COMPLIANCE MANUAL, *supra* note 9, at 39-41 (distinguishing between discrete acts and hostile-work-environment claims); see also *infra* notes 78-79 and accompanying text (differentiating between claims of hostile work environment and discrete discriminatory acts).

25. See EEOC COMPLIANCE MANUAL, *supra* note 9, at 39 (detailing when charging party must file a claim for discrete act). The time period begins to run when the plaintiff receives notification of the decision, regardless of when the decision becomes effective. See *id.*

26. See *id.* (noting when discriminatory employment actions may be challenged). A discriminatory act that is part of a pattern of discrimination can be challenged as a single claim so long as a single act occurred within the proper filing period. See *id.* at 41.

27. See *id.* at 42 (announcing limited situations in which tolling may occur).

28. See *id.* at 42 (emphasizing filing period runs when individual realizes she may have claim); see also *Galloway v. Gen. Motors Serv. Parts Operation*, 78 F.3d 1164, 1166 (7th Cir. 1996) (reasoning equitable tolling relieves claimant from having to file Title VII claim before feasible).

29. See EEOC COMPLIANCE MANUAL, *supra* note 9, at 42 (specifying that individual’s ignorance must be excusable and not based on lack of diligence).

30. Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1015 (1997) (emphasizing fundamental nature of statutes of limitations as legal principle); see also *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (assessing applicability of statutes of limitations).

31. See *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting difficult equilibrium legislatures must strike in enacting statutes of limitations). Legislatures often limit the amount of time plaintiffs have to file claims, recognizing that evidence disappears over time. See *id.*; see also *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980) (summarizing important balance legislatures must strike when enacting statutes of limitations). “The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from

must account for society's interest in both the plaintiff's and defendant's interests.³²

At common law, courts narrowly construed, and often equitably tolled, statutes of limitations.³³ Discovery rules are a legislative acknowledgement that a plaintiff who was justifiably unaware of the existence of a claim should have a filing extension until the plaintiff discovers, or reasonably should have discovered, the right to bring a claim.³⁴ In other words, the discovery rule tolls the limitations period until a plaintiff discovers, or should have discovered, that he has been harmed by the defendant's actions.³⁵ In the 1970s and 1980s, however, state legislatures began abolishing discovery rules, reasoning that they conflicted with one of the primary goals of statutes of limitations: preventing defendants from having to defend stale claims.³⁶

Federal courts generally apply a discovery rule when the applicable statute is silent on the issue.³⁷ The Supreme Court has been hesitant to adopt a discovery rule in every instance; for example, in *United States v. Kubrick*,³⁸ the Court addressed the issue of when a claim "accrues" within the meaning of the Federal Tort Claims Act for a medical malpractice case.³⁹ The Court declined

employment decisions that are long past." *Del. State Coll.*, 449 U.S. at 256-57; *see also Wood*, 101 U.S. at 139 (highlighting importance of statutes of limitations). Such statutes "stimulate to activity and punish negligence." *Wood*, 101 U.S. at 139.

32. *See* Richardson, *supra* note 30, at 1021 (summarizing four interests legislatures consider in enacting statutes of limitations); *see also* *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419 (1960) (stating purpose of statutes of limitations). Such statutes are designed "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." *Local Lodge No. 1424*, 362 U.S. at 419 (citation omitted).

33. *See* Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 685 (1991) (commenting on statutes of limitations at common law). Equitable tolling represents a favoring of plaintiffs' interest over the other interests that a statute of limitations is designed to further. *See id.*; *see also* *Hamilton v. Smith*, 773 F.2d 461, 462 (2d Cir. 1985) (opining "game [should not] be over before a plaintiff has had his innings"); Adam Bain & Ugo Colella, *The United States Supreme Court and Federal Law: Article: Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 493 (2004) (observing court may "save" case by applying equitable exception to otherwise untimely claim).

34. *See* AM. L. PROD. LIAB. 3d § 47:33 (2007) (defining discovery rule). Pursuant to a typical discovery rule, the statute of limitations will not begin to run until the plaintiff knows or reasonably should have known of the injury and the connection between the injury and the defendant's conduct. *See id.* Courts must therefore determine whether the plaintiff exercised reasonable diligence, which is a question of fact. *See id.* Discovery rules are particularly vital in situations where the cause of plaintiff's injury is inherently undeterminable at the time the plaintiff discovered the injury. *See id.*; *see also In re Asbestos Litigation*, 649 F. Supp. 1340, 1346 (D. Del. 1986) (holding discovery rule applicable in asbestos case).

35. *See* AM. L. PROD. LIAB. 3d § 47:33 (2007) (stating discovery rule triggered by plaintiff's reason to suspect factual basis for cause of action).

36. *See* Weinberg, *supra* note 33, at 685 (providing history of statutes of limitations and discovery rules); *see also* *TRW Inc. v. Andrew*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) (criticizing discovery rule as "bad wine of recent vintage").

37. *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (indicating federal courts' tendency to apply discovery rule when statute silent on issue); *see also* *Urie v. Thompson*, 337 U.S. 163, 178 (1949) (recognizing discovery rule for latent medical disease sued for under Federal Employers' Liability Act).

38. 444 U.S. 111 (1979).

39. *See id.* at 113 (stating question presented in case); *see also* 28 U.S.C. § 2401(b) (2006) (announcing

an invitation to invoke a discovery rule, reasoning that Congress did not intend to toll the statute of limitations until the plaintiff learned of his claim.⁴⁰

Similarly, in *Rotella v. Wood*,⁴¹ the Court declined to adopt a discovery rule under the Racketeer Influenced and Corrupt Organizations Act (RICO).⁴² The Court stated that although equitable considerations might justify tolling in some cases, it should be the exception and not the rule.⁴³ The Court stated that the discovery rule is most appropriate in medical malpractice cases and, furthermore, that the discovery of the injury—not the discovery of other elements that form the cause of action—is what triggers the running of the statute of limitations.⁴⁴

C. Pre-Ledbetter Employment Discrimination Cases

In 1975, in *Albermarle Paper Co. v. Moody*,⁴⁵ the Supreme Court held that backpay liability shall not accrue from a date more than two years prior to the plaintiff's filing of an EEOC charge.⁴⁶ The Court determined, however, that bad faith on the part of the employer is not a prerequisite for awarding backpay to the plaintiff.⁴⁷ Additionally, the Court reasoned that awarding backpay would encourage employers to evaluate their practices in an effort to eliminate employment discrimination.⁴⁸

Two years later, in *United Air Lines, Inc. v. Evans*,⁴⁹ United's seniority system caused a past discriminatory act to have a present effect, but the Court focused on whether there was any *current* Title VII violation.⁵⁰ United's policy

Federal Tort Claims Act provisions).

