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Title VII's Protection Against Pay Discrimination: The Impact of Ledbetter v. Goodyear Tire & Rubber Co.

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In one of its most controversial decisions in years, the Supreme Court in May issued a 5-4 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*[1] that severely undercuts the ability of pay discrimination victims to enforce their rights under Title VII, the main federal anti-employment-discrimination statute.[2] In its decision, the Court applied the statute of limitations in a way that ignored the realities of both pay discrimination claims, specifically, and workplace bias more generally. In so doing, it imposed an obstacle that will gravely inhibit the ability of bona fide discrimination victims to assert their rights. This article will examine *Ledbetter*'s negative impact on rights-claiming under Title VII and map out the legislative fix necessary to restore statutory protection against pay discrimination.

Ledbetter v. Goodyear Tire & Rubber Co.

This case was brought by Lilly Ledbetter, the only female production supervisor at Goodyear Tire and Rubber's plant in Gadsen, Alabama. An employee there for twenty years, she took early retirement in 1998, after being involuntarily transferred to a less-desirable job on the production floor. Six months prior to her retirement, Ledbetter filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging various forms of sex discrimination. At trial, a jury concluded she had indeed suffered illegal pay discrimination on the basis of sex. (Her salary was as much as 40 percent lower than that of the lowest-paid male supervisor.) The jury awarded Ledbetter over \$3.5 million, mostly in the form of punitive damages, which was reduced by the judge to \$360,000 in accordance with Title VII's cap on damages.[3]

On appeal, Goodyear argued that Ledbetter's claim had been time-barred with respect to all pay decisions made prior to September 26, 1997 -- 180 days prior to the date she filed her charge with the EEOC. The Supreme Court ultimately decided Goodyear was right. Thus, for Lilly Ledbetter, the Court's adverse decision means that the entire \$360,000 verdict in her favor must be vacated, even though she proved to a jury that multiple discriminatory decisions were made prior to September 26, 1997, that continued to affect her pay until the day she retired. Ledbetter, and most other victims of pay discrimination, will suffer for this narrow interpretation of Title VII.

The issue presented by Ledbetter's case is when pay discrimination claims must be brought in order to be timely. Title VII provides that an EEOC charge must be brought within 180 days "after the alleged unlawful employment practice occurred."[4] But when does the 180-day clock begin to run in the case of pay discrimination? That was the question presented to the Supreme Court in *Ledbetter*, to which there are three possible answers: (1) from the date of the pay <u>decision</u> that sets a discriminatory wage, (2) from the date an employee <u>learns</u> her pay is discriminatory (in the law, this is called a "discovery" rule), or (3) from the date any <u>paycheck</u> that pays an employee less because of her sex is issued (this is deemed a "paycheck accrual" rule).

Briefly, the Supreme Court opted for the first approach: According to the majority opinion, the plaintiff has 180 days after the pay decision that sets the discriminatory wage to file her charge with the EEOC in compliance with Title VII's statute of limitations. The majority declined to consider whether a discovery rule might be used to extend the statute of limitations for discrimination that is unknown to the employee and flatly rejected the paycheck accrual rule.

This ruling turned primarily on the Court's interpretation of its own precedent, a 2002 ruling in *National Railroad Passenger Corporation (Amtrak) v. Morgan*.[5] There, it had held that "discrete" acts of discrimination must be challenged within 180 days of their occurrence. In so ruling, the Court rejected the so-called "continuing violations" doctrine, under which some lower federal courts had permitted plaintiffs to challenge a series of related acts of discrimination together, as long as at least one had occurred within the 180 days prior the filing of an EEOC charge.

In *Morgan*, the Court carved out an exception for "hostile environment" harassment since, by its very nature, such a claim accrues over time and through the aggregation of multiple incidents of misconduct that together create the hostile environment. For such claims, a plaintiff can challenge harassment as long as at least one of the acts that together created the hostile environment occurred within the 180-day charge-filing period.

Thus, the issue in *Ledbetter* was whether pay discrimination claims should be treated like a discriminatory firing, where the clock starts ticking immediately, or like hostile environment claims, where the clock starts ticking anew with each incident. In an opinion written by Justice Samuel Alito, the *Ledbetter* majority ruled that the "discrete" act rule applies to pay discrimination claims, departing from the longstanding position of the EEOC, the agency charged with enforcing Title VII.

The Court's rejection of Ledbetter's claim turned on two basic conclusions: First, the Court ruled that under *Morgan*, a discriminatory pay decision is a discrete act that triggers the statute of limitations. Second, it ruled that a paycheck containing a discriminatory amount of money is not a present violation, but, instead, is merely the present *effect* of a prior act of discrimination. "[C]urrent effects alone cannot breathe life into prior, charged discrimination," the Court wrote, "such effects have no present legal consequences."[6]

To reach the second conclusion, the Court relied on *United Air Lines v. Evans*, in which it had dismissed the discrimination claim of a flight attendant who had been wrongfully terminated and then rehired -- without seniority -- years later.[7] The Court refused to permit her to challenge the loss of seniority, since it held that that was just an "effect" of the prior, uncharged wrongful termination. The Court also relied on *Delaware State College v. Ricks*,[8] in which a librarian who had been denied tenure, allegedly on the basis of race, was not permitted to sue within 180 days of his termination, since the notice of the tenure denial had been communicated to him a year earlier. Again, the Court held that the actual termination of his teaching contract was merely an effect of the allegedly illegal denial of tenure, rather than a present violation of Title VII.

