THE PROBLEMATIC APPLICATION OF TITLE VII'S LIMITATIONS PERIOD IN THE PAY DISCRIMINATION CONTEXT: *LEDBETTER V. GOODYEAR*, THE LEDBETTER FAIR PAY ACT, AND AN ARGUMENT FOR A MODIFIED BALANCING TEST

JONATHON WRIGHT*

INTRODUCTION

The United States Supreme Court has decided several pay discrimination cases throughout the past four decades.[1] However, due to the unique nature of compensation decisions, courts have struggled to consistently apply Title VII's limitation period[2] to disparate-treatment pay cases.[3] Specifically, courts

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* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis. M.B.A. Candidate, 2010, Kelley School of Business—Indianapolis. B.S., 2005, Kelley School of Business—Indianapolis. Recipient of the Papke Prize for Best Note in Volume 42, endowed by and named in honor of David R. Papke, former R. Bruce Townsend Professor of Law and faculty advisor to the Indiana Law Review.

1. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).; Bazemore v. Friday, 478 U.S. 385 (1986); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

2. Title VII defines a timely charge in the following manner:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e)(1) (2006). Accordingly, in so-called deferral states, which have relevant state or local laws giving state agencies primary jurisdiction in Title VII discrimination claims, the applicable charge must be brought within 300 days of the unlawful act to be timely. *Id.* In non-deferral states, where there is no relevant state or local agency, to be timely, the applicable charge must be brought within 180 days. *Id.*

3. *See Ledbetter*, 550 U.S. at 623 (case citations omitted) (noting the split regarding the proper application of the limitations period in Title VII disparate-treatment pay cases among the lower courts).

have disagreed about exactly which activity constitutes the unlawful employment action in the context of compensation decisions.[4] Some courts identified both the pay-setting decision and the actual payment of the discriminatory wage as actionable employment actions.[5] Others recognized only the pay-setting decision as the unlawful employment action and viewed the payment of discriminatory wages merely as an effect of past discrimination.[6]

On May 29, 2007, the United States Supreme Court determined that pay decisions alone are the unlawful employment practices in disparate-treatment pay cases.[7] In so holding, the Court reasoned that the actual payment of the discriminatory wage was merely an adverse effect of the previous pay-setting decision: "A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[8] In other words, Title VII plaintiffs must focus on intentional pay decisions during the charge filing period for their pay discrimination claim to be timely.[9]

Just weeks after the Supreme Court's *Ledbetter* decision, Representative George Miller (Democrat—California) introduced the Lilly Ledbetter Fair Pay Act of 2007 (the Bill)[10] in the House of Representatives.[11] Although this particular Bill ultimately failed a cloture motion in the Senate,[12] President Obama

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4. Title VII makes it unlawful for an employer to "discriminate against any individual with respect to [the individual's] compensation . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006).

5. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (holding that both the decision to implement a discriminatory pay scale and payments made in accordance with such a scale may be the basis for pay discrimination causes of action under Title VII), *abrogated by Ledbetter*, 550 U.S. 618.

6. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1182-83 (11th Cir. 2005) (finding Title VII plaintiffs may not base pay discrimination claims on pay decisions occurring before the last pay decision affecting the plaintiff's pay during the limitations period), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

7. *Ledbetter*, 550 U.S. at 628-29.

8. *Id.* at 628.

9. *Id.* Note, however, this framework does not apply to facially-discriminatory pay structures. Such pay schemes are controlled by *Bazemore v. Friday*, 478 U.S. 385 (1986). That is, an employer who intentionally retains a facially-discriminatory pay schedule is liable as long as it continues to use the discriminatory pay scheme. *Ledbetter*, 550 U.S. at 634-35.

10. H.R. 2831, 110th Cong. (2007).

11. Govtrack.us, H.R. 2831 [110th]: Lilly Ledbetter Fair Pay Act of 2007 (Jul. 31, 2007), http://www.govtrack.us/congress/bill.xpd?bill=h110-2831 [hereinafter Govtrack.us, H.R. 2831 [110th]].

12. *See* Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

signed the Lilly Ledbetter Fair Pay Act of 2009 (LFPA),[13] a nearly identical version, into law on January 29, 2009.[14] The LFPA amends Title VII of the Civil Rights Act of 1964 (among other anti-discrimination statutes), effectively overturning the *Ledbetter* decision and embracing the paycheck accrual theory the Supreme Court so adamantly rejected.[15]

This Note examines the application of Title VII's limitations period in the context of pay discrimination cases. Part I briefly reviews the Supreme Court cases that provided the pre-*Ledbetter* foundation for identifying the unlawful employment practice in the pay discrimination context; it also explores the split among lower courts concerning the application of the limitations period in Title VII disparate-treatment pay cases. Part II examines the *Ledbetter* decision in detail. It explores the case's factual circumstances, Lilly Ledbetter's legal strategy, Justice Alito's majority opinion, and Justice Ginsburg's dissent. Part III describes the LFPA, evaluates its legal effects, and addresses its practical implications. Finally, Part IV examines whether current judicial doctrines are flexible enough to adequately protect victims of pay discrimination and advocates a modified balancing test for the application of Title VII's limitations period in the pay discrimination context.

I. PRE-*LEDBETTER* SUPREME COURT CASES IDENTIFYING THE RELEVANT UNLAWFUL EMPLOYMENT PRACTICES FOR THE PURPOSES OF APPLYING TITLE VII'S LIMITATIONS PERIOD TO DISPARATE-PAY CASES

The Supreme Court has ruled on the application of Title VII's limitations period in the pay discrimination context numerous times since the statute's inception.[16] The most poignant decisions of the past four decades serve as a foundation for understanding how the lower courts ultimately split in their interpretation of the limitations period in Title VII pay discrimination jurisprudence.

A. The Early Cases

1. Unfortunate Historical Events with No Legal Consequences: United Air Lines, Inc. v. Evans.[17]—Throughout the 1960s, United Air Lines, Inc. (United) maintained a policy that refused to employ married flight attendants.[18] Accordingly, after her marriage in 1968, United forced Carolyn Evans (Evans)

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13. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

14. Govtrack.us, S.181 [111th]: Lilly Ledbetter Fair Pay Act of 2009 (Apr. 18, 2009), http://www.govtrack.us/congress/bill.xpd?bill=s111-181 [hereinafter Govtrack.us, S181 [111th]].

15. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

16. *See* cases cited *supra* note 1.

17. 431 U.S. 553 (1977).

18. *Id.* at 554.

to resign from her flight attendant position.[19] Despite United's questionable policy, Evans did not file a claim with the Equal Employment Opportunity Commission within the applicable limitations period.[20] Therefore, Evans's claim arising from her separation with United expired.[21]

In November 1968, United entered a new collective-bargaining agreement, which effectively ended the "no marriage" flight attendant policy and provided for reinstatement of some of the flight attendants who had been terminated pursuant to that policy.[22] The agreement, however, did not cover Evans.[23] In 1972, after unsuccessfully seeking reinstatement several times, Evans applied, and was hired as a new employee.[24]

Despite carrying an identical employee identification number, United treated Evans as a new employee for seniority purposes.[25] Evans sued, claiming that even though the original adverse employment action was time-barred, United's refusal to give her credit for prior service gave present life to the past discriminatory act.[26] That is, Evans asserted her Title VII claim under a continuing violation theory.[27]

The Supreme Court acknowledged that the seniority system or, rather, United's refusal to recognize Evans's previous seniority benefits, continually impacted Evans's pay and benefits.[28] However, the Court distinguished between continuing and present violations.[29] Justice Stevens wrote for the Court, stating: "A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences."[30] The Court noted that United's seniority system treated the discriminatorily discharged employees in the same manner as those non-discriminatorily discharged.[31] That is, United applied the system neutrally.[32] Therefore, the Court implied that there must be some intentional discriminatory act during the limitations period in order for a Title VII action to be timely.[33]

The *Evans* decision expressly rejected the continuing violation theory.[34] Distinguishing time-barred discriminatory acts and their effects during the

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19. *Id.*
20. *Id.* at 555.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 556-57.
27. *See id.* at 558.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.*

statutory period from violations actually occurring within the statutory period, the Court created a rather stringent approach for applying Title VII's limitations period for plaintiffs in such a position:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by [Section] 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.[35]

