Pliable Precedents, Plausible Policies, and Lilly Ledbetter’s Loss

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This article examines the U.S. Supreme Court’s controversial Ledbetter v. Goodyear decision in which the Court curtailed the statute of limitations applicable to pay discrimination claims brought under Title VII of the Civil Rights Act of 1964. As argued herein, the different but plausible readings of the Court’s Title VII precedent in Justice Alito’s five-Justice employer-protective opinion and in Justice Ginsburg’s employee-protective dissent are reflections of a fundamental disagreement about the Court's proper role and function in the interpretation and application of Title VII (and, by extension, other employment discrimination statutes). The formalist, dichotomous, and classificatory approach of Justice Alito’s majority opinion did not examine or give any interpretive significance to that which was of critical importance to the dissenting Justice Ginsburg: recognition of workplace realities and the contextual nuances of certain forms of pay discrimination. Because defensible viewpoints and plausible policy formulations can be found on both sides of this analytical divide, the fact that and the way in which the Court split in its resolution of an important issue not answered in a clear, express provision of Title VII warrant scholarly examination. This is especially so given Congress’ reaction to the Court’s construction and application of Title VII in the legislature’s enactment of the Lilly Ledbetter Fair Pay Act of 2009.

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"Legalistic thinking tends to be dichotomous, classificatory—a squeezing of novel problems into old categories by main force."¹

"There’s a gap between what’s right, and what’s legal."²

I. Introduction

In 1998 Lilly Ledbetter filed a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) and a subsequent lawsuit in which she alleged, among other things, that the comparatively low salary she received during her years of employment with Goodyear Tire & Rubber Co. was caused by the employer’s sex-based discrimination outlawed by Title VII of the Civil Rights Act of 1964 (Title VII).³ A jury found for Ledbetter and the federal district judge presiding over the trial ordered Goodyear to pay Ledbetter $360,000 plus attorneys’ fees and costs.⁴

Moving to overturn the district court’s decision, Goodyear argued that Ledbetter could not challenge any of the company’s decisions regarding her and other employees’ confidential salaries⁵ made prior to the applicable limitations period governing the timely filing of discrimination charges with the EEOC.⁶ On appeal, Goodyear successfully argued to the Court of Appeals for the Eleventh Circuit that Ledbetter could only state a cause of action for pay discrimination occurring in the 180-day period preceding the filing of her EEOC charge.⁷ Persuaded by the company’s argument and

¹. RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 182 (2007).
⁴. The jury recommended a backpay award of $223,776 and awarded Ledbetter $4,662 for mental anguish and $3,285,979 in punitive damages. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1176 (11th Cir. 2005), aff’d, 127 S. Ct. 2162 (2007). Because Title VII caps the amount of punitive and compensatory damages, see 42 U.S.C. § 1981a(b)(3)(D) (Supp. V 2000), the district court remitted the punitive damages to $295,338, added that amount to the $4,662 mental anguish award, and awarded Ledbetter $60,000 in backpay. 421 F.3d at 1176.
⁸. Title VII provides that an individual must file a charge with the EEOC within 180 days “after the alleged unlawful employment practice has occurred,” with that time period expanded to 300 days in
vacating the verdict for Ledbetter, the Court of Appeals concluded that no reasonable juror could have found that Goodyear's decisions concerning Ledbetter's salary made during the 180-day period preceding her EEOC claim were the product or result of unlawful sex discrimination.\(^8\)

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*\(^9\) a deeply divided United States Supreme Court, affirming the Eleventh Circuit, held that an employer's "pay-setting decision is a discrete act that occurs at a particular point in time" and that "the period for filing an EEOC charge begins when that act occurs."\(^10\) Accordingly, the Court concluded, "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so . . . ."\(^11\) Thus, as will be discussed below,\(^12\) Ledbetter and other employees subject to the Court's defensible but by no means required reading and application of Title VII would have to file charges with the EEOC whenever they had or even suspected that they had been subjected to unlawful pay discrimination.\(^13\) An untimely activation of Title VII's antidiscrimination procedures can be fatal—as Ledbetter learned, a Title VII court action based on an untimely EEOC charge is subject to dismissal.\(^14\)

*Ledbetter* was, and continues to be, a controversial decision. Immediate reactions to the Court's ruling included Senator Edward Kennedy's statement that the "Supreme Court held that Ms. Ledbetter was entitled to nothing at all . . . . Never mind that she had no way of knowing what other workers made, or that the discrimination occurred with each paycheck."\(^15\)

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\(^8\)See *Ledbetter*, 421 F.3d at 1177-78.


