On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality

Katie Putnam
ON LILLY LEDBETTER’S LIBERTY: WHY EQUAL PAY FOR EQUAL WORK REMAINS AN ELUSIVE REALITY

ABSTRACT

On January 29, 2009, the Lilly Ledbetter Fair Pay Act became the first bill signed into law by President Barack Obama. It reverses the U.S. Supreme Court holding in Ledbetter v. Goodyear Tire & Rubber Co. by expanding the time in which a plaintiff claiming pay discrimination can bring suit. This Note argues that Ledbetter was wrongly decided, scrutinizes the legislation drafted to overturn the holding, and compares alternative solutions, such as the use of a discovery rule, equitable doctrines, or legislation that would strengthen the role of the Equal Employment Opportunity Commission to ensure that employees are truly protected by Title VII. A 2003 Department of Labor study revealed that women continue to earn seventy-eight percent of what men earn. The disparity will not disappear soon, and for that reason, the story of female worker turned feminist heroine, Lilly Ledbetter, must be told, shared, and considered.

I. LILLY LEDBETTER’S STORY
   A. The Facts
   B. Procedural History
II. INTENT IS THE PRIMARY ELEMENT IN A TITLE VII DISPARATE TREATMENT CLAIM
III. BAZEMORE
IV. MORGAN
V. WHY DOES THIS DECISION MATTER?
VI. LEGISLATIVE RESPONSES
   A. The Lilly Ledbetter Fair Pay Act
   B. The Lesson from Lorance
VII. EQUITABLE DOCTRINES
   A. Waiver, Equitable Tolling, Estoppel, Defense of Laches
   B. The Discovery Rule
   C. Massachusetts’s Experience
VIII. FORTIFYING THE ROLE OF THE EEOC
   A. Chevron Deference and Arabian Respect
IX. PAYCHECKS AS PROPERTY AND ON LIBERTY

CONCLUSION

By a one Justice margin on the United States Supreme Court, Lilly Ledbetter lost her Title VII sex-based pay discrimination claim
against Goodyear Tire and Rubber Company on May 29, 2007.1 In a five to four decision written by Justice Alito, the Court held that Ledbetter's claim was untimely because it relied on an intentional discriminatory pay decision that occurred outside of the 180-day charging period for Title VII claims.2 Protesting this strict interpretation of the Title VII statute of limitations, Justice Ginsburg read her dissent from the bench.3 The isolation of Ginsburg's voice, "as precise and emotionless as if she were reading a banking decision,"4 evoked an undeniable kinship between the lone female Supreme Court Justice and Lilly Ledbetter, the lone female area manager, who earned $559 less per month than the lowest paid male area manager and $1509 less per month than the highest paid area manager.5 Ginsburg and Ledbetter, however, were not alone in their interpretation of Supreme Court precedent.6 Taking up Ledbetter's side, Ginsburg argued that precedent established a "paycheck accrual rule," permitting paychecks that were not issued with discriminatory intent to satisfy the statute of limitations articulated in the Title VII enforcement provisions for the purpose of bringing a Title VII claim.7 Furthermore, the Equal Employment Opportunity Commission ("EEOC"), a federal agency created by the Civil Rights Act of 1964 to enforce the provisions of Title VII,8 filed an amicus brief in support of Ledbetter

2. Id. at 621; see 42 U.S.C. § 2000e-5(e)(1) (2000) (stating that claimant has 180 days after the alleged unlawful employment practice occurred to file a charge).
3. Robert Barnes, Over Ginsburg's Dissent, Court Limits Bias Suits, WASH. POST, May 30, 2007, at A01 ("The decision moved Justice Ruth Bader Ginsburg to read a dissent from the bench, a usually rare practice that she has now employed twice in the past six weeks to criticize the majority for opinions that she said undermine women's rights.").
4. Id.
5. Ledbetter, 550 U.S. at 643 (Ginsburg, J., dissenting).
6. Numerous activist groups filed amicus briefs on behalf of Lilly Ledbetter. See Brief for the National Employment Lawyers Ass'n et al. as Amici Curiae Supporting Petitioner, Ledbetter, 550 U.S. 618 (No. 05-1074); Brief for the National Partnership for Women & Families et al. as Amici Curiae Supporting Petitioner, Ledbetter, 550 U.S. 618 (No. 05-1074).
7. The majority and dissenting Justices in Ledbetter battled over whether the holding in Bazemore v. Friday, 478 U.S. 385 (1986), articulated the paycheck accrual rule. See Ledbetter, 550 U.S. at 633-35; id. at 646-47 (Ginsburg, J., dissenting). Lower courts and Justice Ginsburg extrapolated the paycheck accrual rule from dicta in Justice Brennan's opinion in Bazemore: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." Bazemore, 478 U.S. at 395; see 42 U.S.C. § 2000e-5(e)(1) (2000) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred."). In some jurisdictions the period is 300 days but this Note will use the 180-day period because that was the applicable period in Ledbetter. See § 2000e-5(e)(1).
when the case was appealed to the Eleventh Circuit. In the EEOC’s Compliance Manual, the agency articulated its position that “repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period.”

The controversy that framed the Ledbetter case en route to the Supreme Court was inflamed by the Court’s decision. The United States Congress responded to the decision and Ginsburg’s call — “once again, the ball is in Congress’ court” — quickly. The House of Representatives voted on and passed the Lilly Ledbetter Fair Pay Act, but the parallel legislation on the Senate side was blocked by Republican senators in April 2008. Unsurprisingly, President George Bush vowed to veto the legislation, which would be the first attempt by Congress to overrule a decision from Chief Justice John Roberts’s Court. With the election of President Barack Obama, the bill was reintroduced in January 2009. The House of Representatives passed the bill by a vote of 247 to 171 on January 9, 2009, and the Senate

9. Ledbetter, 550 U.S. at 656 (Ginsburg, J., dissenting) (citing Brief of EEOC Supporting Petition for Rehearing and Suggestion for Rehearing En Banc, Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005) (No. 03-15264)).
10. Id. (citing 2 EEOC COMPLIANCE MANUAL § 2-IV-C(1)(a) (2006)).
12. Ledbetter, 550 U.S. at 661 (Ginsburg, J., dissenting).
passed the bill two weeks later by a vote of sixty-one to thirty-six.19 On January 29, the Lilly Ledbetter Fair Pay Act became the first piece of legislation signed by President Obama.20 While Lilly Ledbetter has vindicated the rights of many female workers for generations to come, it is still important to examine why the Supreme Court got this one wrong in the first place and to look at alternative solutions to the passage of legislation targeting the specific holding of the case because, as Ledbetter has shown, effecting change through legislation can take far too long because legislatures are vulnerable to political tides and elections.