40. See *Kubrick*, 444 U.S. at 123 (determining congressional intent to invoke discovery rule lacking).

41. 528 U.S. 549 (2000).

42. See *id.* at 559 (reasoning discovery rule at odds with policy underlying time limitation); see also 18 U.S.C. §§ 1961-1968 (2006) (setting forth RICO provisions). The Court reasoned that extending the statute of limitations by applying a discovery rule would "prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." See *Rotella*, 528 U.S. at 559; see also *TRW Inc. v. Andrew*, 534 U.S. 19, 33-35 (2001) (declining to apply discovery rule to toll statute of limitations under Fair Credit Reporting Act).

43. See *Rotella*, 528 U.S. at 561 (emphasizing equitable tolling should be applied sparingly).

44. See *id.* at 555 (setting limits on discovery rule and rejecting mistaken view of what triggers statute of limitations).

45. 422 U.S. 405 (1975).

46. See *id.* at 417 (providing time limitation for recovery of backpay). The Court also held that a plaintiff is not guaranteed recovery of backpay, but that backpay is an optional remedy available to courts. See *id.* at 415. The Court reasoned that Congress modeled Title VII after the National Labor Relations Act (NLRA)—a statute which permits the recovery of backpay—and thus referred to the legislative history of the NLRA. See *id.* at 419, 421 n.11; see also 29 U.S.C. §§ 151-169 (2006) (setting forth NLRA provisions).

47. See *Albermarle*, 422 U.S. at 422 (reasoning statutory remedy's purpose to compensate employees' injuries, not punish employers' bad faith). The Court noted that an employee's financial injury may still be significant, notwithstanding his employer's lack of bad faith in inflicting it. See *id.* at 422.

48. See *id.* at 417-18 (recognizing injunctive order alone insufficient because order would not cause employers to evaluate policies).

49. 431 U.S. 553 (1977).

50. See *id.* at 558 (focusing on current violations because of statutory ninety-day window).

prohibited female flight attendants from marrying, so when the plaintiff married, United forced her to resign.⁵¹ Three years later, the Supreme Court determined that forcing resignations based on a discriminatory marriage policy violated Title VII.⁵² Following this decision, United again employed the plaintiff, but treated her as a new employee for seniority purposes.⁵³ She sued, arguing that “the seniority system g[ave] present effect to a past act of discrimination.”⁵⁴ The Court rejected this argument, reasoning that “[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed [I]t is merely an unfortunate event in history which has no present legal consequences.”⁵⁵

In 1980, the Supreme Court heard two cases relating to Title VII’s limitations period, *Mohasco Corp. v. Silver*⁵⁶ and *Delaware State College v. Ricks*.⁵⁷ In *Mohasco*, the Court discussed the importance of time limitations and rejected the plaintiff’s attempt to justify his delayed claim by reading two definitions of the word “filed” into the statute.⁵⁸ The Court reasoned that Congress chose short deadlines to encourage plaintiffs to promptly bring all employment discrimination claims.⁵⁹

In *Ricks*, the Court held that the limitations period commenced when the college notified the plaintiff that it was denying him academic tenure.⁶⁰ The Court reasoned that the only alleged discrimination occurred when the college actually communicated that decision to the plaintiff; therefore, the limitations period began running at that time, notwithstanding the fact that “one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later.”⁶¹ In its decision, the Court stressed the importance of

51. *Id.* at 554-55 (describing factual basis for plaintiff’s claim, including United’s discriminatory policies).

52. *See id.* at 554 (noting airline’s policy violated Title VII). The plaintiff, however, was not a party to the case. *Id.*

53. *Evans*, 431 U.S. at 554-55 (describing airline’s seniority system and plaintiff’s level upon returning to company).

54. *Id.* at 558 (presenting plaintiff’s argument and rejecting it). The Court reasoned that although the seniority system continued to affect the plaintiff’s pay, she had not demonstrated that United’s system treated those employees United forced to resign differently from those employees who resigned on their own or those United terminated for nondiscriminatory reasons. *Id.* at 558.

55. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

56. 447 U.S. 807 (1980).

57. 449 U.S. 250 (1980).

58. *See Mohasco*, 447 U.S. at 826 (emphasizing importance of strict compliance with statutory time limitations). The Court stated, “[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” *Id.*

59. *See id.* at 825 (recognizing congressional intent in enacting relatively short limitations periods). The Court acknowledged that statutes of limitations are inherently arbitrary, but stated that the time period was long enough to allow the plaintiff to seek redress. *See id.* at 818.

60. *See Ricks*, 449 U.S. at 259 (determining point at which statute of limitations period began). The plaintiff alleged that the college denied him academic tenure because of his national origin. *Id.* at 252.

61. *Id.* at 258 (emphasizing plaintiff should have brought suit following discriminatory act, not effect).

honoring time limitations.⁶²

In *Zipes v. Trans World Airlines*,⁶³ the Court evaluated whether the timely filing of an EEOC claim is a jurisdictional prerequisite to a Title VII suit in federal court, or whether the time period is subject to waiver, estoppel, and equitable tolling.⁶⁴ The Court held that a timely charge of discrimination is not a prerequisite to filing suit in federal court but rather is a requirement subject to equitable tolling.⁶⁵ The Court reasoned that its holding properly balanced two important interests: the remedial purpose of Title VII and giving prompt notice of the claim to the employer.⁶⁶

In 1986, the Court held in *Bazemore v. Friday*⁶⁷ that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.”⁶⁸ The Court dismissed the argument that its holding would give legal effect to actions that took place prior to the enactment of Title VII, instead stating that it would permit the plaintiff to recover for the continuation of a previously adopted discriminatory pay structure.⁶⁹ Thus, the Court essentially rendered irrelevant the fact that the program was initiated before the effective date of Title VII.⁷⁰

The Supreme Court heard *Lorance v. AT&T Technologies, Inc.*⁷¹ to resolve a split in authority regarding when the limitations period begins to run in a lawsuit arising out of a seniority system that is neither discriminatory on its face nor in the manner in which it is applied.⁷² The Court distinguished

62. See *id.* at 259-60 (highlighting promotion of several interests in statutes of limitations); see also *supra* notes 31-32 and accompanying text (discussing competing interests legislatures must consider in enacting statutes of limitations).