\(^10\)Id. at 2165.

\(^11\)Id. at 2169.

\(^12\)See infra notes 201-02 and accompanying text.

\(^13\)See Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, *N.Y. Times*, May 30, 2007, at A18 ("Some legal experts said the ruling would put pressure on workers to file discrimination claims within 180 days even when they are still seeking more conclusive evidence that they were discriminated against").

\(^14\)See, e.g., Zerilli-Edelglass v. New York City Transit Auth., 333 F.3d 74, 81 (2d Cir. 2004) (holding that plaintiff seeking equitable tolling for an untimely complaint failed to act with reasonable diligence throughout the period she sought to have tolled, and dismissing claim). It is not always fatal, however. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

Another commentator complained that the Court's decision "effectively slammed the courthouse doors in the faces of countless wronged employees" and "undermines the capacity of working Americans who have traditionally faced discrimination in the workplace and deserve the opportunity to provide for themselves and their children on a level playing field." Others suggested that "the Court's conservative bloc imposed a significant limitation on workplace protections for victims of discriminatory pay, which will automatically bar the courthouse door to all employees whose inequitable pay has resulted from discriminatory acts outside the 180-day charge-filing period, even if the employees did not know of the discrimination at the time the pay decision was made."

Legal scholars also criticized the Court's decision, arguing that the ruling reflects a problematic "insular individualism" that "underestimates the influence of context on individual decisionmaking" and "ignores the employer's role in creating that context"; that the Court "ignored the realities of both pay discrimination claims specifically and workplace bias claims more generally" and did not "account[ ] for the fact that an employee may not realize that she has experienced discrimination in time to protect her rights"; and that the decision is the latest exemplar of a common thread in the Court's employment discrimination jurisprudence—a wavering in that institution's "commitment to fighting discrimination with litigation."

The United States Congress also focused on Ledbetter's interpretation and application of Title VII. Two weeks after the issuance of the Court's 2007 decision, Lilly Ledbetter testified before a committee of the House of Representatives. The House quickly passed the Lilly Ledbetter Fair Pay

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16. Marc Morial, Congress Must Crack Down on Wage Discrimination to Allow All Americans Fair Chance at American Dream, CHI. DEFENDER, Sept. 24, 2007, at 9; see also Erwin Chemerinsky, Turning Sharply to the Right, 10 GREEN BAG 2d 423, 437 (2007) (arguing that Ledbetter and other 2006 Court decisions close the doors to those who come to the courthouse seeking relief).


18. Tristin K. Green, Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 375 (2008). Professor Green defines "insular individualism" as "the belief that discrimination can be reduced to the action of an individual decisionmaker (or group of decisionmakers) isolated from the work environment and the employer . . . ." Id. at 354. In her view, such individualism is evident in the Ledbetter Court's focus on the conduct of one of Ledbetter's supervisors and in the Court's reasoning distinguishing Ledbetter from Court precedent addressing the timeliness of pay discrimination allegations. See id. at 362-63.


20. Scott A. Moss, Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts, 76 FORDHAM L. REV. 981, 986 (2007) (emphasis added). Arguing that "the Court has used policy arguments badly," Professor Moss analyzes the ways in which the Court's employment discrimination decisions have (incoherently, in his view) required plaintiffs to promptly file suit in certain cases (such as pay discrimination claims) and to delay filing suit in other cases (such as sexual harassment claims) so that conciliation may be pursued through internal resolution policies and mechanisms. Id. at 985.