Ledbetter is particularly remarkable21 because an individual rights claim was resolved against the plaintiff in the Supreme Court on procedural grounds.22 The simplicity of the issues and facts in the case coupled with the socio-political and historical importance of employment discrimination law have generated a natural platform to discuss whether the federal government should continue to afford plaintiff-workers significant protection under the Civil Rights Law of 1964 after over forty years of litigation. The Ledbetter case involves sex discrimination, but as Justice Ginsburg underscored in the dissent, Title VII decisions apply to all the protected classes listed therein, including race, religion, and national origin.23 Lilly Ledbetter, then, is only one person within a class of prospective plaintiffs who were vulnerable to the denial of relief for actual pay discrimination before President Obama signed the bill.24 This Note compares the approaches of the majority and dissenting opinions in Ledbetter in terms of statutory interpretation, handling

20. Richard Leiby, A Signature with the First Lady's Hand in It, WASH. POST, Jan. 30, 2009, at C1 (noting that Michelle Obama, specifically, has championed Lilly Ledbetter's cause).
23. Id. at 658 (Ginsburg, J., dissenting) (mentioning age and disability, which are not protected by Title VII, but other civil rights laws, the Age Discrimination in Employment Act of 1967 (“ADEA”) and the Americans with Disabilities Act of 1990 (“ADA”), as classes who may have less protection post-Ledbetter).
24. But see Nancy Zisk, In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule to Determine the Start of the Limitations Period for Pay Discrimination Claims, 16 DUKE J. GENDER L. & POL’Y 137, 138 (2009) (arguing that the Ledbetter decision may be limited to its “very specific facts”).
of precedent, and understanding of congressional intent. It argues that *Ledbetter* was wrongly decided because paychecks constitute property; as such, a discovery rule or equitable tolling would be more appropriate doctrines to use than intent to determine when litigation is reasonably initiated in this context. By reviewing the majority's reasoning, the Note scrutinizes the Lilly Ledbetter Fair Pay Act and similar legislation drafted by the California Legislature to determine if it adequately articulates the "paycheck accrual rule" and clarifies the language of Title VII. Finally, the Note submits that a statutory amendment strengthening the role of the EEOC in the statutory interpretation of Title VII would anchor judicial decisions to the general public's understanding of how Title VII works and avoid strained interpretations exemplified by decisions like *Ledbetter*.

I. LILLY LEDBETTER'S STORY

A. The Facts

Lilly Ledbetter worked at the Goodyear Tire and Rubber Plant in Gadsen, Alabama from 1979 until 1998 when she retired.\(^{25}\) Ledbetter was the only woman who held the position of area manager; the other fifteen managers were men.\(^{26}\) According to one source, Ledbetter received an anonymous letter relating that she was making less than her male co-workers with similar experience and positions.\(^{27}\) In July 1998, Ledbetter filed a formal charge of sex discrimination with the EEOC.\(^{28}\) Ledbetter filed her complaint alleging pay discrimination based on sex under Title VII and the Equal Pay Act of 1963 ("EPA") in November 1998.\(^{29}\)

B. Procedural History

A jury sitting in the Northern District of Georgia awarded Ledbetter $223,776 in back pay (which the court reduced to $60,000\(^{30}\)),

26. Id. at 643 (Ginsburg, J., dissenting).
27. Valerie Dowdle, *Ledbetter, Lilly v. Goodyear Tire & Rubber Co.*, ON THE DOCKET, May 29, 2007, http://otd.oyez.org/articles/2007/05/29/ledbetter-lilly-v-goodyear-tire-rubber-co-05292007 ("[B]y 1998, when the anonymous note turned up ... she was being paid less than all her male counterparts in the tire assembly department, even recent hires with far less on-the-job experience.").
$4662 for mental anguish, and $3,285,979 in punitive damages (which the court reduced to $295,338 to bring the total damages awarded within the statutory limitations under Title VII).\textsuperscript{31}

On appeal to the Eleventh Circuit, the defendant argued that Ledbetter's claim was time-barred by the statute of limitations, codified at 42 U.S.C. § 2000e-5(e)(1) (2000), and the court agreed.\textsuperscript{33} Ledbetter filed a petition for writ of certiorari to the Supreme Court to resolve the statute of limitations issue for Title VII pay discrimination claims.\textsuperscript{34} The Supreme Court granted certiorari to resolve a circuit court split on this question.\textsuperscript{35}

II. INTENT IS THE PRIMARY ELEMENT IN A TITLE VII DISPARATE TREATMENT CLAIM

Title VII defines an "unlawful employment practice" to include discrimination against an individual with respect to compensation because of the individual's membership in one of five protected classes: race, color, religion, sex, or national origin.\textsuperscript{36} Plaintiffs may bring either a disparate treatment or a disparate impact claim under Title VII.\textsuperscript{37} Ledbetter claimed disparate treatment.\textsuperscript{38} In a disparate treatment case, the plaintiff must provide sufficient evidence to support an inference that the differential treatment resulting from an employment decision was rooted in discriminatory intent.\textsuperscript{39} Under Title VII, the plaintiff almost always bears the burden of persuasion on the element of discriminatory intent.\textsuperscript{40} Ultimately, the two elements of Ledbetter's claim were "an employment practice[] and discriminatory intent."\textsuperscript{41}