Even at this early time in Title VII jurisprudence, the Court began developing a framework for applying the relevant limitations period in a manner that would not transfer discriminatory intent from expired discriminatory acts to related effects that fall within the statutory period.[36]

2. Effects v. Acts: Delaware State College v. Ricks.[37]—In March 1974, Delaware State College (Delaware) denied Columbus Ricks (Ricks), a black Liberian junior faculty member, tenure as a member of the college faculty.[38] Unsatisfied with that result, Ricks filed a grievance with Delaware's Educational Policy Committee which, in May 1974, took the matter under reconsideration.[39]

While the grievance was pending, Delaware continued its plans for Ricks's eventual dismissal.[40] On June 26, 1974, pursuant to university policies disfavoring the immediate termination of junior faculty members not offered tenure, Delaware offered Ricks a final, nonrenewable one-year contract.[41] Delaware informed Ricks that the contract would expire on June 30, 1975.[42] Ricks signed the contract on September 4, 1974.[43] One week later, the Educational Policy Committee denied Ricks's grievance.[44] Ricks filed suit under Title VII and other federal anti-discrimination statutes, arguing that the limitations period ran from his termination date, not when Delaware denied his tenure.[45]

The Supreme Court rejected Ricks's argument and found the action time-barred.[46] The Court held that the limitations period for Ricks's Title VII action

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35. *Id.*
36. *See id.*
37. 449 U.S. 250 (1980).
38. *Id.* at 252.
39. *Id.*
40. *Id.*
41. *Id.* at 252-53.
42. *Id.* at 253.
43. *Id.* at 253-54.
44. *Id.* at 254.
45. *Id.*
46. *Id.* at 256.

ran from the time Delaware communicated its decision to deny Ricks's tenure.[47] The Court emphasized that Ricks failed to allege any discriminatory *act* occurring during the charging period.[48] Rather, the Court categorized Ricks's termination as an *effect* of Delaware's previous decision to deny tenure.[49]

The *Ricks* Court's categorization of acts and effects further reinforced *Evans*'s progeny, limiting employer liability to specific and distinct discriminatory acts that occur within the limitations period.[50]

3. Lessons from the Early Cases: The Continuing Violation Theory Will Not Support a Timely Title VII Action.—While *Evans* and *Ricks* do not involve disparate pay, they arguably foreclose the idea of the continuing violation theory in pay discrimination cases. Indeed, the Court's language essentially states this point.[51] The distinction between "acts" and "effects" implies that the law is unwilling to transfer discriminatory intent from earlier employment actions to later consequences. Justice Stevens's term, "merely an unfortunate event in history which has no present legal consequences,"[52] represents the Court's early and somewhat strict framework for applying Title VII's limitations period. At this point, courts had no excuse for disagreeing about whether subsequent discriminatory wages from time-barred discriminatory pay-setting decisions were actionable. *Evans* implies that the time barred pay-setting decision constitutes "relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered," it "is the legal equivalent of a discriminatory act which occurred before the statute was passed."[53] *Ricks* would term the discriminatory wages within the limitations period "effects" of an employer's alleged discriminatory act.[54] However, the progression of the civil rights movement and language from later opinions opened the door for debate about whether subsequent discriminatory pay from time-barred discriminatory pay-decisions constitutes an actionable wrong under Title VII.

B. The Modern Cases: Sources of Disagreement Among the Lower Courts

1. Facially-Discriminatory Compensation Schemes: Bazemore v. Friday.[55]—Prior to August 1, 1965, the North Carolina Agricultural Extension

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47. *Id.* at 259.

48. *Id.* at 257.

49. *Id.* at 258.

50. *See id.*

51. *See id.* ("The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'") (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)); *Evans*, 431 U.S. at 558 ("[Evans] emphasizes the fact that she has alleged a *continuing* violation. . . . But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.").

52. *Evans*, 431 U.S. at 558.

53. *Id.*

54. *Ricks*, 449 U.S. at 257-58.

55. 478 U.S. 385 (1986).

Service (NCAES) segregated Caucasian and African-American service employees into two branches.[56] The Caucasian branch served Caucasian customers, while the African-American branch served African-American customers.[57] In response to the Civil Rights Act of 1964, North Carolina merged the NCAES branches into a single department.[58] This unification, however, did not result in the immediate elimination of pay disparities that existed between the Caucasian and African-American branches.[59] After Congress extended Title VII to include public employees in 1972, some African-American employees brought suit seeking recovery for the pay disparities that continued to exist from the old, dual pay scale.[60] The United States intervened, and the African-American workers amended their complaint on the eve of trial to add a claim under Title VII.[61]

The Supreme Court reversed the Court of Appeals decision, which rejected the African-American employees' Title VII disparate pay claim.[62] Specifically, the Court held that when employers implement a facially discriminatory pay scheme, they engage in intentional discrimination whenever they issue paychecks to disfavored employees in accordance with that scheme.[63]

Although the Court issued a per curium opinion, all members of the Court joined Justice Brennan's separate opinion, concurring in part.[64] In relevant part, Justice Brennan stated: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[65] Justice Brennan's simple statement is perhaps the most profound source of disagreement among lower courts' application of Title VII's limitation period to pay discrimination claims. One school of thought limits *Bazemore* and its progeny regarding individual payments of discriminatory wages to facially discriminatory pay structures.[66] The Supreme Court's *Ledbetter* opinion ultimately accepts this

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56. *Id.* at 390.

57. *Id.*

58. *Id.* at 390-91.

59. *Id.* at 390.

60. *Id.* at 391.

61. *Id.*

62. *Id.* at 397.

63. *Id.* at 396-97.

64. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 646-47 (2007) (Ginsburg, J., dissenting) (noting that all members of the court agreed with Justice Brennan's *Bazemore* concurrence regarding discriminatory low payments to similarly situated African American employees, *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

65. *Bazemore*, 478 U.S. at 395-96 (Brennan, J., concurring in part, joined by all members of the Court).

66. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1182-83 (11th Cir. 2005), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

approach.[67] A number of courts, however, cite Justice Brennan's *Bazemore* opinion for the proposition that each discriminatory paycheck is a new Title VII violation, regardless of when the employer made the pay decision.[68]

2. Congressional Response as a Source of the Continuing Violation Theory: Lorance v. AT&T Technologies, Inc.[69]—In 1979, AT&T Technologies, Inc. (AT&T) changed its method for calculating seniority under its collective-bargaining agreement with tester employees, positions traditionally held by men.[70] Prior to the change, all employees at the plant earned seniority based solely on the number of years the plant had employed the employee.[71] The 1979 agreement made seniority for employees in tester positions depend on the time spent in that position alone.[72] Three years later, AT&T laid-off several female testers because of their lower seniority status under the 1979 collective-bargaining agreement.[73] The female testers filed a charge with the Equal Employment Opportunity Commission, alleging that AT&T adopted the new seniority system with the purpose of protecting male testers from lay-offs when women with more plant seniority moved into the traditionally-male tester positions.[74]

The Supreme Court found the women's action untimely because they failed to file within the charging period.[75] The Court determined that because the female testers alleged that AT&T adopted the new system with discriminatory intent but applied it neutrally to both genders, the limitations period ran from the time of the agreement's execution, not when the female testers felt the effects of the discriminatory act.[76]

Notably, Congress responded by amending Title VII to allow for employer liability stemming from both the adoption of an intentionally discriminatory

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67. *See Ledbetter*, 550 U.S. at 637 (majority opinion).

68. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (describing the position set forth in *Bazemore* as "every paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act"), *abrogated by Ledbetter*, 550 U.S. 618 (2007); Shea v. Rice, 409 F.3d 448, 452 (D.C. Cir. 2005) ("[E]mployer[s] commit[] a separate unlawful employment practice each time [they pay] one employee less than another for a discriminatory reason." (citing Bazemore v. Friday, 478 U.S. 385, 396 (1986))); Goodwin v. General Motors Corp., 275 F.3d 1005, 1009 (10th Cir. 2002) ("[*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation.").

69. 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006).

70. *Id.* at 901-02.

71. *Id.*

72. *Id.* at 902.

73. *Id.*

74. *Id.* at 902-03.

75. *Id.* at 911-12.