21. See Justice Denied? The Implication of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing on the Amendment of Title VII Before the H. Comm. On Educa-
Act in July 2007\textsuperscript{22} but a Republican filibuster in the Senate blocked further consideration of the legislation.\textsuperscript{23} Congress continued to express its disagreement with the Court’s decision and sought to legislatively override its holding. On January 29, 2009, President Barack Obama signed his first bill into law: the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA).\textsuperscript{24} Congress announced its finding that \textit{Ledbetter} “significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades”; that the Court’s decision “undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices”; and that in limiting the filing of compensation discrimination claims the Court “ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.”\textsuperscript{25} As amended by the LLFPA, Title VII now provides that unlawful discrimination in compensation occurs (1) “upon the adoption of a discriminatory decision or other practice,” (2) “when an individual becomes subject to a discriminatory compensation decision or other practice,” or (3) “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid . . .”\textsuperscript{26}

Why did the Court’s decision in \textit{Ledbetter} generate such a concentrated reaction and opposition that ultimately led to a Congressional over-
ride? This essay seeks to examine and critique Ledbetter’s approach to and resolution of the important issue of the time in which a pay discrimination claimant must initiate Title VII’s investigative and litigation procedures. It argues that the different but plausible readings of the Court’s Title VII precedent, as set out in Justice Alito’s five-Justice majority employer-protective opinion and in Justice Ginsburg’s employee-protective dissent, are reflections of a fundamental disagreement about the Court’s proper role and function in the interpretation and application of Title VII (and, by extension, other employment discrimination statutes). The formalist, dichotomous, and classificatory approach of Alito’s majority opinion did not examine or give any interpretive significance to that which was of critical importance to Ginsburg’s dissenting opinion: recognition of workplace realities and the contextual nuances of certain forms of pay discrimination. Defensible viewpoints can be found on both sides of this analytical divide, and so the fact that and the way in which the Court split in its resolution of an important issue not answered in a clear, express provision of Title VII warrants scholarly examination. This is especially so given Congress’ reaction to the Court’s construction and application of Title VII.

Part II of this article examines Ledbetter and the differing analyses of the EEOC charge-filing issue set out in Justices Alito’s majority and Justice Ginsburg’s dissenting opinions. Part III’s critique of the Court’s decision takes a closer look at the interpretive choices available to and made by the Justices as they determined whether Ledbetter failed to timely file her pay discrimination charge with the EEOC. Ledbetter was unable to persuade a majority of the Court that, under its precedents, the jury verdict in her favor should stand because she had met the statutory filing requirements. Part III also explores the role that policy preferences played in the ultimate outcome of the case. It questions Justice Alito’s declaration that the Court had to “apply the statute as written” and in a manner divorced from the realities of pay discrimination confronting not just women, but all others protected by Title VII. Finally, Part IV concludes that more attention must be paid to the formalist-realist divide on display in Ledbetter; to the extent that the Justices may continue to separate into these oppositional camps, this judicial reality must be taken into account by Title VII litigants and those fashioning arguments and developing litigation strategies on their behalf.

II. THE COURT’S LEDBETTER DECISION

A. Ledbetter’s EEOC Charge and Lawsuit

Lilly Ledbetter worked for Goodyear Tire & Rubber Company at its Gadsden, Alabama tire plant from 1979 to 1998. Employed for most of

those years as an area manager, the job performances of Ledbetter and other area managers were evaluated on a yearly basis pursuant to the company’s merit raise system. While Ledbetter’s initial salary “was in line with the salaries of men performing substantially similar work,” by the end of 1997 Ledbetter (the only female manager) was paid a salary of $3,727 per month. At that time the lowest paid male area manager received $4,286 per month (fifteen percent more than Ledbetter); the highest paid male manager’s salary was $5,236 per month (approximately forty percent more than Ledbetter’s pay). In 1998, after Ledbetter was transferred to another job, Goodyear’s evaluation ranked her twenty-third of twenty-four salaried employees and fifteenth of sixteen area managers. As a result of that evaluation Ledbetter and three other low ranked managers were denied salary increases.