In relying on these precedents, the Court in *Ledbetter* effectively ignored another line of precedents in which it had applied a different rule to pay claims. For example, in *Bazemore v. Friday*, all members of the Court joined Justice Brennan's separate opinion, in which he wrote: "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[9] The Court in *Ledbetter* attempted to distinguish *Bazemore* on the theory that the employer had carried forward a discriminatory pay structure rather than a discriminatory pay decision. But a paycheck that is deflated because of a prior decision to pay an individual woman less because of her sex is no less a discrete instance of discrimination than one that is deflated because of a prior decision to pay all women less because of their sex. As Justice Ginsburg argued in dissent, the majority's opinion in *Ledbetter* means that "[a]ny annual pay decision not contested immediately (within 180 days) . . . becomes grandfathered, a *fait accompli* beyond the province of Title VII ever to repair."[10] An employer could pay a woman less than her male counterparts for her entire career, and admit that the reason for doing so is because she is female, as long as the decision to set the discriminatory wage happened at least six months earlier.

Ledbetter's Inhibition of Rights-Claiming for Pay Discrimination Victims

In order to prevail on a pay discrimination claim after *Ledbetter*, a victim must quickly perceive that she has suffered discrimination and promptly report it. But that is a rare occurrence rather than the usual case. *Ledbetter*'s insistence that discriminatory pay decisions be challenged within 180 days is blind to the difficulties employees face in perceiving and challenging pay discrimination.

Obstacles to Perceiving Discrimination

There are many obstacles to victims' perceiving discrimination in the workplace.[11] For example, there is a well-documented "minimization bias" that leads targets to resist perceiving and acknowledging discrimination even in the face of conduct that objectively qualifies as discrimination.[12] Researchers have also shown that victims tend to downplay the likelihood of discrimination and attribute negative outcomes to other causes when discrimination is less obvious.[13] In addition, social psychologists have shown that women, and members of other historically disadvantaged social groups, are reluctant to perceive themselves as victims of discrimination because it conflicts with deeply-ingrained beliefs that the world is meritorious and individuals are responsible for their own fate.[14]

Another factor that influences an individual's perception of bias is her sense of entitlement. An individual's belief that she has experienced discrimination is contingent upon her belief in the illegitimacy of her current treatment.[15] However, women's sense of entitlement is skewed by the general tendency to perform intra-group comparisons. Women tend to compare themselves to other women – not to similarly-qualified, similarly-skilled men -- in evaluating their treatment. For example, working women tend to evaluate the fairness of their current pay by reference to what other women earn, and what they themselves have earned in the past.[16] Such within-gender comparisons by women lead to diminished salary expectations. In studies where men and women are asked to set their own rates of pay for performing a specified task, men typically pay themselves one-third more than what women pay themselves for the same task.[17] Recognizing that one's wage is deflated, and the product of discrimination, is thus difficult.

In addition, the limited availability of information, paired with limits upon the way people process the information that is available, further thwarts people's ability to quickly perceive sex discrimination. Studies have found that people resist perceiving individual instances of sex discrimination under normal conditions of information-gathering -- in which information trickles in piece-by-piece, showing individual instances of different treatment. People are much more likely to perceive discrimination when information regarding disparities is presented all at once -- showing across-the-board, organization-wide comparisons between men and women.[18] Since employees almost never have access to that kind of global, synthesized information, individual instances of discrimination frequently go unnoticed.

These problems make perceiving sex discrimination difficult in general, but they are greatly compounded for pay discrimination. While the results of hiring, firing, promotion, demotion, and transfer decisions are generally commonly known and discussed, employee compensation is typically hidden under a veil of secrecy.[19] Victims of pay discrimination are hampered by the lack of transparency in employee compensation systems and a code of silence governing workplace salaries. Employers rarely disclose company-wide salary information, and workplace norms often discourage frank and open conversations among employees about salaries. As a result, employees rarely know what their colleagues earn, much less what raises and adjustments are given out to others at each and every pay decision. This lack of transparency makes perceiving pay discrimination even more difficult than perceiving other types of discrimination.

An employee who learns that she will receive a 5% raise, for example, will have little reason to suspect pay discrimination, without knowing, at the very least, what raises others have received. Indeed, the discriminatory pay gap may begin with no change at all in an employee's pay, but rather with a decision to increase the pay of a male colleague, while leaving her pay unchanged for a discriminatory reason. And without access to full information about all of their colleagues' salaries and the underlying reasons (whether legitimate or discriminatory) for the pay differences among them, it is next to impossible for an employee to accurately perceive individual instances of pay discrimination.[21]

The burden that *Ledbetter* places on new employees to quickly perceive pay discrimination is particularly acute. The kind of informal connections through which employees learn the salaries of their peers do not exist for new employees. New employees are not likely to learn about pay discrimination until much later, after the offending pay decisions have long been in place.