63. 455 U.S. 385 (1982).

64. *Id.* at 392 (stating issue in case). The plaintiffs were a class of TWA flight attendants who alleged that the airline practiced unlawful sex discrimination by grounding all of its female, but not male, cabin attendants who had children. *Id.* at 388.

65. *Id.* at 393 (asserting Title VII time period subject to equitable tolling and not condition to filing suit); see also *Coke v. Gen. Adjustment Bureau, Inc.*, 640 F.2d 584, 586 (5th Cir. 1981) (stating time period subject to equitable tolling); *Leake v. Univ. of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979) (holding time limitation jurisdictional in the sense that equitable principles should apply); *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979) (reasoning remedial legislation entitled to liberal construction and hence limitations period not jurisdictional); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976) (agreeing Title VII time provisions, although not jurisdictional, subject to equitable modification); Emily Hitchcock, Comment, *Coherence Out of Chaos: Interpreting Section 706(e) of Title VII*, 33 EMORY L.J. 1027, 1031 (1984) (analogizing charge-filing period to statute of limitations because both subject to equitable considerations).

66. See *Zipes*, 455 U.S. at 398 (referring to congressional purpose in enacting Title VII). Congress intended to provide a remedy for plaintiffs subject to discriminatory employment practices. See *id.*

67. 478 U.S. 385 (1986) (per curiam).

68. *Id.* at 395 (Brennan, J., concurring) (asserting holding in case). The Court so held, notwithstanding the fact that the wage system was developed prior to the enactment of Title VII. *Id.* at 396. The plaintiffs used multiple regression analyses as evidence that blacks were being paid less than whites engaged in similar employment. *Id.* at 398.

69. *Id.* at 396 n.6 (clarifying that holding did not give legal effect to time-barred claims).

70. *Id.* at 395 (reasoning refusal to allow plaintiffs to recover would exempt employers from liability).

71. 490 U.S. 900 (1989).

72. See *id.* at 903 (acknowledging circuit split and phrasing issue in case).

between a facially neutral system and a facially discriminatory system, holding that the former only discriminates at the time of adoption, while the latter continues to discriminate each time it is applied.⁷³ The Court reasoned that Title VII was modeled after the National Labor Relations Act (NLRA), and therefore, like the NLRA, its time requirement for filing a claim is not jurisdictional and should be treated as a statute of limitations subject to equitable doctrines.⁷⁴ Following *Lorance*, Congress passed the Civil Rights Act of 1991, which provided for compensatory and punitive damages in cases of intentional employment discrimination.⁷⁵

The *National Railroad Passenger Corp. v. Morgan*⁷⁶ Court addressed whether, and in what situations, a Title VII plaintiff may bring a suit based on events that occurred outside the 180- or 300-day statutory time period.⁷⁷ The Court distinguished a hostile environment from a discrete discriminatory act, holding that a discrete discriminatory act “occurred” on the day that it happened, thus commencing the running of the 180- or 300-day time period.⁷⁸ On the other hand, the Court held that a plaintiff must file a charge within 180 or 300 days of any of the discrete acts forming the hostile work environment.⁷⁹ Finally, the Court stated that the statutory time period for filing a charge is subject to equitable doctrines such as tolling or estoppel.⁸⁰

73. *See id.* at 913 n.5 (distinguishing between facially neutral and facially discriminatory systems).

74. *Id.* at 910 (citations omitted) (comparing NLRA to Title VII); *see supra* note 46 (stating Title VII based on NLRA and thus should be interpreted similarly).

75. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 (2006)) (authorizing up to \$300,000 in damages to intentional discrimination victims, depending on employer’s size); *see also* Steven A. Plass, *Bedrock Principles, Elusive Construction, and the Future of Equal Employment Laws*, 21 HOFSTRA L. REV. 313, 353-54 (1992) (discussing expansion of statute of limitations pursuant to 1991 Act passed in response to *Lorance*).

76. 536 U.S. 101 (2002).

77. *See id.* at 105 (articulating question presented in case).

78. *See id.* at 110 (reasoning discrete acts readily detectable by plaintiff do not warrant tolling of time period). A plaintiff who fails to institute a claim within that time period will lose the ability to recover damages for it. *See id.*; *see also* Rafael Gely, *Supreme Court Employment Law Cases 2001-02 Term*, 6 EMP. RTS. & EMP. POL’Y J. 189, 208-13 (2002) (discussing *Morgan* Court’s reasoning).

79. *See Morgan*, 536 U.S. at 117-18 (differentiating between discrete discriminatory act and hostile-environment claims). The Court reasoned that in contrast to discrete discriminatory acts, a single hostile-environment act—such as an act of harassment—may not be actionable. *See id.* at 116. A hostile-environment claim often comprises several separate acts that, in total, constitute an unlawful employment practice. *See id.* at 117. A court may consider all of the actions constituting such a claim, provided any act contributing to the hostile environment occurs within the EEOC statutory time limit. *See id.* at 106, 117; *see also* Forsyth v. Fed’n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (characterizing discriminatory pay schedule as discrete act). The *Forsyth* court held that a plaintiff could only recover damages for paychecks that were actually delivered during the statutory period because the adoption of a discriminatory pay schedule is considered a discrete act. *See id.* at 573.

80. *See Morgan*, 536 U.S. at 106, 113 (concluding equitable doctrines applicable to Title VII time period).

D. The Supreme Court's 2007 Ledbetter Decision

The *Ledbetter* Court held that the statutory period for a pay-setting decision begins when the act occurs.⁸¹ Lilly Ledbetter, the plaintiff, joined a Goodyear tire plant as a supervisor in 1979 and subsequently received less pay than her male counterparts.⁸² Ledbetter argued that she received poor evaluations because of her sex, and therefore filed suit because, as a result of these evaluations, she received less pay than her similarly situated male coworkers.⁸³ The jury awarded Ledbetter both backpay and punitive damages totaling over \$3,500,000.⁸⁴ Goodyear filed a motion for judgment as a matter of law or, in the alternative, a new trial or remittur; the court denied the motion for judgment as a matter of law, but remitted Ledbetter's award to \$360,000.⁸⁵

When Ledbetter accepted the reduced award, Goodyear appealed.⁸⁶ The Court of Appeals for the Eleventh Circuit held that a Title VII pay discrimination claim cannot be based on a pay decision occurring before the last pay decision affecting the plaintiff's pay during the EEOC charge period.⁸⁷ The court reasoned that there must be an age limit on discriminatory pay decisions upon which a plaintiff may rely to recover.⁸⁸ As a result, the

81. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007) (concluding pay-setting decision discrete act). The issue in the petition for certiorari was "[w]hether and under what circumstances a plaintiff may bring an action under Title VII . . . alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." *Id.* at 2166. On the other hand, in its brief, Goodyear phrased the issue differently: "whether Ledbetter has a cognizable intentional discrimination claim for a disparity in pay during the limitations period that she claims is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." Brief for Respondent at 12, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074).

82. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d at 1169, 1173 (11th Cir. 2005) (providing factual basis for Ledbetter's claim), *aff'd*, 127 S. Ct. 2162 (2007). Managers of her plant would, on an annual basis, issue raises to their employees based on a merit system. *Id.* at 1172. In making these decisions, a manager would consider the employee's performance and current salary, in addition to how recent the employee received a raise. *Id.*

83. See *Ledbetter*, 127 S. Ct. at 2166 (recounting plaintiff's basis for claim). The plaintiff's salary at the time she filed suit was the result of numerous annual reviews that she received throughout her career at Goodyear. *Id.*; see Brief of the Nat'l P'ship for Women & Families et al. as Amici Curiae in Support of Petitioner at 7, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074) [hereinafter Nat'l P'ship Brief] (recognizing small pay disparities expand exponentially even if subsequent raises are determined by otherwise neutral criteria). Ledbetter filed claims under Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act. See *Ledbetter*, 127 S. Ct. at 2176.

84. See *Ledbetter*, 421 F.3d at 1176 (providing procedural history of case). The jury awarded Ledbetter \$223,776 in backpay, \$4,662 for mental anguish, and \$3,285,979 in punitive damages. *Id.*

85. *Id.* (highlighting district court's award). The remitter included an additional \$60,000 in backpay over the statutory \$300,000 maximum. *Id.*; see also 42 U.S.C. § 1981(a)(b)(3)(D) (2006) (limiting Title VII compensatory and punitive damages to \$300,000 against employers with more than 500 employees).

86. See *Ledbetter*, 421 F.3d at 1176 (detailing lower court procedural posture).

87. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2166 (2007) (restating holding of Eleventh Circuit decision); see also *Ledbetter*, 421 F.3d at 1171 (stating issue presented in Eleventh Circuit case). The appellate court addressed how the Title VII time limitation would apply in a case involving an employer that annually reviewed its employees' salaries. See *Ledbetter*, 421 F.3d at 1171.

88. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1182 (11th Cir. 2005) (reasoning

Eleventh Circuit determined that a plaintiff employee could only recover for paychecks that were actually received within the limitations period.⁸⁹

On appeal to the Supreme Court, Ledbetter argued that each inferior paycheck represented a discrete discriminatory act, which should accordingly restart the statutory time period.⁹⁰ She contended that *Bazemore* was applicable to her case and, accordingly, that every paycheck she received offering her less than a male coworker because of her sex constituted a Title VII violation subject to challenge within the applicable limitations period.⁹¹ Ledbetter criticized Goodyear's argument, contending its adoption would have a detrimental impact on future plaintiffs' claims.⁹² Additionally, Ledbetter suggested that pay discrimination, unlike discriminatory firing, for example, may be difficult for a plaintiff to perceive.⁹³ Furthermore, plaintiffs may not have sufficient motivation to bring a claim initially due to the unsympathetic realities of the workplace environment.⁹⁴ Although she recognized the difficulties that putative plaintiffs may have in providing sufficient evidence to

holding otherwise would render statutory time limit "completely illusory").

89. *Id.* at 1183 n.18 (restricting plaintiff's possible recovery to those paychecks received within the limitations period).

90. *See Ledbetter*, 127 S. Ct. at 2167 (summarizing plaintiff's argument).

91. *See* Reply Brief for Petitioner, *supra* note 2, at 2 (urging Court to favor *Bazemore*'s construction of Title VII). Ledbetter argued that according to *Bazemore*, each time an employer implements a discriminatory decision—by, for example, issuing a paycheck pursuant to such decision—the employer engages in a present act of intentional discrimination. *Id.* at 6. According to this theory, Ledbetter's claim was timely because each paycheck she received during the limitations period constituted a new unlawful practice. *Id.* at 19-20. Alternatively, Ledbetter argued that the 1998 pay-setting decision perpetuated intentionally discriminatory disparities from past years and was therefore unlawful. *See id.* *But see* Brief Amici Curiae of the Equal Employment Advisory Council & the Soc'y for Human Res. Mgmt. in Support of Respondent at 6, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074) (indicating Ledbetter's view would effectively eliminate statute of limitations). If plaintiffs could challenge their current salary at any time, regardless of when the relevant pay-setting decisions were made, it would essentially eliminate the statute of limitations for actions impacting an employee's pay. *See id.*

92. *See* Reply Brief for Petitioner, *supra* note 2, at 1 (cautioning Goodyear's proposed rule would result in dismissal of legitimate claims). If a plaintiff justifiably failed to discover a pay disparity within either 180 or 300 days of the pay-setting decision, then her claim would be barred. *See id.* at 1. The plaintiff additionally argued that the EEOC's own interpretation of Title VII—that each paycheck may be challenged as a discrete act—should be given deference. *See id.* at 17-18; *see also supra* note 22 (discussing deference to agencies' statutory interpretations). *But see* Brief for Respondent at 11, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074) (advising Court to enforce Title VII as written, not as "misconstrued" by EEOC).

93. *See* Nat'l P'Ship Brief, *supra* note 83, at 12 (arguing receipt of paycheck unlikely to be perceived as adverse); *see also Ledbetter*, 127 S. Ct. at 2182 (Ginsburg, J., dissenting) (highlighting difficulty of perceiving discrepancy when given smaller raises than men). A woman who is earning less than her male counterparts yet is still receiving a raise may be unaware that she is receiving less because of her sex. *See id.* at 2182. Unlike discriminatory hiring, firing, promotion, or demotion decisions, victims of discriminatory pay decisions will not likely immediately recognize that they were subjected to discrimination. *See* Nat'l P'Ship Brief, *supra* note 83, at 12.