76. *Id.* at 912.

seniority system and its application.[77] This response reinforced the schism between courts' treatment of the Title VII limitations period in the pay discrimination context. The congressional response after *Lorance* led some courts to believe that the *Lorance* decision incorrectly restricted employer liability in many cases involving current effects of past discrimination.[78] Of course, proponents of the other school of thought restricted the congressional intent inherent in the 1991 amendment to an expansion of employer liability only in the arena of seniority systems.[79]

3. The Great Divide: The Continuing Violation Theory in the Pay Discrimination Context v. Discriminatory Wages as Effects of Time-Barred Unlawful Acts.—Evans and *Ricks* developed a strict approach for applying Title VII's limitations period.[80] Under these early cases, the Court consistently distinguished between time-barred discriminatory acts and the effects of such acts that fall within the statutory period.[81] These cases, however, did not involve

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77. The amended statute provides:

> 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.

42 U.S.C. § 2000e-5(e)(2) (2006).

78. Indeed, Justice Ginsburg's dissenting opinion in *Ledbetter* interprets this legislative move as such:

> Until today, in the more than [fifteen] years since Congress amended Title VII, the Court had not once relied upon *Lorance*. It is mistaken to do so now. Just as Congress' "goals in enacting Title VII . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first [180] days," Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 653-54 (Ginsburg, J., dissenting) (quoting *Lorance*, 490 U.S. at 914 (1989) (Marshall, J., dissenting), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006)), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

79. *See id.* at 627 n.2 (majority opinion) ("After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. . . . [T]he very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments '*expand[ed]* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.' For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination.") (citations omitted).

80. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 257-58 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

81. *See, e.g.*, *Ricks*, 449 U.S. at 257-58.

pay discrimination. In *Bazemore*, the Court's first ruling on the application of Title VII's application period for disparate payment of wages, the Court found discriminatory wages within the limitations period separately actionable.[82] While the scope of this holding is arguably limited to facially discriminatory pay schemes,[83] it opened the door for the interpretation that each discriminatory paycheck is an actionable wrong under Title VII.[84] Under this interpretation, discriminatory wages paid within the relevant statutory period each constitute an actionable wrong under Title VII.[85] The congressional response after *Lorance* reinforced the possibility that Congress actually intended for the current effects of discriminatory acts that occurred outside the limitations period to be actionable.[86] Lower courts waited for clarification on the proper scope of these holdings in the pay discrimination context.

C. National Railroad Passenger Corp. v. Morgan:[87] *A New Framework for Identifying Unlawful Employment Actions in Title VII Cases*

In 2002, the Supreme Court addressed the circuits' problematic application of Title VII's limitation period in the pay discrimination context with its *Morgan* decision.[88] The Court approached the problem by distinguishing between two types of unlawful employment actions: "[D]iscrete acts" and "claims . . . based on the cumulative effect of individual acts."[89]

The Court held that discrete acts are temporally distinct;[90] thus, they each constitute an actionable unlawful practice.[91] The Supreme Court stated the following rule with respect to discrete discriminatory acts: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act."[92] Therefore, there is no continuing violation theory with respect to discrete discriminatory acts.[93] Rather,

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82. Bazemore v. Friday, 478 U.S. 385, 395-97 (1986).

83. *See Ledbetter*, 550 U.S. at 637.

84. *Bazemore*, 478 U.S. at 395-96.

85. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (holding that both the decision to implement a discriminatory pay scale and payments made in accordance with such a scale may be the basis for pay discrimination causes of action under Title VII), *abrogated by Ledbetter*, 550 U.S. 618.

86. *See, e.g.*, *Ledbetter*, 550 U.S. at 652-54 (Ginsburg, J., dissenting) (generalizing the congressional response to *Lorance* as evidence that the *Lorance* decision was at odds with the overall purpose of Title VII).

87. 536 U.S. 101 (2002).

88. *Id.*

89. *Id.* at 114-15.

90. *Id.* at 114.

91. *Id.*

92. *Id.* at 113.

93. *See id.*

each alleged violation must be "independently discriminatory and . . . timely filed" in order to be actionable.[94] This definition of discrete acts does little to change the Court's historical dichotomy between acts and effects. Indeed, under *Morgan's* definition of discrete acts, the employer practices in *Evans* and *Ricks* are not actionable.[95] Therefore, the reader might wonder what this new definition of discrete acts really does to clarify which specific employment practices constitute the appropriate act for application of Title VII's limitation period.[96]

The Court acknowledged that claims based on the cumulative effects of individual acts were different in nature and, thus, should be treated accordingly.[97] The Court classified hostile work environment claims within this category because of their successive nature, the emphasis on the totality of the environment, not individual acts, and the lack of a particular temporal existence.[98] Thus, the series of acts "collectively constitute one 'unlawful employment practice.'"[99]

The Court's new dichotomy between discrete acts and cumulative effects of individual acts did little to clarify the appropriate application of the Title VII limitations period. Indeed, the introduction of a new category of employment practices that plaintiffs can aggregate into one adverse employment action may have actually blurred the appropriate boundaries for Title VII's limitations period even further. It certainly created another attractive argument for plaintiffs that found themselves without an independent discriminatory practice within the relevant statutory period. Now, plaintiffs could attempt to aggregate the current

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94. *Id.*

95. In *Evans*, United applied the seniority system in a neutral manner. United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). Therefore, United's application of the system would not have met the Court's standard for discrete acts, because it was not independently discriminatory. *See Morgan*, 536 U.S. at 113 (stating that a discrete act must be independently discriminatory in order to be actionable). Further, even if United adopted the system with the sole intent of discriminating against women with respect to seniority, the implementation of the system would not be actionable because Evans' claim was untimely. *See id.* (stating that a discrete act must be timely filed in order to be actionable).

Similarly, in *Ricks*, Delaware's decision to deny Ricks tenure would not be actionable because Ricks did not file within the relevant statutory limitations period. Del. State Coll. v. Ricks, 449 U.S. 250, 256 (1980). Nothing in the *Morgan* decision would change Ricks's termination from an effect of Delaware's decision to deny him tenure to an actual discriminatory act. *See Morgan*, 536 U.S. at 112-13 ("'Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.' . . . [Ricks] could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory.") (quoting *Ricks*, 449 U.S. 257).

96. Note, however, that untimely discriminatory acts may still be used as evidence in support of a timely claim. *Morgan*, 536 U.S. at 113.

97. *Id.* at 115-16.

98. *Id.*

99. *Id.* at 117 (quoting 42 U.S.C. § 2000e-(5)(e)(1) (2000)).

effects of past discriminatory acts into one unlawful action arising from the cumulative effects of a time-barred individual discriminatory act.[100]

D. The Circuit Split

Given the Supreme Court's often-imprecise application of the limitations period in Title VII cases, it comes as no surprise that lower courts disagreed about whether each paycheck made subject to an untimely discriminatory decision is actionable. After all, it is not clear exactly which employer actions constitute discrete acts and which do not. Moreover, some of the Court's language actually seemed to promote such a theory.[101]

This approach interpreting each paycheck made subject to an untimely discriminatory decision as actionable, however, seems to fly in the face of previous Supreme Court cases, such as *Evans* and *Ricks*, which were left intact by the *Bazemore* decision. For example, in *Evans*, the Court concluded that the "continuing effects of the precharging [sic] period discrimination did not make out a present violation."[102] Similarly, in *Ricks*, the Court held that the filing charge ran from the time Delaware communicated its decision not to offer the plaintiff tenure, not his actual termination.[103] Together, these cases illustrate the Court's tendency to distinguish between acts and effects.[104]

The Supreme Court's response in *Morgan* to this disagreement among circuits was apt. However, the Court's approach, distinguishing between discrete acts and cumulative effects merely restated the problem. After *Morgan*, although courts no longer had to determine whether related, discrete acts falling outside

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100. Justice Ginsburg's dissenting *Ledbetter* opinion, discussed *infra* Part II.C.2, is one such attempt. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 651-52 (2007) (Ginsburg, J., dissenting) (describing the alleged discriminatory pay as a cumulative and gradually-developing scheme of discrimination, rather than a series of discrete acts), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

101. Remember Justice Brennan's statement 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, regardless of the fact that this pattern was begun prior to the effective date of Title VII." Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring in part, joined by all Members of the Court). Taken in isolation, many circuits cited *Bazemore* in support of a continuing violation theory or paycheck accrual rule. *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1181 n.17 (11th Cir. 2005) (naming the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits among those that approved of such an interpretation), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

102. *Ledbetter*, 550 U.S. at 625 (majority opinion).

103. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

104. *See supra* Part I.A.

the statutory time period for filing charges under Title VII were actionable,[105] they now had to determine whether disparate pay claims based on compensation decisions before the statutory period involve a series of discrete discriminatory low paychecks or the cumulative effects of an individual act, the pay decision.

II. THE SUPREME COURT INTERPRETATION: *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*[106]

Lilly Ledbetter worked for Goodyear Tire & Rubber Co. (Goodyear) at its Gadsen, Alabama, plant for nearly nineteen years.[107] During most of this time, Ledbetter served as an area manager, a typically male-dominated position.[108] Initially, Ledbetter received a salary on par with her male counterparts performing similar work.[109]

Goodyear provided or denied raises for salaried employees based primarily on their supervisors' evaluation of the individual's job performance.[110] Over time, Ledbetter's salary slipped in comparison with the male area managers that had equal or less seniority.[111] In March 1998, Ledbetter submitted a questionnaire with the Equal Employment Opportunity Commission.[112] After retiring in November 1998, Ledbetter filed suit in federal court, alleging, among other things, that Goodyear violated Title VII when it paid her a discriminatorily low salary because of her sex.[113]

A. The Trial Court Decision

The district court granted summary judgment for Goodyear on a number of Ledbetter's claims.[114] It did, however, allow Ledbetter's pay discrimination claim to proceed to trial.[115] At trial, Ledbetter claimed that several of her Goodyear supervisors gave her poor performance evaluations because of her

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105. In *Morgan*, the Supreme Court explicitly rejected the continuing violations theory:

> The Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory . . . acts that are . . . related to that act may also be considered for the purposes of liability. With respect to this holding, therefore, we reverse.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (citation omitted).

106. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

107. *Id.* at 621.

108. *Id.* at 643 (Ginsburg, J., dissenting).

109. *See id.* at 622-23 (majority opinion).

110. *Id.* at 621.

111. *Id.* at 622.

112. *Id.* at 620.

113. *Id.* at 621-22.

114. *Id.* at 622.

115. *Id.*

sex.[116] She argued that, as a result of these discriminatory evaluations, Goodyear did not increase her pay as much as it would have if the supervisors had evaluated her in a nondiscriminatory manner.[117] Finally, Ledbetter introduced evidence that she received substantially less compensation than any of her male peers in similar positions.[118] The jury found in favor of Ledbetter and awarded her $223,776 in backpay, $4662 in mental anguish, and $3,285,979 in punitive damages.[119] After denying Goodyear's motion for judgment as a matter of law, the district court reduced the jury's recommended award.[120] Accordingly, the court entered judgment for Ledbetter in the sum of $360,000, plus attorneys' fees and costs.[121]

B. The Court of Appeals Decision

Goodyear appealed to the Eleventh Circuit Court of Appeals.[122] On appeal, Goodyear claimed that all of Ledbetter's pay discrimination claims based on pay decisions prior to the relevant 180-day filing period were time-barred.[123] Goodyear further argued that no intentional discriminatory act occurred after the filing period began to run.[124] The Eleventh Circuit reversed the district court's decision and held that a Title VII disparate-treatment pay claim may not be based on pay decisions before the last pay decision affecting the employee's pay during the limitations period.[125] Ledbetter appealed to the Supreme Court.[126]

C. The Supreme Court Decision

Essentially, Ledbetter's arguments fell under four broad categories. First, Ledbetter relied on evidence of past discrimination in an attempt to show that each paycheck that Goodyear issued during the charging period was a separate and discrete discriminatory act.[127] In support of this argument, Ledbetter cited

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116. *Id.*

117. *Id.*

118. *Id.*

119. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1176 (11th Cir. 2005), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1177.

124. *Id.*

125. *Id.* at 1182-83.

126. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

127. *Id.* at 624.

Bazemore for the application of the "paycheck accrual rule."[128] Second, and in the alternative, Ledbetter argued that Goodyear's 1998 decision to deny her a raise "was unlawful because it carried forward intentionally discriminatory disparities from prior years."[129] Third, Ledbetter attempted to draw analogies between other civil rights statutes and Title VII. Specifically, Ledbetter cited the Equal Pay Act,[130] the Fair Labor Standards Act of 1938,[131] and the National Labor Relations Act.[132] Finally, Ledbetter introduced a number of policy arguments in favor of allowing an alleged victim of discrimination more time to file in the pay discrimination context.[133] In particular, Ledbetter argued that pay discrimination is more difficult to detect than other forms of discrimination.[134]

1. The Majority Opinion.—Writing for the majority, Justice Alito first emphasized that a Title VII plaintiff must file a charge with the Equal Employment Opportunity Commission within the relevant statutory period.[135] Justice Alito noted that, in order to determine whether a Title VII plaintiff filed on time, courts must first "identify with care the specific employment practice that is at issue."[136]

The Court concluded that prior precedent made it clear that new violations do not occur and, thus, a new limitations period does not run, merely because subsequent nondiscriminatory acts involve "adverse effects" of past discrimination.[137] Then, the Court explicitly stated that the "pay-setting decision[s] [are] . . . 'discrete act[s].'"[138] Perhaps in response to the confusion ignited by *Morgan's* distinction between discrete acts and cumulative effects of individual acts, Justice Alito went on to explain that the term "employment practice generally refers to a discrete act."[139] Therefore, cumulative effects of individual discriminatory acts, such as hostile work environment, are the exception, rather than the rule.[140] Finally, the Court stated that "[b]ecause a pay-setting decision is a 'discrete act,' it follows that the period for filing an [Equal Employment Opportunity Commission] charge begins when the act occurs."[141] That is, Title VII plaintiffs may not bring pay discrimination claims based on

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128. *Id.* at 623.

129. *Id.* at 624 (internal quotations omitted).

130. 29 U.S.C. § 206 (2006).

131. *Id.* §§ 201-219.

132. *Id.* § 160.

133. *Ledbetter*, 550 U.S. at 642-43.

134. *Id.* at 642.

135. *Id.* at 623-24 (citing 42 U.S.C. § 2000e-5(e)(1) (2006)).

136. *Id.* at 624.

137. *Id.* at 628.

138. *Id.* at 621.

139. *Id.* at 628 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-111 (2002)) (internal quotations omitted).

140. *See id.*

141. *Id.* at 621.

current salary.[142] Instead, plaintiffs must establish that an unlawful pay decision was actually made within the relevant statutory period.[143]

In response to Ledbetter's policy arguments favoring a longer limitations period for pay discrimination claims under Title VII, the Court cited a number of policy arguments of its own.[144] Specifically, the majority noted that limitations periods represent important legislative judgments about limiting liability.[145] It follows that Title VII's relatively short filing period indicates a clear congressional intent to encourage prompt resolution of claims under the statute. The Court also voiced concerns regarding the dangers of lost evidence when allowing tardy claims to proceed.[146]

Finally, and perhaps once again, to clarify the scope of its *Bazemore* holding, the Court explicitly rejected Ledbetter's paycheck accrual approach.[147] The Court limited *Bazemore*'s holding to cases involving facially discriminatory pay structures: "An employer that adopts and intentionally retains [a facially discriminatory] pay structure can surely be regarded as intending to discriminate . . . as long as the structure is used."[148]

2. The Scathing Dissent.—"Justice Ginsburg took the unusual step of reading a strongly worded dissent from the bench."[149] According to Justice Ginsburg, pay discrimination does not fit within the class of discrete discriminatory acts that are "easy to identify."[150]

Justice Ginsburg conveyed a number of concerns regarding the common characteristics of pay discrimination. First, because pay discrimination usually occurs in small increments and is gradual over time, it only becomes recognizable after a long period of time.[151] Second, employers often keep comparable pay information hidden from employees; therefore, even if victims of pay discrimination recognize that their compensation is stagnant, they may not be able to discover that the employer is treating others more favorably.[152] Finally, the dissent recognized *Morgan's* categorical approach to unlawful

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142. *Id.*

143. *Id.* Note how the majority's approach severely limits the bite of Title VII in the pay discrimination context. Under *Ledbetter*, a plaintiff must establish an intentional and unlawful pay-setting decision within the limitations period. *See id.* Practically speaking, the likelihood a plaintiff will both recognize an unlawful pay-setting decision and file the action within the relevant statutory period is relatively low.