\begin{enumerate}
\item See 42 U.S.C. § 1981a(b)(3) (2000). It is important to note that the district court granted the defendant's motion for summary judgment on the EPA claim, which thereby limited the scope of appellate review (and the holdings in the court of appeals and the Supreme Court) to the Title VII claim. \textit{Ledbetter}, 550 U.S. at 622, 640. In fact, Justice Alito argues that Ledbetter could have pursued her claim under the EPA and avoided the statute of limitations issue altogether. \textit{Id.} at 640.
\item Brief for the Petitioner on Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 9, \textit{Ledbetter v. Goodyear Tire & Rubber Co.}, 421 F.3d 1169 (11th Cir. 2005) (No. 03-15264).
\item \textit{Ledbetter}, 550 U.S. at 622-23.
\item \textit{Id.}
\item \textit{Id.}
\item SUSAN M. OMILIAN & JEAN P. KAMP, 1 SEX-BASED EMPLOYMENT DISCRIMINATION § 11:10 (2008), available at 1 SBEDIS 11:10 (Westlaw).
\item \textit{Ledbetter}, 550 U.S. at 624.
\item Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (discussing the relevance of the holding in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
\item Fallon v. Illinois, 882 F.2d 1206, 1213 (7th Cir. 1989).
\item \textit{Ledbetter}, 550 U.S. at 624. While discriminatory intent is the main element in a Title VII case concerning disparate pay, a plaintiff bringing a claim under the EPA does
Paychecks pose a specific problem to proving present intent because, as Ledbetter argued, although the paychecks issued during the statute of limitations period in her case did not result from intentional discrimination that occurred during the 180-day period, the paychecks within the period are actionable because they "implement[] a prior discriminatory decision." Under this view, the paychecks are tainted with the intentionally discriminatory pay decision. Ledbetter's argument that paychecks are actionable in spite of a lack of present discriminatory intent was grounded in the generally-accepted "paycheck accrual rule." This rule finds its source in dicta in Justice Brennan's concurring opinion in *Bazemore v. Friday*.

III. BAZEMORE

In *Bazemore*, the plaintiffs challenged the persistence of a pre-Title VII payment system that paid white employees more than similarly situated black employees. Though the North Carolina Agricultural Extension Service had taken some steps to cure the discrimination after Title VII became effective, it admitted that the discrimination had not been eliminated. The Supreme Court held that liability could be imposed for discrimination that "perpetuated after 1972." Justice Ginsburg relied on language in the *Bazemore* opinion to locate the case's association with the "paycheck accrual rule": "[e]ach 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." Though a plain reading of this statement not have to prove intent. See 29 U.S.C. § 206(d)(1) (2006) (prohibiting sex discrimination by employers in payment of wages but not requiring proof of intent). To make out a prima facie case under the EPA, the "plaintiff must prove that two workers of opposite sex (1) in the same 'establishment' are (2) receiving unequal pay (3) 'on the basis of sex' (4) for work that is 'equal.'" MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 574 (6th ed. 2003). Because the elements do not correlate under Title VII and EPA, the circuits are split on the issue of whether the EPA burdens must be applied in a Title VII sex-based pay discrimination case. *Id.* at 575. I will discuss the implications of this issue in relation to Justice Alito's emphasis on the EPA as an adequate alternative for Ledbetter. See infra notes 75-83 and accompanying text.

42. *Ledbetter*, 550 U.S. at 625 (quoting Reply Brief for Petitioner at 20).
43. *Id.* at 646 (Ginsburg, J., dissenting) ("[E]ach payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice . . .").
44. *Id.* at 633.
46. *Id.* at 394-95.
47. *Id.*
48. *Id.* at 395.
clearly renders paychecks actionable that result from an earlier discriminatory regime, Justice Alito’s opinion in *Ledbetter* distinguished *Bazemore* by arguing that it was only meant to apply to cases where an employer institutes a pay system that discriminates on its face.\(^{51}\)

Justice Alito read this distinction into *Bazemore* and reinforced it by arguing that “intentionally” maintaining a facially discriminatory policy satisfies the intent element.\(^{52}\) Ironically, a “facially discriminatory pay structure”\(^{53}\) more closely resembles a discrete unlawful employment practice than an individual pay decision (made behind closed doors) because facial policies and discrete decisions are easier for an employee to detect; they are more public and therefore more obvious.\(^{54}\) Logically, it seems the more subtle discrimination should be subject to the exception created by *Bazemore*. To the extent *Bazemore* is vulnerable to competing interpretations, the majority in *Ledbetter* relied on a more recent case, *National Railroad Passenger Corp. v. Morgan*, that purports to answer “whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside this statutory time period.”\(^{55}\)

**IV. MORGAN**

Justice Thomas, writing the majority opinion in *Morgan*, held that “unlawful employment practice[s]” that are “discrete”\(^{56}\) discriminatory acts are subject to the timeliness provision of Title VII. Acts may still be “discrete” notwithstanding their connection to other acts.\(^{57}\) The decision distinguishes “discrete” acts from “hostile work environment” claims and holds further that in the hostile work environment setting, any act that is part of the series of acts that combine to create a hostile environment occurring within the 180-day charging period render defendant liable for all of the acts creating the environment.\(^{58}\)

The *Morgan* opinion plays a significant role in the *Ledbetter* discussion. The dissent in *Ledbetter* uses the *Morgan* definition of

---

52. Id.
53. Id.
54. See Zisk, supra note 24, at 137-45.
57. Id. at 113.
58. Id. at 111.
59. Id. at 118.
a hostile work environment to illustrate its similarities to pay discrimination claims rather than “discrete” acts. The argument is not a strong one, but the majority’s use of the Morgan opinion is equally flawed.

Much of the majority’s support for the holding relies on the development of precedent that supposedly applies to the Ledbetter case. Justice Alito plucks two cases that Justice Thomas used in Morgan to offer examples of “discrete discrimination.” The comparison of the issuance of paychecks to cases where the plaintiffs were either forced to resign or denied tenure is feeble. The plaintiffs in Evans and Ricks can specify the date on which their employers made decisions tainted with discriminatory animus which left them in a undeniably worse position. Lilly Ledbetter, conversely, cannot identify the exact date when her salary started losing ground against her male counterparts. As Justice Ginsburg observed, “[t]he only unlawful employment practice alleged was the College’s decision to deny respondent tenure, and that the limitations periods for both claims had commenced to run by June 26, 1974, when the Board officially notified him that he would be offered a 1-year ‘terminal’ contract.” Evans, 431 U.S. at 554 (“During respondent’s initial period of employment, United maintained a policy of refusing to allow its female flight attendants to be married. When she married in 1968, she was therefore forced to resign.”) (footnote omitted).