94. *See* Nat'l P'Ship Brief, *supra* note 83, at 13 (discussing plaintiffs' fears in bringing claims against employers). Even if an employee is aware that pay discrimination is taking place, she may not file a claim right away for fear of retaliation by her employer. *See id.* at 13. The Eleventh Circuit, however, did not allow for such reasonable delay and would require plaintiffs to file a claim shortly after the employer made the initial discriminatory salary decision. *See id.* at 10.

bring a claim, Ledbetter did not recommend that the Court adopt a discovery rule for Title VII.⁹⁵

The Supreme Court affirmed the Eleventh Circuit decision, concluding that “current effects alone cannot breathe life into prior, uncharged discrimination.”⁹⁶ The Court held that Ledbetter’s cause of action was time barred because it had been fully formed when the discriminatory decisions were made.⁹⁷ In rejecting Ledbetter’s policy arguments, the Court stated that it was more important to apply statutes as written.⁹⁸ The Court even acknowledged that Ledbetter did not initially realize she was the victim of discrimination, but reasoned that, without more, that fact alone could not substantiate a time-barred claim.⁹⁹

The facts set forth by the dissent are both more thorough and more compelling than those presented by the majority.¹⁰⁰ The dissenting opinion recognized the realities of the workplace and the “compelling facts” of Ledbetter’s case.¹⁰¹ In her dissent, Justice Ginsburg criticized the majority’s

95. See Reply Brief for Petitioner, *supra* note 91, at 13 (recognizing secrecy surrounding salary levels and employees’ difficulty in recognizing discrepancy); *id.* at 15 (stating traditional paycheck accrual rule obviates necessity for adopting discovery rule). In making a claim of discriminatory treatment, a plaintiff may have to rely on “a pattern of disparate pay decisions whose allegedly neutral explanations appear increasingly less plausible over time.” *Id.* at 13; see also Brief for the Nat’l Employment Lawyers Ass’n et al. as Amici Curiae in Support of Petitioner at 8, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074) (arguing each paycheck Ledbetter received should be examined in a larger context).

96. See *Ledbetter*, 127 S. Ct. at 2169 (rejecting Ledbetter’s argument and affirming circuit court decision). The Court reasoned that the EEOC time limitation protects employers from having to defend claims arising from employment decisions made long ago, one of the primary policies underlying every statute of limitations. *Id.* at 2170.

97. See *id.* at 2171 n.3 (determining when Ledbetter could have, and should have, sued). The Court cited *Evans*, *Ricks*, *Lorance*, and *Morgan* for the common proposition that “[t]he EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.” *Id.* at 2169.

98. *Id.* at 2177 (determining policy of applying statutes as written outweighs plaintiff’s policy arguments).

99. See *id.* at 2175 (recognizing Ledbetter did not realize discrimination, but refusing to create exception for justifiably ignorant plaintiffs). Thus, not only was Ledbetter still suffering the effects of the discrimination, but more importantly, she was unaware that the discrimination had even taken place. See *id.* at 2182, 2185-86 (Ginsburg, J., dissenting). The dissent argues that the majority took this position because under Ledbetter’s rule, even an employee with full knowledge of all of the elements relating to the claim could bring a claim even twenty years later. See *id.* at 2186.

100. Compare *id.* at 2178 (Ginsburg, J., dissenting) (providing facts relied on by dissent), with *id.* at 2165 (majority opinion) (introducing less compelling facts). The dissent provided that although Ledbetter’s pay was initially on par with that of her male counterparts, after nearly twenty years of service, she was earning significantly less than them. See *id.* at 2178 (Ginsburg, J., dissenting). In effect, by the end of 1977, Ledbetter was receiving \$3,727 per month, while the male area managers were earning between \$4,286 and \$5,236, representing a fifteen percent and forty percent pay discrepancy, respectively. See *id.*

101. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting) (summarizing, in more detail, facts of Ledbetter’s case); see also *supra* note 100 (comparing facts presented in majority and dissenting opinions). The dissent recognized that an employee is only likely to bring a claim when her wage discrepancy is both readily apparent and significant enough to warrant a complaint. See *Ledbetter*, 127 S. Ct. at 2179 (Ginsburg, J., dissenting). The dissent reasoned that a plaintiff’s “initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current

insistence that plaintiffs immediately bring a claim because she recognized that pay disparities are often small and that only upon the exponential growth of such disparities will a plaintiff gain awareness.¹⁰² The dissent stated that to satisfy the statute of limitations, the Court should consider both the pay-setting decision *and* the actual payment of a discriminatory wage.¹⁰³ Justice Ginsburg reasoned that pay disparities are more similar to hostile-work-environment claims than to discrete discriminatory acts.¹⁰⁴

E. Congress's Proposed Legislation in Response to Ledbetter

In response to *Ledbetter*, the House of Representatives drafted the Lilly Ledbetter Fair Pay Act of 2007 to take effect as of May 28, 2007, the day before the *Ledbetter* decision.¹⁰⁵ The bill would amend Title VII to clarify that an unlawful employment practice occurs with respect to compensation claims when (1) a discriminatory decision is made; (2) an individual becomes subject to that decision; or (3) an individual is affected by the decision.¹⁰⁶ Under the bill, a plaintiff would be entitled to recover backpay for two years prior to the filing of the charge.¹⁰⁷ The House passed the bill on July 27, 2007, but the Senate subsequently blocked its passage.¹⁰⁸

and continuing payment of a wage depressed on account of her sex." *Id.*

102. See *Ledbetter*, 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting) (characterizing Court's holding as unrealistic). The dissent also acknowledged that comparative pay information is unlikely to be made available to employees. See *id.*; see *supra* note 95 (recognizing secrecy surrounding wage information).

103. See *id.* at 2179 (Ginsburg, J., dissenting) (determining discriminatory wage payments should fall within statutory period). The majority, on the other hand, determined that a pay-setting decision must take place within the statutory period and thus rejected Ledbetter's claim, despite Ledbetter's receiving several discriminatory paychecks within the statutory time period. *Id.* (majority opinion). Thus, according to the Court's decision, "Each and every pay decision [Ledbetter] did not immediately challenge wiped the slate clean." *Id.* at 2187. (Ginsburg, J., dissenting) (characterizing majority opinion's effects).

104. See *Ledbetter*, 127 S. Ct. at 2181 (analogizing pay disparities to hostile work environment claims). Ledbetter was charging discrimination that built up over time. See *id.*; see also *supra* notes 78-79 and accompanying text (outlining distinction between hostile-environment claims and discrete discriminatory acts).