144. *See id.* at 642-43.

145. *Id.* at 632, 642-43.

146. *Id.* at 632.

147. *Id.* at 633.

148. *Id.* at 634.

149. David Copus, Pay Discrimination Claims After Ledbetter 9 (Oct. 20, 2007) (unpublished manuscript, on file with the American Employment Law Council).

150. *Ledbetter*, 550 U.S. at 648-49 (Ginsburg, J., dissenting).

151. *Id.* at 645.

152. *Id.*

employment actions.[153] Justice Ginsburg found, however, that pay discrimination is more akin to hostile work environment claims, and, thus, should be categorized as "'claims . . . based on the cumulative effect of individual acts.'"[154] In support of this argument, she noted that Ledbetter's pay fell from fifteen to forty percent below similarly situated male employees only after numerous successive performance evaluations and pay adjustments.[155]

Justice Ginsburg next appealed to prior Supreme Court precedent, statutory language, and lower court cases. She cited *Bazemore* for the proposition that "the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination . . . [and] occurs whenever a paycheck delivers less to a woman than to a similarly situated man."[156] The dissent also emphasized the fact that Congress amended Title VII after the *Lorance* decision, a move she claimed illustrated a congressional intent to foster protection for victims of discrimination.[157] In regards to Title VII's statutory language, Justice Ginsburg acknowledged that Title VII's back-pay provision[158] already allows employer liability to accrue for two years before the charge is filed, which "indicates that Congress contemplated challenges to pay discrimination commencing before, but continuing into, the . . . filing period."[159] Finally, Justice Ginsburg argued that the majority's opinion flew in the face of the overwhelming

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153. *Id.* at 647-48. Justice Ginsburg's argument that Title VII pay discrimination claims should be treated as cumulative effects, rather than discrete acts, recognizes the true bite of the majority's opinion. Under the majority's view, Title VII plaintiffs may not base pay discrimination claims on current salary. *See id.* at 621 (majority opinion). Rather, they must rely on an unlawful pay-setting decision within the past 180 days (or 300 days in jurisdictions with state agencies that enjoy primary jurisdiction). *See id.* This is a rather tough burden to meet. Under the dissent's view of Title VII pay discrimination as claims based on the cumulative effects of individual acts, plaintiffs could rely on the overall effect of past decisions as they impact current salary. *See id.* at 648 (Ginsburg, J., dissenting).

Therefore, the LFPA may be misplaced in focusing on the timeliness issue. *See infra* Part III. That is, the LFPA does little to address the categorization of pay discrimination as a discrete act. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16). Title VII plaintiffs will still have to focus on discrete, unlawful compensation decisions or payments, within the relevant statutory period. Although a longer statutory period provides Title VII plaintiffs with more time to bring claims, it is often more difficult for plaintiffs to reconstruct unlawful decisions affecting similarly situated individuals further into the past. Thus, it is unclear just how effective the LFPA will be.

154. *Ledbetter*, 550 U.S. at 648 (Ginsburg, J., dissenting) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002)).

155. *Id.* at 648-49.

156. *Id.* at 645 (citing Bazemore v. Friday, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part, joined by all other members of the Court)).

157. *Id.* at 652-53.

158. *See* 42 U.S.C. § 2000e-5(g)(1) (2006) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

159. *Ledbetter*, 550 U.S. at 654 (Ginsburg, J., dissenting) (citing *Morgan*, 536 U.S. at 119).

majority of Courts of Appeals decisions on the subject.[160]

D. Pay Discrimination: Discrete Acts or Cumulative Effects

The *Ledbetter* majority and dissent each offer very different, yet understandable, approaches to the problematic application of Title VII's limitations period in the pay discrimination context. On one hand, the *Ledbetter* majority emphasized that "[s]tatutes of limitations serve a policy of repose."[161] Statutory limitations periods are legislative judgments about the appropriate amount of time that a party has to bring an action.[162] Therefore, Title VII's relatively short limitations period actually represents congressional preference for prompt resolution of employment discrimination claims.[163] Limiting Title VII's limitations period in the pay discrimination context in a manner similar to other Title VII discrimination cases encourages employees to bring prompt claims. Therefore, Title VII disparate-treatment pay claims should be treated like other Title VII discrimination allegations regarding the application of the statute's limitations period.

On the other hand, Justice Ginsburg offers some legitimate observations regarding the unique nature of pay discrimination.[164] Because differences in pay may be due to numerous performance evaluations and take a long time to become substantial enough to observe, it may be unfair to expect employees to bring actions within the same limitations period as the other forms of unlawful acts under Title VII.[165] Perhaps these special considerations should require courts to treat discriminatory pay in a way that reflects its evasive nature. After all, Title VII's ultimate goal is achieving "equality of employment opportunities."[166]

Both the majority and dissent make strong arguments. Indeed, each represents one of the competing interests that must be considered when applying Title VII's limitations period in the pay discrimination context. The majority's view favors the interest in "'protect[ing] employers from the burden of defending claims arising from employment decisions that are long past.'"[167] The dissent's view favors the employee's interest in avoiding evasive, unlawful discriminatory actions that create unequal employment opportunities.[168] Given the strong arguments on each side, it is no surprise that Congress responded by proposing legislation that would help clarify the "appropriate" application of Title VII's

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160. *See id.* at 654-55.

161. *Id.* at 630 (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974)).

162. *See id.* (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979)).

163. *See id.* at 630-31 (citing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977)).

164. *See id.* at 645 (Ginsburg, J., dissenting).

165. *Id.* at 650-51.

166. *Occidental*, 432 U.S. at 368 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

167. *Ledbetter*, 550 U.S. at 630 (majority opinion) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980)).

168. *See id.* at 645 (Ginsburg, J., dissenting).

limitations period in the pay discrimination context.

III. CONGRESSIONAL RESPONSE: THE LILLY LEDBETTER FAIR PAY ACT

On June 22, 2007, just weeks after the Supreme Court's *Ledbetter* decision, congressional Democrats responded. Representative George Miller of California introduced the Bill[169] in the United States House of Representatives. Support for the LFPA was largely divided along party lines.[170]

A. Proposal and Status

Democratic proponents of the Bill claimed that the legislation merely attempted to reverse the Supreme Court's *Ledbetter* decision.[171] As such, Democratic supporters basically argued that each paycheck resulting from earlier discrimination should constitute a violation under the Civil Rights Act of 1964.[172] Republicans, however, termed the Bill "hastily-written" and "the most substantial change to employment law in more than four decades."[173]

On July 31, 2007, the Bill passed the House of Representatives by a vote of

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169. H.R. 2831, 110th Cong. (2007).

170. Republicans represented just two of the 225 votes supporting the LFPA, or 0.89%. Govtrack.us, H.R. 2831 [110th], *supra* note 11. Democrats represented six of the 199 nays, or 1.51%. *Id.* Nine representatives did not vote. *Id.*

171. *See, e.g.*, Press Release, Democratic Committee on Education and Labor, U.S. House of Representatives, House Passes Bill to Restore Workers' Rights to Challenge Pay Discrimination Claims: The Lilly Ledbetter Fair Pay Act Rectifies Flawed Supreme Court Ruling on Pay Discrimination (July 31, 2007) [hereinafter Democratic Committee], *available at* http://www.house.gov/apps/list/speech/edlabor_dem/rel073107.html ("The Lilly Ledbetter Fair Pay Act would clarify that every paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision constitutes a violation of the Civil Rights Act. As long as workers file their charges within 180 days of a discriminatory paycheck, their charges would be considered timely. This was the law prior to the Supreme Court's May 2007 [*Ledbetter*] decision.").

172. *Id.*

173. Press Release, Republican Committee on Education and Labor, U.S. House of Representatives, House Democrats Undermine 40 Years of Civil Rights Law, Open the Door for Unbridled Litigation (July 31, 2007) [hereinafter Republican Committee], *available at* http://republicans.edlabor.house.gov/PRArticle.aspx?NewsID=224. Senior Republican Member of the House Committee on Education and Labor, Congressman Howard P. "Buck" McKeon, stated:

> [A]s we combat discrimination in the workplace, we also must stand firmly behind a process that ensures justice for all—and that includes protecting against the potential for abuse and excessive litigation. That, I believe, is where Democrats and Republicans diverge. We aren't taking sides for or against discrimination in the workplace. Rather, we're staking out distinct positions on fair and equitable justice and the rule of law.