Obstacles to Challenging Discrimination

Perceiving bias in pay before the limitations period expires is only half the problem. Even if an employee fortuitously learns that a recent pay decision was tainted before the 180 days elapse, there are significant obstacles to challenging discrimination that is accurately perceived. Research shows that employees rarely challenge discrimination, even when it is obvious.[22] Even in the harassment context, for example, where the discrimination tends to be relatively blatant, filing a complaint is a last resort, after other strategies have failed.[23]

The high risk of retaliation and the social costs imposed on people who complain about discrimination sharply discourage women from reporting it to authorities or legal institutions.[26] The fear of retaliation is the primary reason why people choose not to challenge discrimination.[27] Although it is impossible to know exactly how often retaliation occurs in response to a discrimination claim, the evidence suggests that such fears are not misplaced.[28] Even if employers do not overtly retaliate, the social costs accompanying claims of discrimination are also difficult to bear.[29] People are not well-liked when they report discrimination. They are viewed as troublemakers and experience reputational harm, even when their claims clearly have merit.[30] As a result, the risks of retaliation are great and many employees are understandably reluctant to rush to file a discrimination claim. Such reluctance is especially likely if the pay disparity is relatively minor, yet, as we noted above, even minor pay disparities can add up to a very significant discrimination-based deficit over time.

Challenging discrimination is likely to be especially costly for new employees, who are less able to secure Title VII's promised protection from retaliation. In a retaliation claim, it is the employee's burden to prove that the retaliatory measure was taken because the employee complained of discrimination, rather than for some legitimate, nondiscriminatory reason. Filing a complaint, even a meritorious one, against one's employer within the first six months makes that next to impossible. Unlike longstanding employees, new employees will not have the benefit of an established work record (likely complete with periodic positive evaluations) that is necessary to prove that an adverse action was retaliatory and not based on job performance.

In light of the personal costs of reporting discrimination, an employee who is aware of pay discrimination might reasonably tolerate it for some time, until the discrimination deficit becomes too much for her to tolerate.Yet, under *Ledbetter*, once a salary review takes place, the employee loses her chance to challenge pay discrimination first set in motion by prior decisions.

In addition to these difficulties, *Ledbetter* creates a dilemma for employees who complain to their employers too soon. A natural response to *Ledbetter* would be for employees to complain to their employers the moment they suspect pay discrimination. However, in a doctrinal Catch-22, an employee who complains to her employer too soon may find herself in an even worse position: out of a job because she complained, and with no legal recourse for the retaliation she suffered.

Under *Clark County School District v. Breeden*, the Supreme Court held that an employee who opposes what she believes (inaccurately) to be unlawful discrimination is protected from retaliation only if she had a "reasonable belief" that the practice she opposed in fact violates Title VII.[31] The plaintiff in *Breeden* internally complained about a sexually explicit colloquy between her supervisor and a coworker during a meeting that she found offensive. She was subsequently assigned to less desirable job duties and relieved of her supervisory responsibilities – as a result, she alleged, of her speaking out.

Title VII outlaws not only discrimination, but retaliation done to punish those who speak out about it. Yet the Supreme Court rejected Breeden's retaliation claim on the ground that even if she had experienced retaliation in response to her complaint, no reasonable employee could have believed that the sexual dialogue would, without more, create a hostile environment in violation of Title VII. In other words, if Breeden had waited until further offensive comments were made on other occasions to speak out, then she might have been able to win her retaliation claim. This standard leaves employees unprotected from retaliation if they oppose an employment practice too soon. Lower courts have applied this standard harshly, leaving plaintiffs unprotected for acting on their subjective beliefs that certain employer conduct is discriminatory without sufficient factual and legal support for proving an actual violation of Title VII.

The dilemma for pay discrimination claimants is clear: It may take a pattern of substantial pay disparities in order to establish an inference that the gap in pay is attributable to gender bias, rather than to some legitimate nondiscriminatory reason such as performance or experience. If the plaintiff waits too long, she loses her ability to challenge continuing discrimination in pay, even as the gap increases through neutral percentage-based raises. Yet if she complains to her employer at the first sign of a pay gap, she risks lacking an adequate foundation for a "reasonable belief" that the gap is attributable to gender discrimination -- leaving her vulnerable and unprotected from retaliation in response to her complaint.

The only way out of this dilemma is for the employee to immediately file a charge with the EEOC at her very first suspicion of pay discrimination, without saying a word to her employer or anyone in the workplace -- since *Breeden*'s reasonable belief standard applies only to forms of "opposition" short of the formal EEOC charge-filing process. Once a formal EEOC charge is filed, protection from retaliation kicks in, regardless of whether the plaintiff reasonably or unreasonably believed a violation occurred.

One of the stranger results of the *Ledbetter-Breeden* dilemma is to encourage employees to avoid precisely the kind of informal, prompt resolution and conciliation of disputes that the majority in *Ledbetter* insists Title VII intends. Rather than risk speaking out to find out more information or try to improve the situation within a given company, employees are pressured to go straight (and silently) to the EEOC.

The Supreme Court's ruling in *Ledbetter* inhibits the ability of pay discrimination plaintiffs to claim their substantive rights under Title VII. This narrowing of protection through the erection of procedural obstacles not only insulates pay discrimination from challenge, but will also exacerbate the longstanding, and seemingly intractable, gender wage gap. In the remaining sections, we review the data on the gender wage gap, consider the inadequacy of existing statutory protection, and map out specific action Congress could take to restore Title VII's robust protection against pay discrimination and workplace discrimination more generally.