Ultimately, Morgan did not provide an answer to the specific question in Ledbetter. In 2002 the Court did not explicitly categorize pay discrimination. In fact, it is absent from the shortlist of “discrete acts” — among Thomas’ “easy to identify” examples are “termination, failure to promote, denial of transfer, [and] refusal to hire.”

V. Why Does This Decision Matter?

The elemental importance of individual liberty underpins the Bill of Rights of the Constitution of the United States. The Civil
Rights Act of 1964\textsuperscript{69} is an essential outgrowth of the foundational emphasis on individual liberty, and Title VII was conceived as a broad proscription against subtle and overt discrimination in all workplaces.\textsuperscript{70} Lilly Ledbetter's situation is a clear example of the insidiousness of subtle discrimination. Title VII has been effective for over forty years, and yet sex discrimination persists.\textsuperscript{71} Indeed, a 2003 Department of Labor study showed that women earn seventy-eight percent of what men earn.\textsuperscript{72}

According to one estimate, 40,000 pay discrimination cases were filed in the five-year period from 2001 to 2006.\textsuperscript{73} The article argued that "many" of the pay discrimination cases brought under Title VII would be barred post-\textit{Ledbetter}.\textsuperscript{74} Yet the ultimate impact of \textit{Ledbetter} on female plaintiffs bringing sex discrimination claims was (lucky) dampened significantly by the Equal Pay Act of 1963 ("EPA").\textsuperscript{75}

According to Justice Alito, Lilly Ledbetter lost her case because she "abandoned" her EPA claim after a magistrate judge dismissed the claim.\textsuperscript{76} Though the EPA and Title VII have been construed identically because both seek to root out sex-based pay discrimination, the EPA is much more narrow, focusing exclusively on sex discrimination and pay differences.\textsuperscript{77} The EPA cures the problems identified in \textit{Ledbetter} because it does not require a showing of intent\textsuperscript{78} and

\begin{itemize}
\item \textsuperscript{70} 110 CONG. REC. 6549 (1964) (Clark-Case Memorandum); see Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 581 n.14 (1984) (adopting the opinions in the memorandum prepared by Senators Clark and Case on Title VII as "authoritative"); Chad Derum & Karen Engle, \textit{The Rise of the Personal Animosity Presumption in Title VII and the Return of 'No Case' Employment}, 81 TEX. L. REV. 1177, 1198 (2003) (discussing the Clark-Case Memorandum); \textit{see also Ledbetter}, 550 U.S. at 660-61 (Ginsburg, J., dissenting) ("This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose.").
\item \textsuperscript{74} \textit{Id}.
\item \textsuperscript{76} \textit{See Ledbetter}, 550 U.S. at 640 n.9; \textit{see also Transcript of Oral Argument, supra note 64, at 8 ("The district court held that there were fact disputes that precluded that conclusion, but for some reason only reinstated the Title VII claim.").}
\item \textsuperscript{77} 45A AM. JUR. 2D \textit{Job Discrimination} § 626 (2002).
\item \textsuperscript{78} \textit{Id}.
\end{itemize}
does not have a statute of limitations. To make out a prima facie case, a plaintiff shows simply that she is doing equivalent work, but receiving less than a male employee. In this respect, proving an EPA claim is easier than a Title VII claim, but Title VII claims may proceed without a "comparison employee" to demonstrate the wage differential.

The EPA clearly provides an alternative path for some Ledbetter-like plaintiffs. In fact, plaintiffs who can bring an EPA claim should; EPA claims favor plaintiffs, while Title VII claims favor defendants. By using a procedural tool to further limit plaintiffs' protection, ironically, the Court bolstered an already defendant-friendly statute.

The EPA did not, however, provide recourse for all claims potentially barred by Ledbetter. For example, Title VII and the EPA do not cover all of the same private employers. Any employer subject to only Title VII liability was immunized against old claims by Ledbetter. Furthermore, at least one article argues that Title VII may preempt discrimination cases under Title IX in the education sector. To the extent Ledbetter effectively eliminated a subset of sex discrimination claims, and endangered other employment discrimination claims based on race, national origin, disability, and age, it is important to consider whether the legislation recently signed by President Obama effectively responds to and neutralizes the Ledbetter holding.

VI. LEGISLATIVE RESPONSES

A. The Lilly Ledbetter Fair Pay Act

The House of Representatives introduced the Lilly Ledbetter Fair Pay Act on June 22, 2007, less than a month after the Supreme

---

80. OMILIAN & KAMP, supra note 37, § 8:01 (2007).
81. 45A AM. JUR. 2D Job Discrimination § 626 (2002).
83. 45A AM. JUR. 2D Job Discrimination § 626 (2002).
85. Douglas P. Ruth, Note, Title VII & Title IX = ?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?, 5 CORNELL J.L. & PUB. POLY 185, 186 (1996) (arguing that Congress intended to preempt Title IX employment discrimination actions with Title VII because of the lack of procedural safeguards in Title IX).
Court's decision. According to the House Report on the bill, the purpose of the legislation was "to reverse the Supreme Court's May 29, 2007, ruling in Ledbetter v. Goodyear." The (now enacted) bill, however, also amends the Age Discrimination in Employment Act of 1967 ("ADEA"), the Americans With Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973 with respect to compensation decisions. The key language amending the Civil Rights Act states:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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 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.

The enacted bill formally adopts the paycheck accrual rule that Congress found to be one of the "bedrock principles of American law for decades." Thus, the bill is narrowly tailored to the specific holding in Ledbetter, though it immunizes other similar civil rights laws from the same procedural interpretation.