Id.

225 to 199.[174] The Senate placed it on the Senate Legislative Calendar under General Orders.[175] On April 23, 2008, however, the Bill failed a cloture motion for consideration in the Senate.[176] The cloture motion received fifty-six ayes, four short of the sixty necessary to begin the Bill's consideration in the Senate.[177]

On January 8, 2009, Senator Barbara Mikulski (Democrat—Maryland) introduced the LFPA to the United States Senate.[178] It passed the Senate and House of Representatives on January 22, 2009, and January 27, 2009, respectively.[179] President Obama signed the LFPA into law on January 29, 2009.[180] The LFPA, as enacted, is nearly identical to the Bill, deviating only with respect to minor grammar syntax and an updated citation to the Supreme Court's *Ledbetter* decision.[181]

B. Legal Effect

The LFPA essentially amends four statutes: (1) the Civil Rights Act of 1964;[182] (2) the Age Discrimination in Employment Act of 1967;[183] (3) the Americans with Disabilities Act of 1990;[184] and (4) the National Rehabilitation Act of 1973.[185] The LFPA provides, in pertinent part, as follows:

> [A]n 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, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[186]

Accordingly, the LFPA clearly overturns the *Ledbetter* majority opinion.[187] In

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174. Govtrack.us, H.R. 2831 [110th], *supra* note 11.

175. *Id.*

176. *Id.*

177. Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at 22.

178. Govtrack.us, S. 181 [111th], *supra* note 14.

179. *Id.*

180. *Id.*

181. *Compare* Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. § 2000e-5, -16), *with* H.R. 2831, 110th Cong. (2007).

182. 42 U.S.C. §§ 2000a-2000h-6 (2006).

183. 29 U.S.C. §§ 621-34 (2006).

184. 42 U.S.C. §§ 12101-12213 (2006).

185. 29 U.S.C. §§ 701-796*l* (2006).

186. Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

187. Note, however, the LFPA does not address the *Ledbetter* majority's categorization of pay discrimination as a discrete act. *See supra* note 153. That is, although the legislation may change

fact, the legislation adopts the paycheck accrual rule that the Supreme Court expressly rejected.[188] The LFPA's ramifications, however, are not limited to its impact on the procedural application of Title VII's limitations period in pay discrimination cases.[189] It has the potential to go much further and substantially change the face of discrimination law in many other areas as well as reallocate the policy priorities determined by current employment law.[190]

C. Practical Implications

Given the LFPA's potentially broad reach, it is important to understand the practical implications of the legislation's enactment. The LFPA certainly addresses Justice Ginsburg's concerns in her *Ledbetter* dissent;[191] however, critics remain unconvinced that the proposed legislation is an equitable approach to applying Title VII's limitations period in the pay discrimination context.[192]

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applicable limitations periods in the compensation context, it will not relieve Title VII plaintiffs' hardships in many other areas. *See* Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)). Therefore, the reader should remember that even though critics or proponents make the following, albeit compelling, arguments, the practical impact of the LFPA is largely unknown. It is, however, important to comprehend the arguments on both sides to properly understand the competing interests at hand and formulate any truly "appropriate" application of Title VII's limitations period. Therefore, at the very least, this Part discusses some of the most important policy considerations inherent in the application of Title VII's limitations period in the pay discrimination context. Even though the LFPA addresses this problem by attempting to change the categorization of pay discrimination from a claim based on a discrete act to one based on the cumulative effect of individual acts, the same competing interests are still at play. Thus, they are relevant to any proposed solution to the problematic application of Title VII's limitation period in the pay discrimination context.

188. *See* Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

189. *See* Republican Committee, *supra* note 173.

190. *Id.*

191. *Compare* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) ("The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time. . . . Employers may keep [any pay differentials] under wraps . . . ."), *with* Lilly Ledbetter Fair Pay Act of 2009 § 2(2), Pub. L. No. 111-2, 123 Stat. 5 (2009) ("The limitation imposed by the [*Ledbetter*] Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination . . . .").

192. *See* Press Release, National Retail Foundation, NRF Calls Fair Pay Act "Litigation Time Bomb" (July 30, 2007), *available at* http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=346 ("The National Retail Federation today urged the House to reject legislation that would effectively eliminate the statute of limitations in employment discrimination cases, calling the measure a 'litigation time bomb' that would create 'a lawsuit bonanza' for trial lawyers."); Republican Committee, *supra* note 173 ("In reality, however, House Republicans and a coalition of some 40-plus organizations have exposed [the LFPA] as an effort to open the door

1. Concerns: The LFPA's Shortcomings.—Critics of the LFPA point to the legislation's broad scope as an indicator that it has the potential to significantly expand employer liability.[193] For example, because the LFPA amends several civil rights statutes, it essentially removes a limitations period for all factual scenarios that can be framed as a "discriminatory compensation decision or other practice."[194] Similarly, the LFPA's language about "wages, benefits, or other compensation"[195] has the potential to significantly expand temporal liability for employers.[196]

If the term "benefits," for example, includes retirement or pension plans, an employer could potentially remain liable for a pay decision that took place several decades ago. Further, almost all adverse employment actions have an impact on compensation. For example, denied promotions or disciplinary actions often affect an employee's compensation entitlement.[197] Critics argue such a broad reading of compensation would lead to almost a complete elimination of limitation periods for far too many Title VII claims.[198] For example, following the LFPA introduction, the American Benefits Council expressed its concern that removing Title VII's limitations period could substantially undermine the solvency of pension plans in the United States.[199]

This poses some obvious concerns for employers and courts. Frivolous suits are often the product of stale claims and lost evidence. Moreover, the mere cost for employers to retain documentation to protect against such a broad concept of liability is troublesome.

Additionally, the Equal Employment Opportunity Commission only requires employers to keep records made regarding "rates of pay or other terms of compensation" for one year.[200] "The agency selected one year as the appropriate period 'so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed.'"[201] When a plaintiff files a charge with

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for trial lawyers across the nation to cash-in on the most substantial change to employment law in more than four decades.").

193. *See, e.g.*, Republican Committee, *supra* note 173.

194. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16). *See The Impact of* Ledbetter v. Goodyear *on the Effective Enforcement of Civil Rights Laws: Hearings on H.R. 2831 Before the House Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary*, 110th Cong. 63 (2007) [hereinafter *Hearings*] (testimony of Neal D. Mollen).

195. Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

196. *See Hearings*, *supra* note 194, at 63 (testimony of Neal D. Mollen).

197. *Id.* at 60 (testimony of Neal D. Mollen).

198. *Id.* at 62-63 (testimony of Neal D. Mollen).

199. Republican Committee, *supra* note 173.

200. 29 C.F.R. § 1602.14 (2007).

201. *Hearings*, *supra* note 194, at 58 (quoting 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis in original)) (testimony of Neal D. Mollen).

the Equal Employment Opportunity Commission, however, the employer must keep all records related to the complaint until the claim is resolved.[202] These administrative decisions reflect a desire to balance the need to retain evidence related to a Title VII discrimination charge with the costs of doing so, and this balancing test was assumedly a factor in Congress's decision to define a relatively short limitations period for Title VII claims. With the passage of the LFPA, employers may "be obligated to keep [pay and compensation] records, not for one year, but in perpetuity."[203]

Finally, the LFPA does not distinguish between those plaintiffs who do not report pay discrimination due to its evasive nature and those who delay allegations for their own self-interest. Therefore, the legislation shifts responsibility from plaintiffs who, perhaps intentionally, sit on stale claims, to employers who are vulnerable to lost evidence. As one commentator noted,

> It violates the most basic notions of justice to allow an individual—even one who may have been subjected to discrimination—to wait until the employer is essentially defenseless to raise the allegation. The [*Ledbetter*] Court rightly concluded that this sort of delay is unacceptable. That decision should be embraced, not reversed.[204]

That is, the LFPA's failure to distinguish among a plaintiff's motivations in waiting to bring suit may perpetuate any problems created by lost evidence and stale claims.