The Persistent Gender Wage Gap and the Need for Congressional Action

The gender-based wage gap in the United States is persistent and well-documented. Although researchers disagree about the size of the gap, almost all agree that it exists and is significant. Current estimates of the gender wage gap hover between seventy and eighty percent—meaning that a woman, on average, earns seventy to eighty cents for every dollar earned by a man.[32] The pay gap is especially pronounced for African-American women and Hispanic or Latino women, who earn even less on the dollar compared to white men.[33]

The gender wage gap exists at every level of earnings, but is largest at top of the earnings spectrum. For example, "Physicians and Surgeons," is the highest paid occupational category for both sexes, yet the female median ($88,000) is only 63% of the male median ($140,000).[34] The wage gap remains significant at the bottom of the earnings spectrum, however, especially since the effect of real-dollar differences may be felt most acutely by lower-wage workers.[35]

Although the gender wage gap today is narrower than the 1970s measure of fifty-nine cents on the dollar, the bulk of the change occurred during the 1980s, and studies show little additional progress since 1990.[36] Moreover, the disparity in men's and women's wages extends, with some variation, throughout the employment lifecycle. Women in their 40s and 50s earn salaries more disparate from their male counterparts than do women at the beginning of their careers.[37] When earnings over a longer period of time are aggregated, the gap is even starker. In their prime earning years, women earn only 38 percent of what men earn over a 15-year period.[38]

Discrimination accounts for a significant part of the wage gap. Although there are plausible nondiscriminatory reasons for pay differences between men and women, none of them, even in the aggregate, explains the entire gap.[39] For example, part of the wage gap is sometimes attributed to differing degrees of labor force attachment between men and women. Yet, women who work year-round and full-time during at least 12 of 15 consecutive years earn only 64 percent of what men with a similar attachment to the labor force earn.[40]

Differences in the number of hours worked also fail to explain the gender disparity in wages. Hour-for-hour, women earn less than men.[41] Similarly, differences in education explain little of the wage gap. According to 2000 Census data, the "only women aged 35-54 to earn more than 71.4 percent of men at the median are those with some college education, but only a bit more, 72.1 percent."[42] Most importantly, when studies simultaneously control for multiple variables such as education, occupation, hours worked, and time away from the workplace because of family care responsibilities, a significant gender gap remains.[43]

While debate continues over how much of the gender wage gap is explained by discrimination, clearly some employers continue to practice pay discrimination. For example, employers penalize women for expected leave-taking out of proportion to the patterns many women actually follow.[44] There is also a well-documented "wage premium" for married men, but not for married women, and a wage penalty of 10-15% for women who have children.[45] Major U.S. corporations have settled multi-million dollar lawsuits for pay discrimination in recent years.[46]

Most importantly, discriminatory pay decisions are not an isolated event. Rather, they continue to reverberate throughout a woman's employment life. Even small pay disparities are typically magnified by percentage-based pay adjustments and morph over time into a devastating disadvantage. Linda Babcock and Sara Laschever found that a $4,000 (7.6%) starting pay disparity between a male and a female employee, followed by 3% annual raises, would evolve into a $15,000 annual disparity by age 60. That means the female employee may lose a total of $361,171 over her employment life, while the male employee gains a staggering $568,834 assuming he earns even a modest three percent in interest on the difference.[47]

Despite modest progress in narrowing the wage gap, sex discrimination in compensation persists, and the need for strong protection under Title VII is as great as ever. *Ledbetter* will exacerbate the existing problem of gender-based pay disparities, making the need for Congressional intervention more pressing than ever.

The Inadequacy of Current Legal Protections

With *Ledbetter*, current law provides inadequate protection against pay discrimination, particularly given the difficulties individual victims have in perceiving and challenging discrimination.

Protection under the Equal Pay Act

Some pay discrimination victims will find supplementary protection in the federal Equal Pay Act of 1963, which follows the paycheck accrual rule, and may thereby enable them to avoid *Ledbetter*'s harsh statute of limitations.[48] The Equal Pay Act requires employers to pay men and women equally if they do substantially similar work, with possible defenses for pay disparities resulting from merit-based systems, seniority systems, or a factor other than sex. A plaintiff may challenge an ongoing violation of the Equal Pay Act at any time, and may seek recovery for the prior two years of discrimination (or three years, if the violation is "willful").

The existence of the Equal Pay Act as an alternative statutory remedy for sex discrimination in pay does not, however, solve the problems created by the *Ledbetter* ruling. First, much pay discrimination that violates Title VII is not covered under the Equal Pay Act. The Equal Pay Act is limited to cases where the plaintiff can point to a comparator of the opposite sex who does the same work in the same job for more money. Title VII, in contrast, reaches all claims of intentional pay discrimination, regardless of whether there is an opposite-sex comparator who earns more. For example, a woman who holds a unique job in a workplace, or simply a job that is not the equivalent of any job performed in that workplace by a higher-earning man, will have no hope of prevailing under the Equal Pay Act, even if can clearly be proven that the employer paid her less because of her sex.

Second, the Equal Pay Act does not fully remedy even that pay discrimination that it does cover. Unlike Title VII, the Equal Pay Act does not permit compensatory or punitive damages. It is limited to back pay and, in certain cases, fixed and limited liquidated damages. The limited relief under the Equal Pay Act is wholly insufficient to create significant incentives on employers, especially large employers such as Goodyear, to prevent pay discrimination in the workplace, or to provide full remedies to the victims of pay discrimination.