105. See H.R. 2831, 110th Cong. § 6 (2007) (stating effective date of proposed legislation). In its findings, the House stated that *Ledbetter* significantly impairs a plaintiff's ability to bring a Title VII suit and that "the limitation imposed by the Court on the filing of discriminatory compensatory claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights law that Congress intended." *Id.* § 2.

106. See *id.* § 3 (clarifying when discriminatory compensation decision would trigger 180- or 300-day time period). Thus, each time compensation was made pursuant to a discriminatory decision, it would be deemed an unlawful employment practice for purposes of calculating the commencement of the statute of limitations. *Id.*

107. *Id.* § 3 (discussing when plaintiff entitled to recover backpay). The plaintiff would be allowed to recover back pay "where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge." *Id.*

108. See U.S. House of Representatives Comm. on Rules, *H.R. 2831 – Lilly Ledbetter Fair Pay Act of 2007*, http://www.rules.house.gov/SpecialRules_details.aspx?NewsID=2806 (last visited Oct. 12, 2008) (setting forth voting history of bill). The House adopted the bill by a vote of 215 to 187. *Id.*; see also OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2831 – LILLY LEDBETTER FAIR PAY ACT OF 2007 1 (2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf> [hereinafter STATEMENT OF ADMINISTRATION POLICY] (criticizing H.R.

In addition, the Senate proposed a bill to prohibit wage discrimination on the basis of sex.¹⁰⁹ The proposed bill would amend the Equal Pay Act by adding that “[n]o employer . . . shall discriminate . . . between employees on the basis of sex . . . by paying wages . . . at a rate less than the rate at which the employer pays wages to employees . . . for work on equivalent jobs.”¹¹⁰ Unlike the House’s bill, the Senate’s version does not purport to undo the *Ledbetter* decision.¹¹¹ The Senate bill is currently in the first step of the legislative process, having been introduced and referred to the Committee on Health, Education, Labor, and Pensions on April 11, 2007.¹¹² As of this writing, however, the Senate has not taken subsequent action on the bill.¹¹³

III. ANALYSIS

A. Discussion of Ledbetter Majority and Dissenting Opinions

The issue addressed by the Supreme Court in *Ledbetter* was “[w]hat activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation.”¹¹⁴ The Court was faced with two potential answers: either the pay decision alone *or* the pay decision and the actual payment of discriminatory wages.¹¹⁵ The Court chose the former, but the latter view “is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII’s remedial purpose.”¹¹⁶

The Court relied on *Evans*, *Ricks*, *Lorance*, and *Morgan*, reasoning that

2831 by stating bill would effectively eliminate Title VII statute of limitations). “If H.R. 2831 were presented to [President George W. Bush], his senior advisors would recommend that he veto the bill.” *Id.* According to the *Statement of Administration Policy*, the administration supports anti-discrimination legislation, but it does not support the expansion of the statute of limitations because it would “exacerbate the existing heavy burden on the courts by encouraging the filing of stale claims.” *Id.* at 1-2.

109. *See* S. 1087, 110th Cong. (2007) (proposing to amend Fair Labor Standards Act of 1938 and prohibit wage discrimination).

110. *See id.* (proposing amendment to Equal Pay Act, 29 U.S.C. § 206 (2006)).

111. *Compare* H.R. 2831, 110th Cong. § 2 (2007) (naming Act after Lilly Ledbetter and providing effective date immediately prior to *Ledbetter* decision), *with* S. 1087, 110th Cong. (2007) (setting forth similar findings as House bill but not mentioning *Ledbetter* decision).

112. *See* The Library of Congress, Advanced Bill Summary & Status Search for the 110th Congress, <http://thomas.loc.gov/bss/d110query.html> (last visited Sept. 30, 2008) (providing status of Senate bill).

113. *See id.* (indicating status of Senate bill).

114. *See* *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2179 (2007) (Ginsburg, J., dissenting) (setting forth question presented in *Ledbetter*’s petition for certiorari).

115. *See id.* (summarizing two possible interpretations of Title VII).

116. *See id.* (criticizing Court’s holding). The Court declined to address *Ledbetter*’s policy arguments, stating that “it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the prompt processing of all charges of employment discrimination . . . and the interest in repose.” *Id.* at 2177 (citation omitted). The Court’s opinion, however, is one overarching public-policy argument, albeit one advancing the opposite position. *See id.* at 2170 (emphasizing importance of adhering to statute of limitations).

those cases are controlling.¹¹⁷ In so doing, however, the Court failed to seriously address why *Bazemore* is inapposite.¹¹⁸ In her brief, Ledbetter quoted *Bazemore*, stating that “each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.”¹¹⁹ In a footnote, the *Ledbetter* majority reasoned that *Bazemore* involved a current violation, not the carrying forward of a past act of discrimination.¹²⁰ The Court stated that *Bazemore* merely stands for the proposition that an employer engages in intentional discrimination each time it issues paychecks pursuant to a discriminatory pay system.¹²¹

B. Congress’s Proposed Legislation: A Viable Solution to the Problem Faced by Ledbetter? Congress Should Amend the Statute to Include a Discovery Rule

In her dissenting opinion, Justice Ginsburg invited Congress to correct the Court’s “cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose.”¹²² The Senate bill, while recognizing the existence of significant pay differentials between men and women, does not alter the *Ledbetter* decision; in fact, its main purpose is to amend the Fair Labor Standards Act of 1938.¹²³ On the other hand, the House of Representatives’s version of the bill is named after Lilly Ledbetter and its findings are not only about wage discrimination but also the specific, negative effects the *Ledbetter* decision will have on employees whose employers have intentionally discriminated against them.¹²⁴

117. See *id.* at 2167-70 (summarizing holdings of cases). From those four cases, the Court derived the rule that the EEOC limitations period begins to run when a discriminatory act takes place. *Id.*

118. See *Ledbetter*, 127 S. Ct. at 2172-74 (discussing *Bazemore* decision and disapproving of Ledbetter’s reliance on it).

119. See *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (per curiam) (discussing effect Title VII’s passage had on *Bazemore* plaintiff’s claim); Reply Brief for Petitioner, *supra* note 2, at 3-4 (quoting *Bazemore* and stating case should control ruling in this case). But see *Ledbetter*, 127 S.Ct. at 2172 (criticizing Ledbetter’s focus on one sentence in *Bazemore* decision).

120. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2173 n.5 (2007) (clarifying focus in *Bazemore*).

121. *Id.* at 2173 (clarifying holding in *Bazemore*). Thus, the Court reasoned that *Bazemore* did not give legal effect to the pre-Title VII actions, but merely focused on the existing salary structure that happens to be discriminatory because it was a continuation of the pre-Title VII discriminatory pay structure. See *id.*

122. See *id.* at 2188 (Ginsburg, J., dissenting) (criticizing majority opinion and inviting legislative correction). “[T]he ball is in Congress’ court,” and the “game [should not] be over before a plaintiff has had his innings.” *Id.*; *Hamilton v. Smith*, 773 F.2d 461, 462 (2d Cir. 1985). Just as Congress amended Title VII following the *Lorance* decision to incorporate the facts of that case, Congress subsequently proposed H.R. 2831 to cover Ledbetter’s situation. See *supra* note 75 and accompanying text (discussing congressional amendment of Title VII following *Lorance*).

123. See S. 1087, 110th Cong. §§ 1-2 (2007) (setting forth congressional findings and purpose of bill).

124. See H.R. 2831, 110th Cong. §§ 1-2 (2007) (providing short title and listing congressional findings).

The *Ledbetter* Court did not address whether Title VII should be read to incorporate a discovery rule because *Ledbetter* did not raise the issue.¹²⁵ Furthermore, although the defendants certainly would have rejected the possible application of a discovery rule in this case or in similar future discrimination cases, even the organizations filing amicus briefs in favor of the plaintiff opposed the adoption of such a rule.¹²⁶ Nevertheless, adopting a discovery rule would have saved *Ledbetter*'s claim, and furthermore, it would be consistent with the rationales for adopting a discovery rule.¹²⁷

The House's bill will amend Title VII by adding

an unlawful employment practice occurs, with respect to discrimination in compensation . . . when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by the application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.¹²⁸

In order to incorporate a version of the discovery rule, Congress should further modify the current version of Title VII. For example, the above provision should be amended by adding another way of determining when an unlawful employment practice occurs: when the individual discovers, or reasonably should have discovered, its implementation.¹²⁹

Although it is unlikely that this additional plaintiff-friendly language will be incorporated into the bill, this proposed statute would nevertheless serve valuable goals.¹³⁰ Statutes of limitations are supposed to protect defendants

125. See *Ledbetter*, 127 S. Ct. at 2177 n.10 (stating why Court did not address discovery rule issue); *id.* at 2180 (indicating plaintiff did not argue equitable considerations should apply).

126. See Nat'l P'Ship Brief, *supra* note 83, at 18 (maintaining discovery rule unsatisfactory solution to Title VII pay discrimination *Ledbetter* faced). "A discovery rule, although appropriate for Title VII claims generally, . . . would turn virtually every pay discrimination case into a messy factual dispute over what the plaintiff knew and when." *Id.* at 1. Furthermore, the National Partnership for Women and Families argues that application of a discovery rule would not resolve the problem *Ledbetter* faced because the limitations period would have commenced when *Ledbetter* learned that a male earned a higher salary, even if she did not know that the discrepancy was the result of discrimination. *Id.* at 17.

127. See *supra* Part II.B (discussing purpose of statute of limitations and application of discovery rule).

128. H.R. 2831, 110th Cong. § 3 (2007) (providing suggested revision of when discriminatory employment practice takes place).

129. See AM. L. PROD. LIAB. 3d § 47:33 (2007) (discussing rationale of discovery rule). Although employment discrimination cases differ from product liability cases, the rationale for applying the discovery rule would not differ between the two. See *supra* notes 34-35 (indicating reasoning behind legislature's adoption of discovery rules in some instances). The Supreme Court has expressly declined to invoke a discovery rule under two statutes: the Federal Tort Claims Act and RICO. See *supra* notes 37-43 and accompanying text (indicating Court's reluctance to universally adopt discovery rules). Nonetheless, the Court has set forth when it is appropriate to invoke a discovery accrual rule—namely, when a statute is silent on the issue. See *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (recognizing discovery rule for Federal Employers' Liability Act); see also 45 U.S.C. § 51 (2006) (setting forth provisions of Federal Employers' Liability Act).

130. See *supra* note 31 and accompanying text (discussing important interests behind statutes of limitations).

from having to defend old claims, while ensuring that plaintiffs have a sufficient, reasonable amount of time to file their claims.¹³¹ In addition, this amendment would be consistent with the EEOC's interpretation of Title VII.¹³²

This amendment will, in effect, incorporate a discovery rule into Title VII, thus tolling the statute of limitations until the plaintiff learned, or should reasonably have learned, of the discrimination.¹³³ One criticism of the House's bill is that it would allow "[a]llegations from thirty years ago or more . . . [to] be resurrected and filed in federal courts," thus resulting in "the effective elimination of any statute of limitations."¹³⁴ The implementation of a discovery rule would not, however, *eliminate* Title VII's statute of limitations; instead, it would merely toll the statute until the plaintiff became aware, or reasonably should have become aware, of the facts that gave rise to the cause of action.¹³⁵

Under this rule, a plaintiff will have either 180 or 300 days to bring the claim once she learns of the discrimination.¹³⁶ In many instances, the discovery rule will not extend the filing period because the plaintiff will learn of the discrimination at the time it occurs.¹³⁷ Under the current version of Title VII, if the plaintiff is aware of the discrimination when the decision is made, she will

131. See *supra* notes 30-32 and accompanying text (discussing conflicting interests legislature must balance in enacting statutes of limitations). The problem with Title VII, as currently written and interpreted by the Supreme Court in *Ledbetter*, is that it does not adequately balance these interests. See *supra* note 32 (setting forth all interests that must be balanced). Those interests are the defendant's interest in avoiding stale claims, the plaintiff's interest in vindicating his rights, and society's interest in both the plaintiff's and defendant's interests. *Id.* In *Ledbetter*, the Court placed more emphasis on the defendant employer's rights than on the plaintiff's rights, even though the plaintiff in the case was justifiably unaware that discrimination was taking place. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2182 (2007) (Ginsburg, J., dissenting). *Ledbetter* was justifiably unaware that she was receiving less pay than her male coworkers. *Id.*