The legislative history of the Ledbetter bill was intensely politically charged. The first version passed in the House of Representatives by a vote of 225 ayes, 199 nays. Speaker Nancy Pelosi praised the passage of the bill: "the Lilly Ledbetter Fair Pay Act restores the balance in the law and allows victims of wage discrimination to seek justice in the courts." But divergent rhetoric was released by the executive branch. Four days before the House vote, the Office of Management and Budget (OMB) published its criticisms of the bill.

87. H.R. 2831 (as introduced by House, June 22, 2007).
93. § 3, 123 Stat. at 5-6.
94. § 2, 123 Stat. at 5.
98. See Office of Mgmt. & Budget, supra note 95.
OMB's statement underscored the burdensomeness of stale claims for defendant-employers and the court system and the traditional rationales for statutes of limitations.\footnote{99} It also argued that "the bill far exceeds the stated purpose" because of the word choice: "compensation decision or other practice."\footnote{100} OMB feared that the phrase, "other practice," could be interpreted to mean not only salary setting, but promotion or termination as well.\footnote{101} Setting the stage for conflict, the OMB statement was unequivocal: "If H.R. 2831 were presented to the President, his senior advisors would recommend that he veto the bill."\footnote{102} While the threat of President Bush's veto is now gone, the struggle behind the enactment of this legislation, as well as similar California state legislation\footnote{103} that was ultimately vetoed by Governor Schwarznegger,\footnote{104} reveals the difficulty of relying on this type of solution to an incorrect Supreme Court holding. The story behind an earlier Title VII case, \textit{Lorance v. AT&T Technologies, Inc.}, mentioned in the \textit{Ledbetter} opinion further underscores the pitfalls associated with drafting this type of recuperative legislation.\footnote{105}

\textbf{B. The Lesson from Lorance}

In \textit{Lorance}, the Supreme Court held untimely the plaintiffs' EEOC charge alleging a discriminatory seniority system because the adoption of the system constituted a discrete act that caused the charging period to start running.\footnote{106} After \textit{Lorance}, Congress amended the timing provisions related to claims regarding seniority systems.\footnote{107} In spite of this clarification, Justice Alito employed the \textit{Lorance}
decision as one of four cases which developed his precedent-based argument that serves as the backbone reasoning for the Ledbetter holding. Looking at the statutory language, it is narrowly tailored specifically to seniority systems alone. Thus, Justice Alito's interpretation is not as cramped as it first appears. By comparing the narrowly drafted post-Lorance legislation ("seniority system") with the more expansive post-Ledbetter legislation ("other practice"), it seems clear that the 111th Congress is using broader word choice to accommodate more liberal judicial interpretations of congressional intent. In the aftermath of Justice Alito's use of Lorance to defeat Ledbetter's claim, the legislatures seem intent on giving courts less discretion to render limited readings of Title VII amendments. Given the vulnerability of the legislation to highly politicized maneuvering or executive veto (California) and the risk of overly narrow drafting, it is worth comparing alternative responses to Ledbetter. I now turn to two legitimate, alternative remedies to Ledbetter: a judicial remedy in the form of equitable doctrines and an administrative remedy in the form of a stronger role for the EEOC. A third alternative, representing a purely academic response to Ledbetter, is a quasi-constitutional approach.

VII. EQUITABLE DOCTRINES

A primary rationale underpinning the Ledbetter majority's decision not to treat each paycheck issued after the discriminatory decision as a discrete employment practice tainted with discriminatory intent is sheltering defendant-employers from stale claims. Justice Ginsburg's response to this rationale underscored its redundancy in

109. Compare 42 U.S.C. § 2000e-5(e)(2) (2000) ("For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.") (emphasis added), with H.R. 2831, 110th Cong. § 3(A) (2007) ("[A]n unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted, [or] when an individual becomes subject to a discriminatory compensation decision or other practice . . . ").
110. There is also a risk that the Supreme Court will narrowly construe the new legislation. AT&T Corp. v. Hulteen, No. 07-543 (U.S. argued Dec. 10, 2008), will likely provide the Court with the opportunity to respond to the new legislation. Kevin K. Russell, Esq., Howe & Russell, P.C., Address at the William & Mary School of Law: Ledbetter v. Goodyear "Arguing for Pay Equality Before the Supreme Court" (Mar. 19, 2009).
111. Ledbetter, 550 U.S. at 630-31.
light of the available equitable doctrines that provide employers with ample protection against old claims.\textsuperscript{112} With the \textit{Ledbetter} holding and access to equitable doctrines, defendant-employers now have double-barreled protection. In the wake of this apparent tipping of the scales, Speaker Nancy Pelosi's statement that the \textit{Ledbetter} legislation "restores balance in the law" appeals to fairness and justice in its assessment of the \textit{Ledbetter} holding.\textsuperscript{113} The \textit{Ledbetter} majority could have applied any one of a number of equitable doctrines to the Title VII pay discrimination setting, including equitable tolling, estoppel, laches and the discovery rule.

\textbf{A. Waiver, Equitable Tolling, Estoppel, Defense of Laches}

The Title VII EEOC filing requirement is akin to a statute of limitations and is therefore "subject to waiver, estoppel and equitable tolling."\textsuperscript{114} Equitable tolling saves a claim in spite of the fact that it was filed outside of the 180-day period if the plaintiff's lateness is excusable.\textsuperscript{115} Waiver, the other side of the coin, finds the plaintiff's procrastination inexcusable.\textsuperscript{116} Conversely, equitable estoppel is used to stop "a party from taking unconscionable advantage of its own wrong by asserting its strict legal rights."\textsuperscript{117}