On March 26, 1998 Ledbetter filed a questionnaire with the EEOC and subsequently filed a formal charge of discrimination with the agency in July of that year. After taking early retirement effective November 1, 1998, she filed a lawsuit against Goodyear and averred, among other things, that the company had engaged in sex-based pay discrimination in violation of Title VII. The case was tried and a jury entered a verdict in Ledbetter’s favor; that verdict was vacated by the Eleventh Circuit on the ground that the pay discrimination asserted by Ledbetter was not challenged in a timely filed EEOC charge.

28. Id. at 2178 (Ginsburg, J., dissenting).
29. See id.
30. See id.
32. See id. at 1175.
33. Ledbetter’s suit also alleged violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006), which outlaws the payment of unequal wages for equal work because of sex, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (2006). Goodyear successfully moved for summary judgment on the Equal Pay Act claim and Ledbetter did not pursue it further. See Ledbetter, 127 S. Ct. at 2166. Interestingly, the Court noted that if she “had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts.” Id. at 2176 (noting that the EPA and Title VII “are not the same” since the EPA “does not require the filing of a charge with the EEOC or proof of intentional discrimination”).
34. 421 F.3d at 1189-90.
B. Justice Alito's Majority Opinion

Writing for a five-Justice majority,35 Justice Alito determined that an employer's "pay-setting decision" is an "easy to identify" "discrete act"36 under the rule announced by the Court in National Railroad Passenger Corporation v. Morgan.37 From this determination "it follows that the period for filing an EEOC charge begins when that act occurs . . . . at a particular point in time."38 Ledbetter "alleged not a single wrong consisting of a succession of acts," Alito wrote, but "a series of discriminatory acts . . . each of which was independently identifiable and actionable . . . ."39 "[W]hen an employee alleges 'serial violations,' i.e., a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation."40

With this analytical move, Justice Alito set the stage for the Court's rejection of Ledbetter's arguments that Goodyear violated Title VII when the company issued paychecks to her during the 180 days preceding the filing of her March 25, 1998 EEOC questionnaire (that period began to run on September 26, 1997),41 and when she was denied a salary increase in 1998.42 Alito noted that Ledbetter did "not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998."43 She argued, instead, that (1) her paychecks "would have been larger if she had been evaluated in a nondiscriminatory

35. Justice Alito's opinion was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

36. 127 S. Ct. at 2165. "A discrete act of discrimination is an act that in itself constitutes a separate actionable unlawful employment practice and that is temporally distinct." Id. at 2175 (quotation marks and internal quotation marks omitted).

37. 536 U.S. 101, 114 (2002), discussed infra notes 131-41 and accompanying text.

38. Ledbetter, 127 S. Ct. at 2165 (internal quotation marks omitted).

39. Id. at 2175.

40. Id.

41. See Ledbetter, 421 F.3d at 1178. Although Ledbetter's actual EEOC charge was filed in July 1998, the Court "assume[d] for the sake of argument that the filing of the questionnaire, rather than the formal charge, is the appropriate date." Ledbetter, 127 S. Ct. at 2166 n.1. The question whether an employee's filing of an intake questionnaire and accompanying affidavit constitutes an EEOC "charge" was recently addressed and answered in the affirmative in Federal Express Corp. v. Holowec, 128 S. Ct. 1147 (2008).

42. See supra notes 31-32 and accompanying text.

43. 127 S. Ct. at 2167.
manner prior to the EEOC charging period” and (2) “the 1998 decision was unlawful because it carried forward the effects of prior, uncharged discrimination decisions.”

“In essence,” Alito wrote, “she suggests that it is sufficient that discriminatory acts [that] occurred prior to the charging period had continuing effects during that period.”

Ledbetter’s “continuing effects” argument faced significant precedential hurdles given Justice Alito’s position that the “instruction provided” by previous Court decisions “is clear.” He stated:

The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Reiterating that Ledbetter did not claim discriminatory acts by the company in the 180 days preceding the filing of her charge, and adding that she did not claim “that discriminatory decisions that occurred prior to that period were not communicated to her,” Justice Alito concluded that Ledbetter’s lawsuit could not rely on discriminatory conduct occurring before the EEOC charge-filing period. “[C]urrent effects alone cannot breathe life into prior, uncharged discrimination . . . such effects in themselves have ‘no present legal consequences.’”