2. Progress: Recognizing Where the LFPA Succeeds.—Although critics of the LFPA raise valid concerns, the LFPA effectively advances progress in combating discrimination in a number of areas. First, and most importantly, it emphasizes Title VII's "primary objective" of "bring[ing] employment discrimination to an end."[205] It replaces the *Ledbetter* decision's employer-favored policy considerations regarding limitations periods with those to which the statute explicitly cites. Indeed, Section 2(1) of the LFPA provides:

> The Supreme Court in [*Ledbetter v. Goodyear Tire & Rubber Co.*], 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decision or other practices, contrary to the intent of Congress.[206]

Second, the LFPA addresses Justice Ginsburg's concerns regarding the unique nature of pay discrimination by creating a new statute of limitations for

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202. *Id.* at 59 (testimony of Neal D. Mollen).

203. *Id.* (testimony of Neal D. Mollen).

204. *Id.* (testimony of Neal D. Mollen).

205. Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

206. Lilly Ledbetter Fair Pay Act of 2009 § 2(1), Pub. L. No. 111-2, 123 Stat. 5 (2009).

Title VII disparate-pay cases. The congressional findings included in the LFPA state, "The limitation imposed by the [*Ledbetter* majority] on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."[207]

While critics would argue that the LFPA actually attempts to eliminate the previous Title VII limitations period for all claims that could theoretically be categorized as compensation decisions or practices,[208] the Act's proponents claim that the legislation merely returns the law to its place before the *Ledbetter* decision.[209] Representative George Miller stated: "As long as workers file their charges within 180 days of a discriminatory paycheck, their charges would be considered timely. This was the law prior to the Supreme Court's [*Ledbetter*] decision."[210] Further, LFPA-supporters argue that returning to this "prior law" will not result in a significant increase in direct spending or affect revenues.[211]

Finally, the LFPA addresses the fact that the Civil Rights Act of 1964 already has several pro-employer factors built into Title VII.[212] These include: (1) the employee bears the burden of proof; (2) the employer's burden is often extremely easy to meet; (3) proof of employer intent is often difficult to obtain; (4) equitable doctrines that frequently protect employers from liability; and (5) Title VII's limitation on damages.[213] LFPA-supporters claim that increasing the employee's burden amidst these pro-employer characteristics actually restricts courts' ability to promote the preventative purpose of Title VII.[214]

IV. RECONCILING THE PARTY SPLIT: COMPETING POLICIES, EQUITABLE JUDICIARY DOCTRINES, AND A MODIFIED BALANCING TEST FOR TOLLING TITLE VII'S LIMITATIONS PERIOD IN THE PAY DISCRIMINATION CONTEXT

Not surprisingly, the LFPA's critics and proponents represent competing interests in the fair and equitable resolution of pay discrimination claims under Title VII. The critics' primary concerns include: (1) excessive litigation due to

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207. Lilly Ledbetter Fair Pay Act of 2009 § 2(2), Pub. L. No. 111-2, 123 Stat. 5 (2009).

208. *See Hearings*, *supra* note 194, at 63 (testimony of Neal D. Mollen).

209. *See, e.g.*, Democratic Committee, *supra* note 171. *See also The Supreme Court, 2006 Term—Leading Cases III*, 121 HARV. L. REV. 355, 364 n.62 (2007) [hereinafter *Leading Cases*] (arguing that the Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all applied the paycheck accrual rule prior to the *Ledbetter* decision). *But see Hearings*, *supra* note 194, at 60 (testimony of Neal D. Mollen) (mentioning the Seventh Circuit's decision in Dasgupta v. Univ. of Wis. Bd. of Regents, 121 F.3d 1138 (7th Cir. 1997), as evidence that lower courts did not uniformly embrace the paycheck accrual rule).

210. *See e.g.*, Democratic Committee, *supra* note 171.

211. Congressional Budget Office, 110th Cong., Report on Cost Estimate for H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007 (Comm. Print 2007).

212. *See Leading Cases*, *supra* note 209, at 364.

213. *Id.*

214. *Id.*

the LFPA's abrogation of any meaningful limitations period; (2) expansion in the scope of liability due to ambiguous statutory language and "compensation" as a broad category; and (3) prejudice to employers from lost evidence in stale claims.[215] The LFPA's supporters are primarily concerned with: (1) quick resolution of pay discrimination claims; (2) judicial cognizance of pay discrimination's idiosyncrasies; and (3) fairness to discrimination victims.[216]

Party lines and politics aside, both views raise legitimate concerns that discrimination law has attempted to balance over the past four decades. Therefore, any satisfactory approach to the application of Title VII's limitations period in the pay discrimination context must, at the very least, recognize each position.

A. Equitable Judiciary Doctrines as a Means of Tolling Title VII's Statutory Limitations Period

The reader may wonder if any change in pay discrimination jurisprudence was necessary, given the various equitable doctrines the judiciary has at its disposal to deal with timeliness issues. Therefore, before considering whether the LFPA is a necessary congressional response to a complex interaction of competing interests in the pay discrimination context, one should determine whether equitable judiciary doctrines would allow the court enough flexibility to manage the majority of cases within this arena.

1. The Discovery Rule.—The discovery rule addresses when a claimant's statute of limitations actually begins to run.[217] Essentially, it is a common law equitable doctrine that delays a limitations period from running until a plaintiff discovers the injury in question.[218]

The Supreme Court has expressly mentioned the possibility that the discovery rule could potentially apply in the employment discrimination context on several occasions.[219] The Court acknowledged the issue in both *Morgan* and *Ledbetter*, but declined to rule on it in each case.[220] Previous Supreme Court

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215. *See supra* Part III.C.

216. *See supra* Part III.C.

217. Copus, *supra* note 149, at 13.

218. *Id.*

219. *See generally id.* at 13-19.

220. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.10 (2007) ("We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.") (citation omitted), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 n.7 (2002) ("There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.").

decisions, however, imply that the Court does, indeed, apply the discovery rule when determining when the limitations period accrues in the employment discrimination context.[221] For example, in *Ricks*, the Court held that the limitations period began when Delaware's "decision was made and communicated to Ricks."[222] The *Ledbetter* opinion also relied on the employer's communication of the discriminatory conduct as the point of the cause of action's accrual. The Court stated: "Ledbetter should have filed an [Equal Employment Opportunity Commission] charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."[223] "In theory at least, an employee suffers an injury at the time the employer makes the allegedly unlawful decision."[224] Therefore, the limitations period should accrue when the employer makes the decision. The Court's continual reference to the time when the employer communicates the unlawful decision to the employee, however, indicates that the plaintiff's discovery of the injury actually commences the limitations period.[225]

Even if the Supreme Court formally acknowledges its application of the discovery rule in Title VII pay discrimination cases, the equitable doctrine will do little to address the concerns of Justice Ginsburg and LFPA proponents.[226] The discovery rule would only postpone the accrual of the limitations period until the employee learns of the unlawful decision, even if the employee is unaware of its discriminatory effect.[227] Therefore, under the discovery rule, the limitations period would begin to run when the employee learned of the discriminatorily low pay, even if the employee was unaware that it was, in fact, discriminatory. This equitable doctrine does little to address the employee's difficulty in accessing comparative pay information and the gradual development of discriminatory pay differentials.

2. Equitable Tolling and Equitable Estoppel.—Equitable tolling and equitable estoppel revolve around the idea that defendants should not be allowed to avoid liability by courts' formulaic application of limitations periods.[228] Courts, however, generally decline to invoke these doctrines where the employer

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221. *See* Copus, *supra* note 149, at 18-19.

222. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

223. *Ledbetter*, 550 U.S. at 628.

224. Copus, *supra* note 149, at 16. Note *Ledbetter* expressly applied *Morgan's* "discrete act" dichotomy to the pay discrimination context: "Because a pay-setting decision is a 'discrete act,' it follows that the period for filing an [Equal Employment Opportunity Commission] charge begins when the act occurs." *Ledbetter*, 550 U.S. at 621.

225. Copus, *supra* note 149, at 18-19.

226. *Id.* at 13.

227. *Id.* at 17 n.9.

228. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959) ("[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.").

did not engage in misconduct.[229] Further, even where the employer deceives a plaintiff, some courts still refuse to suspend limitations periods if the plaintiff remained suspicious about discrimination or should reasonably have been.[230]

Equitable tolling and estoppel, therefore, usually only apply in cases of extreme employer misconduct. While these doctrines would allow some plaintiffs to suspend their charge-filing periods, they would do little to address the majority of cases. When the employer intentionally pays an employee a discriminatory wage, these doctrines would not generally protect employees unless the employer also proactively attempted to mislead the employee.[231]

3. The Effectiveness of the Common Law Equitable Doctrines of Limitations Periods in the Pay Discrimination Context.—Current common law equitable doctrines are inadequate with respect to the majority of pay discrimination cases. Even if applied, the discovery rule would generally only suspend the limitations period from accruing for a few days.[232] In other words, because the discovery rule only operates to delay the accrual of the limitations period in pay discrimination cases until the employee learns of the discriminatory pay, the charging period will usually begin to run when the employer issues the next discriminatory paycheck. This doctrine may marginally increase the length of limitations periods in Title VII pay discrimination cases, but it does not materially impact the large majority of cases.[233]

Equitable tolling and estoppel are somewhat more useful for plaintiffs in the pay discrimination arena. These doctrines, however, have consistently been limited to those instances of extreme employer misconduct.[234] Therefore, they will only protect employees in the most extreme cases.

B. A Policy-Oriented Modified Balancing Test for Applying Title VII's Limitations Period in the Pay Discrimination Context

Because current equitable judicial doctrines of limitations periods do not adequately address the majority of pay discrimination cases, the *Ledbetter* rule failed to recognize some very important policy considerations. The *Ledbetter* rule ignored the idiosyncrasies of pay discrimination and Title VII's ultimate goal of eradicating discrimination.[235] It also failed to recognize that Title VII has many pro-employer tendencies.[236] The LFPA, however, addresses these policy

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229. Copus, *supra* note 149, at 23.

230. *See id.* at 22.

231. *See id.* at 22-23.

232. *Id.* at 13.

233. *See id.*

234. *Id.* at 22-23.

235. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 646-50 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16); Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

236. *Leading Cases*, *supra* note 209, at 364.

considerations with extreme preference for employee-friendly policies. Specifically, the LFPA ignores the problem of lost evidence and Congress's preference for prompt resolution of discrimination claims.[237] Not only does the LFPA exchange the *Ledbetter* rule's pro-employer policies for an equally pro-plaintiff perspective, but it also has the potential to substantially increase the amount of employment discrimination litigation via broad and ambiguous statutory language.[238]

Any approach to the application of Title VII's limitations period in the pay discrimination context must recognize all of the important, albeit competing, interests at stake. Specifically, it must weigh the: (1) potential for excessive litigation due to variations in Title VII's limitations period; (2) expansion in the scope of claims; (3) prejudice to employers from lost evidence in stale claims; (4) quick resolution of pay discrimination claims; (5) idiosyncrasies of pay discrimination; and (6) fairness to discrimination victims. *Ledbetter's* pro-employer rule fails to address concerns regarding fairness to employees and the realities of pay discrimination. The LFPA does not address lost evidence due to stale claims and the benefits of prompt actions. Both fall short.

A modified approach that balances the interests of both employers and employees is necessary to adequately manage the application of Title VII's limitations period in the pay discrimination context. Under this modified approach, as a default rule, Title VII's charging period will commence when the employee learns of the discriminatory act, i.e., pay.[239] An alleged victim of pay discrimination could, however, expand the limitations period by presenting sufficient evidence that a reasonable person would not have known that the payments were discriminatory.[240] Where a plaintiff presents sufficient evidence in this regard, the court will balance a number of factors to determine whether, and to what extent, the limitations period should be tolled. These factors include the: (1) length of time that has passed since the discriminatory act; (2) prejudice to the employer from lost evidence; (3) impact on the quick resolution of pay discrimination claims; (4) wrongfulness of the employer's conduct; (5) alleged victim's ability to obtain comparable pay information while receiving discriminatory pay; and (6) differences in pay between the alleged victim and similarly situated victims.

If, on balance, the court determines that the facts of the case justify the plaintiff's inaction, the court may, within its discretion, toll the limitations period in a manner that is equitable, given the totality of the circumstances. Of course,

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237. *See Hearings*, *supra* note 194, at 58-59 (testimony of Neal D. Mollen).

238. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

239. The employee's knowledge of the act, however, does not require knowledge of discriminatory effect or motive. This shortcoming will be checked by the employee's ability to expand the limitations period by establishing that a reasonable person would not have known that the payments were discriminatory.

240. Note this approach essentially converts the current discovery rule into an equitable doctrine that justifies a plaintiff's inaction where it is reasonable under the circumstances.

the length of tolling will likely vary depending on the court's evaluation of many of the modified balancing test factors. For example, all else being constant, greater employer misconduct will result in a longer tolling period; greater access to information about pay disparity will lead to a shorter tolling period.

These factors address the primary concerns of both employer and employee policies and allow for flexibility so that the judiciary can address the equities of the specific factual circumstances. Applying Title VII's current limitations period as a default rule and placing the burden of proof regarding the reasonableness of pay differential knowledge promotes prompt resolution of pay discrimination claims. Weighing the prejudice to the employer from lost evidence recognizes the difficulty in proving a non-discriminatory motive in stale claims and deters plaintiffs from waiting until employers are defenseless to bring pay discrimination claims. The wrongfulness of the employer's misconduct and the plaintiff's access to comparable pay information address the realities of pay discrimination. That is, it allows the court to toll the limitations period when employers hide pay information or employees have no reasonable means to access it. Finally, the difference in pay between the plaintiff and similarly situated individuals gauges whether the plaintiff should have reasonably recognized the discriminatory effect earlier, weighs the employer's misconduct, and recognizes that fairness to discrimination victims, in many cases, requires a finding of damages.

Critics of this approach to the application of Title VII's limitations period in the pay discrimination context will, undoubtedly, emphasize the fluidity of the modified balancing test. Many will say it has no workable standard, resulting in ambiguity for employers and employees alike, not to mention challenges in judicial application. That view, however, fails to recognize the amount of flexibility necessary to adequately deal with the complexities of pay discrimination. Organizations employ different policies regarding the disclosure of compensation information, and discriminatory acts vary in severity. This test allows courts to address the unique nature of each claim and use its discretion to find the optimal length of Title VII's limitation period under the circumstances.

Critics will also say that this approach, like the LFPA, essentially eliminates any meaningful limitations period for Title VII pay discrimination cases. If this ambiguity is truly more troublesome than the inequities in ignoring the complexities in pay discrimination cases, this argument has merit. The modified test, however, will apply Title VII's current limitations period, unless plaintiffs can establish that the unique nature of pay discrimination unfairly kept them from identifying the wrong. Therefore, it favors the current limitations period, unless justice requires otherwise.

Even if the critics are correct in arguing that this modified test merely replaces current law with an unworkable standard that eliminates meaningful limitations on liability, they must at least admit that the optimal application of Title VII's limitations period will recognize the very real and very different political interests at hand. The current lopsided approaches inevitably result in unfairness to either employers, in the case of the LFPA, or employees, in the case of the *Ledbetter* rule. Therefore, a compromising standard that allows courts to recognize both competing interests is necessary if the judiciary is ever to

effectively manage the problematic application of Title VII's limitations period in the pay discrimination context.

CONCLUSION

The competing interests inherent in pay discrimination claims make the application of Title VII's limitations period particularly troublesome within that context. Several early Supreme Court Title VII decisions distinguished between intentional discriminatory acts outside Title VII's charging period and the consequences of those acts that occur during the statutory period.[241] Subsequent decisions and congressional amendments, however, opened the door for confusion among lower courts with respect to the broad congressional intent for the Civil Rights Act of 1964 and pay discrimination claims, in particular.[242] In May 2007, the *Ledbetter* Court finally clarified the Supreme Court's approach for applying Title VII's limitations period in pay discrimination cases.[243] However, Congress responded quickly and overturned *Ledbetter* with the LFPA.[244] Neither approach fully appreciates the complexities of pay discrimination. Further, traditional common law doctrines for tolling limitations period are not adequate to rectify the shortcomings.[245] Therefore, a modified approach is necessary. This approach must recognize both employee and employer perspectives as well as retain the flexibility necessary to adjust limitations periods when justice so requires. Only then will courts genuinely promote the congressional intent and case-specific equities inherent in Title VII pay discrimination claims.

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241. *See, e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

242. *See* Lorance v. AT&T Techs., Inc., 490 U.S. 900, 912 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006).

243. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

244. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

245. *See generally* Copus, *supra* note 149, at 13-23.