The unfortunate consequence of the Court's ruling in *Ledbetter* is to effectively nullify Title VII's broader reach by imposing a harsh and unrealistic filing deadline, leaving women only the protection of the narrower Equal Pay Act. This is an odd result, given that Title VII was passed after the Equal Pay Act and was intended to <u>broaden</u> pre-existing federal legal protection from sex discrimination. Moreover, the consequences are even harsher for victims of pay discrimination on bases other than sex: They are not protected by the Equal Pay Act at all. Victims of race-based pay discrimination, for example, will have no recourse if their claims are more than 180-days old. Women of color, in particular, who already have difficulty sorting out the "race" from the "gender" components of bias in court cases, will have a particularly tough road to navigate. This seems especially unfair, as women who may be suffering two types of pay discrimination that converge, may end up having no viable case at all.

Discovery Rules and Equitable Tolling

The majority in *Ledbetter* held that the limitations period begins to run when the "discriminatory pay decision was made and communicated," but it failed to provide clarification about what kind of information suffices to put an employee on notice that such a decision has been made. Is it enough for the employer to simply specify the employee's new pay level? Perhaps, more charitably, the majority meant that the time period starts running once the employee learns that she will receive an amount that is less than some of her male comparators who perform similar work? Or that she will receive a specified percentage raise that is less than the raises received by others? The Court's refusal to address such questions suggests its lack of concern for the plight created for employees under this new rule.

The harshness of *Ledbetter* is exacerbated by the Court's express refusal to consider whether a "discovery rule" applies to Title VII claims. (Such a rule, if adopted, operates to delay the statute of limitations until a plaintiff has "discovered" her injury.) The Court dismissed as "policy arguments" the concerns raised by the dissent about the hardship for employees who do not learn about pay disparities until it is too late to file a charge. The Court's silence invites lower courts to design their own approach to handling delayed claims.

In prior rulings, lower federal courts have split over the existence and scope of a discovery rule under Title VII or other federal anti-discrimination laws. The Fourth Circuit, for example, refused to apply a discovery rule to toll the statute of limitations in in *Hamilton v. 1st Source Bank*,[49] a case alleging wrongful discharge under the Age Discrimination in Employment Act. In *Hamilton*, the plaintiff learned during the discovery process for his age discrimination lawsuit that he was paid less than younger employees in the same position. Based on this information, he filed a new complaint for pay discrimination, also under the ADEA, seventeen months after he had been discharged by the employer. The plaintiff specifically requested that the court apply a discovery rule to his pay discrimination claim, but the Fourth Circuit found the claim time-barred because "the 180-day period for filing claims begins to run from the time of an alleged discriminatory act."[50]

Other federal appellate courts have acknowledged the existence of a discovery rule in the context of federal anti-discrimination laws, but have construed it narrowly. The Seventh Circuit's ruling in *Cada v. Baxter Healthcare Corp.* is a good example.[51] The plaintiff in that case brought an age discrimination suit against his employer when, after telling a manager at the company that he would not be retiring, he was told he would be terminated. The plaintiff did not believe the manager had the authority to fire him, but the termination was reaffirmed by his direct supervisor in a meeting a few weeks later. His suit was filed within the limitations period[52] of the meeting with his actual supervisor, but not of the conversation with the manager who first promised to fire him. The Seventh Circuit in *Cada* recognized the existence of a discovery rule, but declined to apply it since it believed the date of accrual was the day the plaintiff was first informed he would be fired.

Application of a discovery rule in the pay discrimination context is likely to be particularly unhelpful. A court would likely start the limitations period running from the time the employee learned that a male comparator earned a higher salary,[53] even if the employee had no reason to suspect that discrimination has occurred.[54] Such an approach would not solve the problems with perceiving discrimination. Even if an employee fortuitously learns of a male colleague's salary, this information is unlikely to be accompanied by an explanation from the employer, broader wage data on the workplace, overt signs of prejudice, or any of the other information that enables employees to attribute adverse actions to discrimination. Current interpretations of the discovery rule make it an ineffective tool for protecting employees who do not have reason to suspect discrimination.

Equitable tolling can be used to delay the limitations clock where an employee does not have reason to suspect discrimination. While courts generally acknowledge the availability of this device in Title VII, its typical application is too limited to affect most cases. Many courts do not toll the limitations period based on the employee's lack of information unless the employer actively concealed relevant facts or actively misled the employee into believing she did not have a claim. But employer concealment of wrongdoing is not the main reason victims fail to perceive pay discrimination.

Moreover, equitable tolling rules have other limitations. For example, pursuing a discrimination allegation through an employer's internal complaint process does not toll the limitations period. An employee who first pursues a suspicion of discrimination through the employer's internal procedures in an effort to find out what happened and try to resolve it internally will be foreclosed from filing a Title VII charge if she waits until that process ends and the 180-day time period passes. The failure to toll the limitations period while employees pursue internal procedures for redress creates an incentive to channel employee complaints into lengthy internal procedures and run out the clock so that employees lose their chance to file a formal claim.

The absence of a meaningful discovery rule and fair equitable tolling rules makes plaintiffs' compliance with *Ledbetter* all the more difficult, yet adoption of such rules will not solve the problem. At best, these are stop-gap measures that can help avoid injustice in rare situations. Even a broad discovery rule would not appreciably ease the burdens on employees to quickly perceive and challenge discrimination. Rather than hope for the best in the lower courts, Congress should step in to overturn the *Ledbetter* ruling.