Thus, Ledbetter could not shift the intent of previous pay decisions to the salary disparities challenged in her suit. Allowing her to do so would “shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.”

Justice Alito then turned to Ledbetter’s reliance on Bazemore v. Friday. Asking the Court to adopt a “paycheck accrual rule” under which “each discriminatory paycheck constitutes a new discrete unlawful employment practice with its own limitations period,” Ledbetter grounded her argument in the Bazemore Court’s statement that “[e]ach week’s paycheck

44. Id. (internal quotation marks omitted).
45. Id.
47. 127 S. Ct. at 2167.
48. Id.
49. Id. (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).
50. Id. at 2170.
51. 478 U.S. 385 (1986) (per curiam), discussed infra notes 142-47 and accompanying text.
that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ."53

But what was clear to Ledbetter and to a number of federal courts of appeals adopting the paycheck accrual rule in post-Bazemore cases was not apparent to Justice Alito. In his view, Bazemore stood for the following proposition:

[When] an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.55

Having described and distinguished Bazemore as involving a facially discriminatory pay structure case focusing "on a current violation, not the carrying forward of a past act of discrimination,"56 Justice Alito made clear that:

[A] new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied." The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.57

Policy assessments also played a prominent role in Justice Alito's holding that Ledbetter's EEOC charge was not timely filed. "Statutes of limitations serve a policy of repose," Justice Alito wrote, and reflect the

54. See, e.g., Shea v. Rice, 409 F.3d 448, 456 (D.C. Cir. 2005) (agreeing with the plaintiff's argument that his claim was not time barred because each paycheck received during the limitations period and thereafter constituted a discrete act of discrimination; "the current application of a discriminatory system—here involving discriminatorily low paychecks—does not present a stale claim"); Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) ("A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period . . . Any paycheck given within the statute of limitations period therefore would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1010 (10th Cir. 2002) ("recognizing that each race-based discriminatory salary payment constitutes a fresh violation of Title VII"); Cardenas v. Massey, 269 F.3d 251, 357 (3d Cir. 2001) (concluding that Title VII's statute of limitations "does not bar claims based on conduct which is alleged to have continued to discriminate unlawfully each time it was applied" (internal quotation marks omitted)).
55. Ledbetter, 127 S. Ct. at 2173.
56. Id. at 2173 n.5.
57. Id. at 2174 (citation omitted).
congressional judgment that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."\textsuperscript{58} Title VII's "obviously quite short deadline"\textsuperscript{59} for filing charges "protect[s] employers from the burden of defending claims arising from employment decisions that are long past."\textsuperscript{60}

Isolating the elements of a disparate-treatment claim—(1) an employment practice and (2) discriminatory intent—Justice Alito stated that "[n]othing in Title VII supports treating the intent element of Ledbetter's claim any differently from the employment practice element."\textsuperscript{61} Unlike the "almost always . . . documented" employment practice, "the employer's intent . . . may fade quickly with time."\textsuperscript{62} Deciding whether discriminatory intent may be inferred from circumstantial evidence "can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened."\textsuperscript{63} Justice Alito noted that Ledbetter's claim challenged the alleged misconduct of one supervisor occurring in the early 1980s and mid-1990s. "Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously."\textsuperscript{64}

Moreover, in response to Ledbetter's contention that the laches doctrine\textsuperscript{65} shielded employers from certain past claims, Justice Alito opined that "Congress plainly did not think that laches was sufficient in this context."\textsuperscript{66} He expressed concern that, under Ledbetter's approach, "if a single discriminatory pay decision made 20 years ago continued to affect an employee's pay today . . . the employee could file a timely EEOC charge today" and could do so "even if the employee had full knowledge of all the circumstances relating to the 20-year-old decision at the time it was made."\textsuperscript{67} Not convinced that a suit alleging illegality on the basis of a cur-