132. See *supra* note 22 and accompanying text (indicating situations in which deference given to agencies' statutory interpretations). According to the *EEOC Compliance Manual*, equitable tolling is appropriate in certain situations "where the [plaintiff] was understandably unaware of the EEOC process or of important facts that should have led him or her to suspect discrimination." EEOC COMPLIANCE MANUAL, *supra* note 9, at 42. The EEOC further explains that equitable tolling is warranted when the plaintiff had "no reason to suspect discrimination at the time of the disputed event[; t]he filing period is tolled until the individual has enough information to reasonably suspect that [he or she] has a valid [Title VII] claim." *Id.* at 42-43. Thus, the EEOC's interpretation of Title VII is similar to that of the statutory amendment currently proposed by the House in light of the *Ledbetter* decision. See *id.* A plaintiff who is justifiably unaware that discrimination has occurred, as was *Ledbetter*, will thus be protected by this equitable tolling; if the plaintiff waits longer than ordinarily seems reasonable, however, then he or she will have the burden of showing that the delay was reasonable under the circumstances, which is a difficult burden to meet. See *id.* at 43.

133. See *supra* notes 11-12 and accompanying text (discussing how discovery rule impacts statute of limitations).

134. See STATEMENT OF ADMINISTRATION POLICY, *supra* note 108, at 1 (rejecting proposed revision to Title VII).

135. See *supra* notes 34-35 (describing how discovery rule works).

136. See *supra* note 10 and accompanying text (discussing limitations period under Title VII as currently codified); *supra* notes 11-12, 136 and accompanying text (addressing how proposed modification of Title VII alters calculation of statute of limitations).

137. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2182 (Ginsburg, J., dissenting) (stating workers know immediately when discrete acts of discrimination take place). *But see id.* (recognizing employees often aware of pay discrepancies).

have either 180 or 300 days to file a claim.¹³⁸ Therefore, in many cases, there will be no difference between the operation of the current version of Title VII, the House's bill, and this proposed amendment.¹³⁹ Although it is true that the incorporation of the discovery rule will result in "factual dispute[s] over what the plaintiff knew and when," the burden of proof will remain with the plaintiff.¹⁴⁰ The plaintiff's failure to act within 180 or 300 days of learning of the discriminatory decision will mean that the claim is barred.¹⁴¹

Under the House's bill, a plaintiff could bring suit each time she receives a discriminatory paycheck and may recover up to two years of back pay.¹⁴² Thus, had Ledbetter brought a claim following her retirement, under this bill, she would not be able to recover the full amount that she should have earned over her nineteen-year career at Goodyear.¹⁴³ If the discovery rule were implemented, however, Ledbetter, and similarly situated plaintiffs in the future, would be able to recover all of the pay they would have earned had there not been a Title VII violation.¹⁴⁴ In her dissent, Justice Ginsburg recognized the problems that putative-plaintiff employees face when determining whether to bring a Title VII action against their employers.¹⁴⁵ Without using the phrase "discovery rule," she suggested that such a rule would be appropriate for employment-discrimination claims.¹⁴⁶

138. See 42 U.S.C. § 2000e-5(e) (2006) (outlining time period during which plaintiff must file claim).

139. See *id.* (starting limitations period following blatantly discriminatory act); H.R. 2831, 110th Cong. § 3 (2007) (triggering limitations period on occurrence of conspicuous discrimination); *supra* note 127 (proposing tolling only in instances in which plaintiff justifiably unaware of discriminatory act).

140. See Nat'l P'Ship Brief, *supra* note 83, at 18 (raising concern over difficult factual determinations); see also AM. L. PROD. LIAB. 3d § 47:33 (2008) (stating whether plaintiff exercised reasonable diligence question of fact).

141. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002) (noting filing deadlines for recovery); *supra* notes 77-80 (explaining when plaintiff may file Title VII claims for discrete discriminatory acts and hostile environment).

142. See H.R. 2831, 110th Cong. § 3 (2007) (recommending more plaintiff-friendly Title VII amendment).

143. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165-66 (2007) (providing details of Ledbetter's employment at Goodyear). At the time of her retirement, Ledbetter was earning roughly \$3,800 per month, while the male managers with the same job title earned between about \$4,200 and \$5,200. *Id.* at 2178 (Ginsburg, J., dissenting). Because the pay discrepancy increased exponentially over time, allowing Ledbetter to recover only two years of backpay would not adequately compensate her for the discrimination she experienced. See *id.* at 2184.

144. See *id.* at 2178-79 (Ginsburg, J., dissenting) (addressing problems faced when bringing pay-discrimination claims). In many instances, comparative pay information is not available to employees. *Id.*

145. See *id.* (discussing employees' reluctance to bring claims against employers). Thus, "Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves." *Id.* at 2179.

146. See *id.* (implying discovery rule appropriate for Title VII actions). "It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to *comprehend her plight* and, therefore, to complain." *Id.* at 2179 (emphasis added); see also *supra* note 126 (indicating potential adoption of discovery rule not issue in case). Amending Title VII to incorporate a discovery rule would mean that the plaintiff would not be barred from bringing a claim after the 180- or 300-day time period had elapsed, provided that she brought the suit within 180 or 300 days of "comprehend[ing of] her plight." *Ledbetter*, 127 S. Ct. at 2179. (Ginsburg, J., dissenting).

IV. CONCLUSION

The stark unfairness of the rule adopted in *Ledbetter* is seen in the decision itself: although the plaintiff was justifiably unaware of the discriminatory pay system, she was not allowed to recover backpay upon filing her claim. Correcting the *Ledbetter* decision requires legislative action because the Supreme Court's heavy reliance on precedent would make overruling the decision difficult. Congress's proposed legislation would provide plaintiffs more flexibility than the Court's interpretation of Title VII currently affords. That legislation could still deny a plaintiff the right to bring claims, even when she is unaware of the discrimination because her employer conceals salary information. The discovery rule more adequately balances the interests of the parties. Moreover, it is more favorable to plaintiffs than a strict adherence to the statute of limitations, although it would only protect plaintiffs who act quickly after becoming aware of their injuries. Therefore, the discovery rule would still respect the competing interests of a statute of limitations, balancing the rights of plaintiffs to file suit with protecting defendants from having to defend stale claims.

*Alyssa B. Minsky**

Equitable doctrines, including equitable tolling, permit the Court to honor the remedial purpose of Title VII, while still giving prompt notice of a claim to the employer. *Id.* at 2186.

* The author would like to thank Professor Marc D. Greenbaum for his constructive suggestions throughout the production process.