Mapping Out a Congressional Fix for *Ledbetter*

On June 12, the House Education and Labor Committee held a hearing on the *Ledbetter* ruling to consider whether to take legislative action to restore Title VII's protection against pay discrimination. The Chairman of that Committee, Congressman George Miller (D-CA), subsequently introduced The Ledbetter Fair Pay Act of 2007, which would overturn the Court's decision and restore the paycheck accrual rule. Congress should take this opportunity not only to fix the specific problems created by the *Ledbetter* decision, but to explore other Title VII deficiencies that deprive discrimination victims of full and fair remedies for their harm as well.

Adopting a Paycheck Accrual Rule

The most direct response by Congress to *Ledbetter* would be to adopt a paycheck accrual rule by statute, restoring the approach that courts took prior to the Supreme Court's wayward ruling. This is effectively what the proposed Ledbetter Fair Pay Act would enact.

Justice Ginsburg closed her dissent in *Ledbetter* with the exhortation that "[o]nce again, the ball is in Congress' court," a reference to the Civil Rights Act of 1991, a federal law that overturned a spate of Supreme Court decisions adopting stingy readings and narrow interpretations of Title VII and other civil rights statutes. One of the decisions overturned by the 1991 Act was *Lorance v. AT&T Technologies*.[55] The Court in *Lorance* took a near-identical approach to filing requirements for challenging a discriminatory seniority system as it did in *Ledbetter* for pay discrimination. In the ruling, the Court held that employees had to challenge the discriminatory seniority system within 180 days of when it was first adopted, rather than within 180 days of when it was first applied to them.

Congress specifically overturned the *Lorance* ruling in the 1991 Act, correcting the injustice of barring employees from challenging discrimination that was perpetuated each time the seniority system was applied.[56] Although the statutory correction was specifically directed to seniority systems, the legislative history reflects Congress' broad disapproval of the reasoning and the result. In fact, an interpretative memorandum written by Senator Danforth, a key player behind the 1991 Act, disapproved the application of *Lorance* to contexts outside of seniority systems.[57]

In *Ledbetter*, however, the Supreme Court ignored this legislative history and relied on the now-repudiated *Lorance* to support of its similar approach to pay claims. As Justice Ginsburg points out in her dissent, the Court has "not once relied upon *Lorance*" in the "more than 15 years" since Congress passed the 1991 Act, and "[i]t is mistaken to do so now."[58]

The Court's failure to take the lessons of the 1991 Act to heart makes the need for Congress to revisit its teachings all the more pressing. Specifically, Congress should pass the Ledbetter Fair Pay Act and restore the paycheck accrual rule—permitting employees to challenge pay discrimination that extends into the filing period regardless of when it first began—that lower courts had applied before *Ledbetter*.

Lengthening the Statute of Limitations

At the root of the problem for rights-claiming under Title VII is the statute's unusually short statute of limitations. Under current law, a victim of employment discrimination must file a charge with the EEOC within 180 days "after the unlawful employment practice occurred."[59]

When Title VII was first enacted in 1964, the statute of limitations was a mere 90 days, a provision meriting little discussion beyond the occasional reference to the problem of stale claims.[60] Congress extended the limitations period to 180 days in 1972 to bring it into line with the National Labor Relations Act, the federal law that regulates unions.[61] Although Title VII's statute of limitations is 2-3 years shorter than the applicable period for most civil lawsuits, no serious effort was made to extend it again until 1990.

A proposed Civil Rights Act of 1990, a bill that was ultimately vetoed, included a provision extending the statute of limitations to two years. The proposed extension was intended to bring Title VII into line with other federal anti-discrimination laws. The House report on the bill criticized the existing limitations period because of the "substantial time" it takes for an individual to realize discrimination has occurred, to become educated about what remedies are available, and to seek the assistance of counsel. Opponents repeated familiar concerns about "stale claims."[62] A very similar bill was introduced in 1991, again including a two-year limitations period for discrimination claims brought under Title VII.[63] This provision was contested and ultimately removed from the bill adopted as the Civil Rights Act of 1991. Opponents cited concerns about Title VII's goal of "prompt resolution" and the potential expansion of liability for businesses.[64]

Since 1991, no serious effort to extend Title VII's statute of limitations has been made. Yet, such an extension would alleviate many of the unfair pressures currently placed on discrimination victims. Time, it turns out, is important to the realization of discrimination and the development of the willingness to complain, not to mention more mundane steps like figuring out how to file a complaint, marshalling the resources necessary to engage in litigation, and finding a lawyer who will take the case, and so on. There is no good reason why a person who slips in a grocery store aisle because of an uncleaned spill should have two years longer than a person who suffers pay discrimination to figure out what happened, who is to blame, and how to enforce her rights.

Lifting the Caps on Damages

Justice Ginsburg also noted, in her dissent in *Ledbetter*, the unfairness that arises from the non-uniformity among federal civil rights laws. Women, for example, may be able to seek redress some types of pay discrimination through the Equal Pay Act, thereby avoiding the Court's harsh rule in *Ledbetter.* But victims of pay discrimination based on race, for example, will not have that option. And even for women, as explained above, the Equal Pay Act is inadequate to fill the gaps in Title VII's protection created by *Ledbetter*.