\begin{itemize}
  \item \textsuperscript{58} Id. at 2170 (quoting U.S. v. Kubrick, 444 U.S. 111, 117 (1979)).
  \item \textsuperscript{59} Id. (quoting Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980)).
  \item \textsuperscript{60} Id. (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980)).
  \item \textsuperscript{61} Id. at 2171.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id. at 2171 n.4; but see id. at 2187 n.10 (Ginsburg, J., dissenting) (in light of the "abundant evidence" of intentional discrimination heard by the jury "the Court cannot tenably maintain that Ledbetter's case 'turned principally on the misconduct of a single Goodyear supervisor' ") (quoting Alito, J., id. at 2172 n.4).
  \item \textsuperscript{65} "[T]he equitable doctrine of laches requires that a suit be brought within a reasonable time after the injury sued on, where what is 'reasonable' depends on the diligence of the plaintiff and the prejudice if any to the defendant caused by a delay in suing." \textsc{Richard A. Posner, How Judges Think} 177 (2008).
  \item \textsuperscript{66} 127 S. Ct. at 2171.
  \item \textsuperscript{67} Id. at 2175. This concern over the litigation of a case alleging pay discrimination occurring 15, 20, or even 40 years earlier was expressed by Chief Justice Roberts during the November 2006 oral argument of the case. \textit{See} Transcript of Oral Argument at 15, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074). Remarking on the Chief Justice's concern, Professor
rent paycheck reflecting 20-year-old discrimination "would even be barred by laches," Justice Alito declined to "adopt a special rule for pay cases based on the particular characteristics of one case that is certainly not representative of all pay cases and may not even be typical."

Justice Alito also rejected Ledbetter's argument that employees should be given more time to file pay discrimination charges because pay claims are more difficult to detect than are other types of employment discrimination. Stating that this argument was not supported by the statute and was inconsistent with the Court's precedents, he remarked that "it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the 'prompt processing of all charges of employment discrimination,' and the interest in repose." "We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute," i.e., "within 180 days after each allegedly discriminatory pay decision was made and communicated to [Ledbetter]. She did not do so . . . ."
C. Justice Ginsburg’s Dissent

Justice Ginsburg began with a description (omitted by Justice Alito) of Ledbetter’s salary history with Goodyear before turning to the specific issue before the Court: the timeliness of EEOC pay discrimination charges. Positing that pay disparities are significantly different from “‘easy to identify’” firings, refusals to hire, denials of promotion, and other adverse employment actions, Justice Ginsburg stated:

Pay disparities often occur, as they did in Ledbetter’s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Justice Ginsburg continued: “It is only when the disparity becomes apparent and sizable . . . that an employee in Ledbetter’s situation is likely to comprehend her plight and, therefore, to complain.” Thus, she concluded, Ledbetter’s “initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.”

Disagreeing with Justice Alito’s reading of the pertinent precedent, Justice Ginsburg argued that the Court’s prior decisions actually supported Ledbetter’s timely filing argument. Noting Bazemore’s statement that “each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII,” Ginsburg opined that that statement meant (as it has meant to the overwhelming number of the federal courts of appeals) that “[p]aychecks perpetuating past discrimina-

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73. Joined by Justices Stevens, Souter, and Breyer.

As noted by one commentator, “Supreme Court practitioners on the Left and Right were taken aback by” Justice Ginsburg’s dissent “which she summarized from the bench.” Jan Crawford Greenberg, The Sky’s Still Up There, ABC NEWS.COM (July 20, 2007), available at http://blogs.abcnews.com/legalities/2007/07/the-skys-still-.html. See also Joan Biskupic, An Enigmatic Court? Examining the Roberts Court as it Begins Year Three: The Alito/O’Connor Switch, 35 PEPP. L. REV. 496, 500 (2008) (“Justice Ginsburg . . . took the unusual step of reading part of her statement from the bench”).

74. See 127 S. Ct. at 2178 (Ginsburg, J., dissenting). That Justice Ginsburg provided the reader with the specifics of the discrepancies in Ledbetter’s and male managers’ salaries and Justice Alito did not is an illustration of the tendency of appellate judges “to report the facts in their opinions in such a way as to make them fit the legal conclusion smoothly or shape the precedent that the decision will create.” Posner, supra note 65, at 69.