Equitable tolling and estoppel are only applied in extraordinary circumstances where justice demands it.\textsuperscript{118} Courts apply these doctrines "with the utmost caution" and they are "not favored."\textsuperscript{119} Moreover, they are difficult claims for plaintiffs to make out. To win equitable estoppel against a party asserting a statute of limitations defense, for example, the plaintiff must meet the clear and convincing standard.\textsuperscript{120} When applying equitable tolling, a court considers five factors, including: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the employer; and (5) the employee's reasonableness in remaining ignorant of the particular legal requirement for filing his or her claim."\textsuperscript{121} Thus, tolling

\begin{footnotes}
\item[112] See \textit{id.} at 658 (Ginsburg, J., dissenting) ("Doctrines such as 'waiver, estoppel, and equitable tolling' allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer." (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002))).
\item[113] See Press Release, Office of the Speaker of the House, supra note 95.
\item[114] 45B AM. JUR. 2D Job Discrimination § 1155 (Supp. 2008) (footnotes omitted).
\item[115] Id.
\item[117] 28 AM. JUR. 2D Estoppel and Waiver § 30 (Supp. 2008).
\item[118] Id.; 45B AM. JUR. 2D Job Discrimination § 1155 (Supp. 2008).
\item[119] 28 AM. JUR. 2D Estoppel and Waiver § 30 (Supp. 2008).
\item[120] Id.
\item[121] 45B AM. JUR. 2D Job Discrimination § 1155 (Supp. 2008).
\end{footnotes}
and estoppel, which challenge plaintiffs to set forth reasonable explanations for their delay in filing, sufficiently protect defendant-employers against stale claims.

In addition, defendant-employers may raise the defense of laches if they can show that the delay has put them at a disadvantage. Laches focuses on the plaintiff's reasonableness and is only available to the defendant. A successful laches defense bars awards for past damages, but leaves available injunctive relief.

Because these doctrines result in balancing the plaintiff's and defendant's rights and are only applied in cases where there is a true risk of unfairness, Justice Ginsburg correctly assessed Justice Alito's reasoning that employers need more protection as overstated.

**B. The Discovery Rule**

Another alternative to the paycheck accrual rule, deriving from equitable concepts, is the discovery rule. Under the discovery rule, the statute of limitations does not start to run until the plaintiff discovers the injury giving rise to the claim, usually because it is the type of injury that is inherently difficult to detect. Proponents of the discovery rule argue that it more accurately reflects the practical reality of discrimination on the ground: "[t]he messy reality of perceiving gender bias contrasts sharply with the common assumption, reflected in discrimination law, that a person's belief that she has experienced discrimination is fixed and immediate." Justice Alito declined a discussion of the discovery rule in *Ledbetter*, but some have interpreted footnote ten of the opinion as "leav[ing] the door open for courts to sustain otherwise stale claims based on an assertion that the circumstances of a particular case did not provide the claimant

---

123. Id.
124. Id.
126. Id. at 642 n.10 (declining to discuss the discovery rule because Ledbetter did not argue that it would change the outcome of her case). For an in-depth argument for the application of a case-by-case discovery rule in pay discrimination cases, see Zisk, supra note 24.
128. Deborah L. Brake, Perceiving Subtle Sexism: Mapping the Social-Psychological Forces & Legal Narratives that Obscure Gender Bias, 16 Colum. J. Gender & L. 679, 681 (2007) (following her work on one of the amicus curiae briefs in *Ledbetter*, Brake wrote this article discussing the social and psychological factors that complicate individuals' ability to perceive gender discrimination when it occurs).
with sufficient information to believe that discrimination occurred."\textsuperscript{129}
While it is unclear whether lower federal courts will interpret footnote ten expansively, it is reassuring that state courts will not be bound by \textit{Ledbetter}. In fact, the Supreme Judicial Court of Massachusetts, the state’s court of last resort, applied the discovery rule in 2006 to a case involving issues similar to \textit{Ledbetter}.\textsuperscript{130}

\textbf{C. Massachusetts’s Experience}

In \textit{Silvestris}, two female teachers brought suit against their employer under the Massachusetts laws that correlate to Title VII and the EPA,\textsuperscript{131} alleging that “their starting salaries were set lower than the starting salaries of male teachers . . . because they were given less credit for their prior work experience.”\textsuperscript{132} The plaintiffs won at the trial court level, where the judge made a finding that defendant “had engaged in wage discrimination.”\textsuperscript{133} As in \textit{Ledbetter}, on appeal, the defendant raised a statue of limitations defense.\textsuperscript{134} As Justice Ginsburg noted in \textit{Ledbetter}, “[c]omparative pay information . . . is often hidden from the employee’s view.”\textsuperscript{135} This was certainly true in \textit{Silvestris}, where the female teachers, whose salaries were set when they were hired in 1993 and 1995, did not discuss starting salaries with their male counterparts until a new male teacher was hired in August 1998 and placed in a surprisingly high salary category.\textsuperscript{136} The women pursued in-house grievance proceedings but they did not file

\textsuperscript{131} MASS. GEN. LAWS ANN. ch. 151B, § 4(1) (West 2004) (“It shall be an unlawful practice: 1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation . . . or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.”); MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2004) (“No employer shall discriminate in any way in the payment of wages as between the sexes . . . .”).
\textsuperscript{132} \textit{Silvestris}, 847 N.E.2d at 330.
\textsuperscript{133} \textit{Id.} at 331.
\textsuperscript{134} \textit{Id.} at 331, 336 (“[T]he governing statute of limitations was six months.”).
\textsuperscript{136} \textit{Silvestris}, 847 N.E.2d at 333-34.
their claim with the Massachusetts agency equivalent to the EEOC until one year later when they received a document containing specific salary information about other teachers.137

Under reasoning similar to Ledbetter, the Silvestris court declined to follow a continuing violation claim, which is usually reserved for the hostile work environment setting, in this pay discrimination case.138 Unlike Ledbetter, however, the court in Silvestris elected to temper the "unfairness" of a bright-line statute of limitations in this situation "where the wrong is 'inherently unknowable'" by applying the discovery rule.139 The court explained that the burden of proof is on the plaintiff to show that a reasonable person would have filed the claim when she did.140 The primary issue facing the court is "when a plaintiff knew or should have known of the existence of a cause of action."141 Applying the discovery rule, the court held for the defendant, finding that the plaintiffs should have filed their claim in 1998 when they had sufficient information to suspect discrimination from conversations with their male coworkers.142 Thus, the substitution of the discovery rule for a harsher bright-line application of the statute of limitations did not disadvantage the defendant.