There is yet another kind of inequity resulting from the non-uniformity of our federal civil rights laws that is blatantly apparent from the *Ledbetter* case. Because *Ledbetter* involved a claim for sex discrimination under Title VII, the plaintiff's damages were capped by the statutory limit of $300,000 applicable to large employers. The $300,000 limit applies to combined compensatory and punitive damages, and to all claims in the case. An employer that violates the statute in numerous ways, for example, by retaliating against the employee as well as engaging in discrimination and harassment, cannot be liable for more than $300,000 in combined damages on all claims. The cap applies to Title VII violations *except* for claims challenging conduct covered by Section 1981, which bars race discrimination in the making and enforcement of contracts, including employment contracts. Thus, damages from sex discrimination are capped under Title VII, while damages for race discrimination, in violation of Section 1981, are not.

The *Ledbetter* case is a good illustration of the caps in practice. The jury awarded Ledbetter of over $3.5 million, which included a substantial punitive damages award to punish Goodyear for its gross misconduct. Because of the caps, however, this award was reduced to $360,000, the maximum allowable combined compensatory and punitive damages plus an award of $60,000 in back pay. With the caps in place, a company such as Goodyear stands to lose very little by violating Title VII, even if its conduct is blatant and egregious.

Even when adopted in 1991, a $300,000 cap on damages (even lower for smaller employers) was ill-advised for a statute purportedly designed to deter employers from violating Title VII. Sixteen years later, it obviously provides insufficient monetary penalties to deter violations of the law. Surely one of the lawyers at Goodyear could have easily discovered that the Gasden plant paid its only female manager a substantially lower salary than each of its fifteen male managers, and indeed, had never paid a female manager equally to a man. If the penalties for violating Title VII were more substantial, companies like Goodyear would have more incentive to be proactive, and to make sure that they complied with equal pay requirements.

Congress should thus lift the statutory cap on damages in Title VII so as to permit plaintiffs full recovery for intentional employment discrimination and impose sufficient incentives on employers to deter discrimination in the first place.

Conclusion

Ledbetter v. Goodyear has seriously undercut federal statutory protection against pay discrimination. Given the entrenched gender wage gap and the documented existence of pay discrimination, this is a ruling under which female employees cannot afford to labor. Fortunately, as it has done in the past with similar judicial retrenchments from civil rights protections, Congress can undo the damage with legislative action. At a minimum, Congress should adopt a paycheck accrual rule by statute. But beyond that, Congress should take this opportunity to make other needed corrections to Title VII: lengthening the statute of limitations and eliminating the cap on damages. These changes would grant employees a fair chance at challenging unlawful pay discrimination and other forms of workplace bias.

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Notes

[1] 127 S.Ct. 2162, 167 L. Ed. 2d 982 (2007).
[2] 42 U.S.C. § 2000e *et seq* (2000).
[3] 42 U.S.C. § 1981a (2000) (combined compensatory and punitive damages for each complaining party cannot exceed $300,000 for employers with more than 500 employees). In addition to the $300,000 in damages, the award also reflected $60,000 in back pay.
[4] 42 U.S.C. § 2000e-2(a)(1) (2000). The limitations period is 300 days in states with a work-sharing agency. *Id.*
[5] 536 U.S. 101 (2002).
[6] *Ledbetter*, 167 L.Ed. 2d 982, 992 (2007).
[7] 431 U.S. 553 (1977).
[8] 449 U.S. 250 (1980).
[9] 478 U.S. 385, 395 (1986) (*per curiam*).
[10] *Ledbetter*, 167 L.Ed. 2d 981, 1002 (2007).
[11] *See* Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 Columbia J. Gender & L. (forthcoming 2007) (on file with authors).
[12] *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005) (summarizing applicable social science research).
[13] *See* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry 801 (2006); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, *in* The Handbook of Research on Employment Discrimination: Rights and Realities 279, 285-87 (Laura Beth Nielsen & Robert L. Nelson, eds., 2006).
[14] *See, e.g.,* James M. Olson & Carolyn L. Hafer, *Tolerance of Personal Deprivation*, *in* The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations 157, 159-623 (John T. Jost & Brenda Major eds., 2001).
[15] Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 Advances in Experimental Psychol. 293, 325-26 (1994) ("beliefs about entitlement are a critical determinant of how members of social groups react affectively, evaluatively, and behaviorally to their socially distributed outcomes").
[16] *See* Olson & Tafer, *supra* note 14, at 166-67.
[17] *See* John T. Jost, *Negative Illusions: Conceptual Clarification and Psychological Evidence Concerning False Consciousness*, 16 Pol. Psychol. 397, 404 (1995).

[18] *See* Faye Crosby, *The Denial of Personal Discrimination*, 27 Am. Behav. Sci. 371, 377-78 (1984).
[19] *See, e.g.*, Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004) (explaining that social norms discourage discussion of salaries in the workplace and observing that one-third of U.S. private sector employers have policies which, although illegal, bar employees from discussing their salaries, while many other employers informally communicate an expec- tation of salary confidentiality).
[20] *See, e.g.*, Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004) (explaining that social norms discourage discussion of salaries in the workplace and observing that one-third of U.S. private sector employers have policies which, although illegal, bar employees from discussing their salaries, while many other employers informally communicate an expec- tation of salary confidentiality).
[21] *Id.* at 178 ("Employees observe wage differentials without the full information necessary to evaluate the justifications for differing wages.")
[22] *See* Brake, *supra* note 12, at 28-36 (discussing and citing social science literature documenting the obstacles to challenging discrimination).
[23] *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L. J. 3, 25-26 (2003) (reviewing surveys and studies of victim response to harassment).
[24] *See* Brake, *supra* note 12, at 28-36 (discussing and citing social science literature documenting the obstacles to challenging discrimination).
[25] *See* Grossman, *supra* note 22, at 25-26.
[26] *See* Brake, *supra* note 12, at 37; Major & Kaiser, *supra* note 13, at 294-96; Kaiser & Major, *supra* note 13, at 817-22, 824.
[27] *See* Brake, *supra* note 12, at 36-37.
[28] *See id.* at 19-20 & note 1 (citing data showing retaliation claims make up a larger percentage of discrimination charges filed).
[29] *See* Kaiser & Major, *supra* note 13, at 818-22.
[30] *See id.*
[31] 532 U.S. 268 (2001).
[32] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003*, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (reporting that women's median weekly earnings were 79.5% of men's in 2003, but only 73.6% for college graduates).
[33] *See id.* at 3 cht. 2 (reporting median usual weekly earnings of $715 for white men, $567 for white women, $491 for black or African American women, and $410 for Hispanic or Latino women); *cf.* Amy Caiazza et al., Inst. for Women's Pol'y Res., *The Status of Women in the States, Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region* 24-25 (Apr. 2004) (finding wide variation in Asian American women's wages).
[34] *See* Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women* 7, 12 tbl. 5 (May 2004).
[35] *See id.* at 13 tbl. 6 (citing example of "Teacher assistants," a lower-paid occupation, where the female median, $15,000, is 75% of the male median of $20,000).
[36] *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 715 (2000).
[37] *See, e.g.,* Bureau of Labor Statistics, *supra*, at 11 tbl. 1 (finding, based on data from the Current Population Survey, that women ages 45-54 earn 73% of what men earn, while women ages 25-34 earn 87% of what men earn); Francine D. Blau et al., *The Economics of Women, Men, and Work* 150 (5th ed. 2006) ("women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age).
[38] *See* Stephen J. Rose & Heidi I. Hartmann, Inst. for Women's Pol'y Res., *Still a Man's Labor Market: The Long-Term Earnings Gap* 9 (2004).
[39] *See* Selmi, *supra* note 35, at 719-43 (reviewing data).
[40] *See* Rose & Hartmann, *supra* note 37, at 10.
[41] *See* Bureau of Labor Statistics, *supra* note 31, at 2, 25 tbl. 9, 26 tbl. 10, 35-36 tbl. 15, 37-36 tbl. 16 (reporting that among hourly workers, the median hourly wage for women is 85% of the median hourly wage for men).
[42] Weinberg, *supra* note 33, at 14, 15 tbl. 9.
[43] *See, e.g.,* U.S. Gen. Acct. Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings*, GAO-04-35 at 2 (Oct. 2003) (examining nationally representative longitudinal data set and concluding that women in 2000 earned only 80% of what men earned even after accounting for differing work patterns and other "key factors"); Weinberg, *supra* note 33, at 21 ("There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience . . . education, and occupation."); Council of Econ. Advisers, *Explaining Trends in the Gender Wage Gap* 11 (1998) (con- cluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, *Male Advantage and the Gender Com position of Jobs: Who Rides the Glass Escalator*, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs).
[44] *See* Selmi, *supra* note 35, at 745-50; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (discussing employer reliance on "stereotype-based beliefs about the allocation of family duties" as a form of sex discrimination).
[45] *See* Selmi, *supra* note 35, at 726.
[46] *See, e.g.*, Richard W. Stevenson, *Texaco is Said to Set Payment Over Sex Bias*, N.Y. Times, Jan. 6, 1999, at C1; *Boeing Agrees to Pay $4.5 Million as Bias Settlement*, L.A. Times, Nov. 20, 1999, at C1.
[47] Linda Babcock & Sarah Laschever, Women Don't Ask: Negotiation and the Gender Divide (2003).
[48] 29 U.S.C. 206(d) (2000).
[49] 928 F.2d 86 (4th Cir. 1990).
[50] *Id.* at 86.
[51] 920 F.2d 446 (7th Cir. 1990).
[52] Because of a state work-sharing agreement, the applicable limitations period was 300 days in this case instead of 180. *See* 42 U.S.C. § 2000e-5(e).
[53] *See* Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1025 (N.D. Iowa 2002).
[54] *See Oshiver v. Levin*, 38 F.3d 1380, 1386-87 (3d Cir. 1994) (describing the discovery rule in a discriminatory hiring and discharge case as starting the limitations period from the plaintiff's awareness of injury, not the awareness of a legal wrong).
[55] 490 U.S. 900 (1989).
[56] 42 U.S.C. § 2000e-5(e)(2) (2000).
[57] *See* 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) ("This legislation should be interpreted as disapproving the extension of this decision rule [in *Lorance*] to contexts outside of seniority systems.").
[58] 167 L.Ed. 2d 982, 1008 (Ginsburg, J., dissenting).

[59] 42 U.S.C. § 2000e-2(a)(1) (2000).
[60] Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (1964); *see* 110 CONG. REC. 7243, at 12723 (1964) (statement of Sen. Case).
[61] Equal Employment Opportunity Act of 1972, Pub L. No. 92-261, sec. 4(a), § 706(e), 86 Stat. 103, 105 (1972).
[62] H. R. REP. NO. 101-644(I), at 25-26, 45-46 (1990).
[63] H. R. REP. NO. 102-40(I), at 63-64 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 601-02.
[64] *See* 137 CONG. REC. H3922-05, H3922 (1991) (statement of Rep. Stenholm).