The equitable doctrines discussed above offer a means of tailoring the judicial scrutiny of a timeliness question to the unique facts in a pay discrimination claim, which are often fuzzy. Although the salary setting decision is a discrete action, it is often made behind closed doors, and co-workers do not normally compare their salaries absent a reason to be suspicious — as in Silvestris and Ledbetter.143 It simply does not make sense to apply a bright-line rule where the passage of one day can change the plaintiff's right to a claim in a setting where the facts are typically gray. In addition to the usefulness of equitable doctrines, the Ledbetter decision also demands scrutiny of the role of the EEOC's interpretations of congressional intent in Title VII cases.

137. Id. at 335.
139. Silvestris, 847 N.E.2d at 336.
140. See id. at 337.
141. Id.
142. Id. at 338.
143. See The Fair Pay Restoration Act: Ensuring Reasonable Rules in Pay Discrimination Cases, Hearing on S. 1843 Before the S. Comm. on Health, Ed., Labor, & Pensions, 110th Cong. (2008) [hereinafter Hearing] (statement of Lilly Ledbetter) ("I only started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three other male managers were getting paid.").
VIII. FORTIFYING THE ROLE OF THE EEOC

Through the Civil Rights Act of 1964, Congress created the EEOC, an independent federal agency.\textsuperscript{144} In addition to Title VII, the EEOC oversees enforcement of the EPA, the ADEA, the ADA, the Rehabilitation Act of 1973, and the Civil Rights Act of 1991, which amended Title VII.\textsuperscript{145} The dispositive issue in \textit{Ledbetter} was whether her filing with the EEOC was timely — within 180 days of the discriminatory decision.\textsuperscript{146} It is counterintuitive that the agency created to enforce Title VII and that takes the primary pass on the facts of a potential case of discrimination would have misinterpreted Congress's intent. But, in fact, this is the very reason Justice Alito used to deny deference to the EEOC's interpretation of the paycheck accrual rule.\textsuperscript{147} This is particularly alarming because the EEOC is statutorily empowered by Congress to:

- carry out educational and outreach activities . . . to — (A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and (B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this subchapter or such law, as the case may be.\textsuperscript{148}

This presents a major issue where the agency that educates possible victims of discrimination on their rights under Title VII is offering advice based on interpretations that the Supreme Court will overturn without any deference (\textit{Chevron})\textsuperscript{149} or respect (\textit{Arabian}).\textsuperscript{150} While

\textsuperscript{147} Id. at 642 n.11 ("But we have previously declined to extend \textit{Chevron} deference to the Compliance Manual, [citing \textit{Morgan}] and similarly decline to defer to the EEOC's adjudicatory positions. The EEOC's views in question are based on its misreading of \textit{Bazemore}.")
Chevron deference may not be necessary, I propose that an alternative to amending the substantive content of Title VII would be amending § 705 to grant more authority to the EEOC in terms of its interpretations of Title VII to complement its power to educate.

A. Chevron Deference and Arabian Respect

Justice Alito supports his assertion that Chevron deference is not required in Ledbetter by referencing footnote six in Morgan.\(^\text{151}\) Chevron deference is a high level of deference given to an agency's statutory interpretation under certain circumstances.\(^\text{152}\) While it generally makes sense that Chevron deference was not applicable in Ledbetter because Chevron set forth a specific framework for analyzing whether an agency's statutory construction accords with congressional intent, and, in Ledbetter, the EEOC was interpreting court-created precedent (Bazemore), Chevron is not the only case discussing judicial posture toward agency actions.\(^\text{153}\)

Justice Alito states in Ledbetter that EEOC compliance manuals do not receive Chevron deference, and he references Morgan in support of this point.\(^\text{154}\) The referenced footnote in Morgan provides a more substantial explanation of the level of deference due to the EEOC's interpretations and references Arabian.\(^\text{155}\) In Arabian, the Supreme Court discussed the level of deference appropriate to the EEOC:

Recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations," we held that the level of deference afforded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Because the EEOC in Arabian had changed its position on the issue of whether Title VII applies to United States citizens working abroad,

\(^\text{151} \) Ledbetter, 550 U.S. at 642 n.11.
\(^\text{152} \) Chevron, 467 U.S. at 842-45 (detailing the deference to be given an agency's interpretation of the statute it is charged with administering).
\(^\text{153} \) See id. at 842-43.
\(^\text{154} \) Ledbetter, 550 U.S. at 642 n.11.
\(^\text{155} \) Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111 n.6 (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive Chevron deference. Such interpretations are '"entitled to respect' under our decision in Skidmore . . . but only to the extent that those interpretations have the 'power to persuade.'") (citing Arabian, 499 U.S. at 257).
\(^\text{156} \) Arabian, 499 U.S. at 257 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976)).
under the standard set forth above, it failed the "consistency" prong and the Court did not give any respect to the EEOC's interpretation there.\textsuperscript{157} As a result, Congress, in finding that Arabian was wrongly decided, passed the Civil Rights Act of 1991.\textsuperscript{158} Under section 109(c) of this legislation, the definition of "employee" under Title VII and the ADA was expanded to include "U.S. citizens employed abroad."\textsuperscript{159}

Ultimately, the Civil Rights Act of 1991, which overruled Arabian as well as a number of other Supreme Court Title VII holdings, provides a useful historic lens for viewing the reaction to Ledbetter.\textsuperscript{160} The dialogue that these cases generate between the Supreme Court and Congress reveals the actual functioning of separation of powers, but also frustrates a number of Title VII plaintiffs' rights because the process is cumbersome and time-consuming. Because the EEOC interpretation in both Ledbetter and Arabian accorded with congressional intent more than the Supreme Court holdings in these cases, there is evidence that strengthening the role of the EEOC by amending the text of Title VII would permit Congress to forestall the situation where legislation clarifying congressional intent is stalled in the Senate and threatened by Presidential veto. I recommend that the judiciary grant more respect to EEOC interpretations for unique cases arising under Title VII. The principal rationale underpinning Chevron deference after all is that the agencies "working on the ground" are in a better position to interpret policy than judges.\textsuperscript{161}

\textbf{IX. PAYCHECKS AS PROPERTY AND ON LIBERTY}

Having argued that the Ledbetter holding represents an expansion and reinforcement of defendants' rights within a Title VII discriminatory pay setting, through defendants' now double-barreled recourse to equitable doctrines and the extension of the Title VII filing period to this unique claim, the critics' impression of the Ledbetter case can be summarized in one word — imbalance.\textsuperscript{162} The Ledbetter opinion reposes on a statutory interpretation of Title VII that ultimately limited Lilly Ledbetter's access to relief. Considering the

\footnotesize{\textsuperscript{157} Id. at 257-58.}
\footnotesize{\textsuperscript{159} Id. § 109.}
\footnotesize{\textsuperscript{160} See id. § 3(2) (reacting primarily to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).}
\footnotesize{\textsuperscript{161} Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .").}
\footnotesize{\textsuperscript{162} See supra note 21.}
idea of balance, the issues involved in *Ledbetter* implicate constitutional questions, *though only in the abstract.*\(^{163}\) It is instructive to compare Lilly Ledbetter’s position to that of her former employer in the aftermath of the decision.

Clearly, employers are now more than protected against the threat of stale pay discrimination claims. Over her lifetime Lilly Ledbetter received significantly less money than she otherwise would have because of her sex.\(^{164}\) Even if the decision was made many years before Ledbetter discovered the disparity, as Justice Ginsburg points out: “the cumulative effect [of the lower paychecks over time] . . . set her pay well below that of every male area manager.”\(^{165}\) The Supreme Court did not challenge the jury’s factual finding in the district court that it was “more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex.”\(^{166}\) Ultimately, Lilly Ledbetter was denied her rightful property — years of fair paychecks.

One of the most important clauses in the Constitution is the Due Process Clause, located in the Fifth and Fourteenth Amendments, which ensures that neither the federal government, nor the state governments, can deny “any person of life, liberty, or property, without due process of law.”\(^{167}\) The fundamental sanctity accorded one’s property in the Due Process Clause, literally next to one’s life and liberty, is treated in John Stuart Mill’s *On Liberty* and further contextualized by the concept of balancing rights.\(^{168}\)

In his discussion on individual liberty, Mill imagines a hypothetical situation where the liberty of one is pitted against the property of another: “An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, *but may justly incur punishment* when delivered orally to an excited mob assembled before the house of a corndealer . . . .”\(^{169}\) Mill explains that unjustified acts that could or do result in harm to others must be “controlled . . . by the active interference of mankind.”\(^{170}\) This is the outermost border of where individual liberty may be exercised without restraint.\(^{171}\) If we think

---

163. I am not arguing that Lilly Ledbetter has any constitutional claims, but the consequences of her case permit the discussion of related fundamental constitutional rights.


165. *Id.* at 660 (Ginsburg, J., dissenting).

166. *Id.* at 644 (Ginsburg, J., dissenting).

167. U.S. CONST. amend. V, XIV.


169. *Id.* (emphasis added).

170. *Id.*

171. *Id.*
of Ledbetter as the corndean whose property is at risk of deprivati-
on, the need to achieve some greater balance in the law that limits
the defendant-employer's ability to avoid punishment for the discrim-
ination that harmed Ledbetter is imperative in Mill's opinion.\textsuperscript{172} Because Mill's \textit{On Liberty} captures the fundamental philosophies that
have shaped the interpretation of the Constitution and the evolution
of American democracy, by using it as a frame to view the \textit{Ledbetter}
case, the greater societal implications of one woman's story come
into focus.

\section*{Conclusion}

Echoing the founders, Mill, and civil rights activists, Speaker
Nancy Pelosi, underscoring the significance of the House of Repre-
sentatives passage of the Lilly Ledbetter Fair Pay Act, said: "Equal
pay for equal work is a fundamental value."\textsuperscript{173} Because this simple
mantra was not honored in \textit{Ledbetter}, the result, as Justice Ginsburg
intimated in her dissent, is that employers have a double-barreled
defense in pay discrimination cases — equitable doctrines are a
mere backup method in the event that the facts cloud the bright-line
operation of the 180-day filing period to eliminate claims of discrim-
ination.\textsuperscript{174} Because this leaves the adversarial parties in Title VII
actions on unbalanced ground, this Note seeks to assess the three
ways to remedy the \textit{Ledbetter} outcome: legislation at the federal and
state level, more extensive application of the discovery rule, and a
re-envisioned role for the EEOC. While the legislation signed by
President Obama overruled the \textit{Ledbetter} holding, the process was
a halting one, with many obstacles.\textsuperscript{175} The discovery rule is a promis-
ing alternative because it would provide for a case-by-case analysis
of pay discrimination claims that are filed outside the period, result-
ing in a true balancing of the parties' rights. Yet the discovery rule
cannot be applied piecemeal across states — the issue must be taken
up by the Supreme Court for the doctrine to gain real credibility.
Finally, the option of granting more authority to the EEOC is also
appealing because it would enable the EEOC to operate as a channel
for discourse between the branches rather than as an impotent arm
of the legislature.

\begin{itemize}
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} Press Release, Office of the Speaker of the House, \textit{supra} note 95.
\item \textsuperscript{174} \textit{Ledbetter}, 550 U.S. at 643-61 (Ginsburg, J., dissenting).
\item \textsuperscript{175} \textit{See supra} note 110 and accompanying text.
\end{itemize}
Powerful women have spoken out on behalf of Lilly Ledbetter. But in her own words, Lilly Ledbetter's stance is unadorned and simple: "Goodyear may never have to pay me what it cheated me out of. But if this bill passes, I'll have an even richer reward because I'll know that my daughters and granddaughters, and all workers, will get a better deal." 176

KATIE PUTNAM*

176. Hearing, supra note 143 (statement of Lilly Ledbetter).

* Editor-in-Chief, William & Mary Journal of Women and the Law; J.D. Candidate 2009, William & Mary School of Law; B.A. 2004, summa cum laude, Mount Holyoke College. All my love and thanks to my parents, my brother, and my friends.