75. 127 S. Ct. at 2179 (quoting Nat’l Passenger R.R. Corp. v. Morgan, 536 U.S. 101, 114 (2002)).

76. See id.

77. Id. at 2178-79.

78. Id. at 2179.

79. Id.


81. See 127 S. Ct. at 2180 (Ginsburg, J., dissenting); supra note 54 and accompanying text.
tion . . . are actionable not simply because they are ‘related’ to a decision made outside the charge-filing period, but because they discriminate anew each time they issue.”

She then noted that the Court’s 2002 National Passenger Railroad Corporation v. Morgan decision placed hostile environment claims in the “cumulative effect of individual acts” category of discrimination claims. In Justice Ginsburg’s view Ledbetter’s claim, “rest[ing] not on one particular paycheck, but on the cumulative effect of individual acts,” resembled and had “a closer kinship to hostile work environment claims than to charges of a single episode of discrimination.”

Ledbetter thus “charged insidious discrimination building up slowly but steadily,” and although the “component acts” of her employer’s pay decisions “fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm.”

Furthermore, in a marked departure from Justice Alito’s analysis, Justice Ginsburg focused on the “realities of the workplace” and the “realities of wage discrimination.” Repeating the points that pay discrimination is different from “generally public events” of easy to see terminations, refusals to hire, etc., and that “[c]ompensation disparities . . . are often hidden from sight,” she argued that a female employee may not immediately know that her salary increase was less than the increase awarded to her male comparators. Justice Ginsburg noted that a female employee “is unlikely to discern at once that she has experienced an adverse employment action” and “may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity.”

Justice Ginsburg concluded that mere suspicion that a relatively small pay increase is explained not by a worker’s performance but by her sex may not be enough to support an “actionable—or winnable” claim where “the amount involved may seem too small, or the employer’s intent too ambiguous . . . .”

As for Justice Alito’s apprehension that employers would have to defend against “long past” and stale claims, Justice Ginsburg responded that “the discrimination of which Ledbetter complained is not long past. As she alleged, and as the jury found, Goodyear continued to treat Ledbetter differ-

82. Id. (citation omitted).
84. 127 S. Ct. at 2180 (Ginsburg, J., dissenting) (quoting Morgan, 536 U.S. at 115).
85. Id. at 2181.
86. Id.
87. Id.
88. Id. at 2184.
89. Id. at 2181.
90. Id. at 2182.
91. Id.
92. Id. at 2185.
ently because of sex each pay period, with mounting harm."93 Given the availability of a laches defense for employers disadvantaged by a plaintiff’s unreasonable delay in filing a charge of discrimination,94 a 20-year-old lawsuit such as that referenced in Justice Alito’s opinion95 would be “foolhardy. No sensible judge would tolerate such inexcusable neglect.”96

In Justice Ginsburg’s view, the Court’s interpretation and application of Title VII effectively removed Ledbetter from Title VII’s protective umbrella. “Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male manager. Knowingly carrying past pay discrimination forward must be treated as lawful conduct.”97 Ledbetter thus lost and would not recover the pay the jury found that she was denied because of sex-based discrimination.98 Commenting that “[t]his is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose,”99 Justice Ginsburg made clear her desire for a legislative response to the Court’s decision: “Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”100 (As we have seen, Congress heeded Ginsburg’s call.)101

III.
CRITIQUE

Ledbetter is an instructive example of the interpretive approaches available to the Justices as they consider and resolve disputes over the meaning and application of statutory provisions. Justice Alito’s majority opinion, agreeing with Goodyear that Ledbetter failed to timely file her charge of discrimination with the EEOC, “is utterly impersonal, crisp, and

93. Id. at 2185-86.
94. See id. at 2186.
95. See id. at 2175.
96. Id. at 2186.
97. Id. at 2187-88.
98. “Nor, were she still employed by Goodyear, could she gain . . . injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work.” Id. at 2188.
99. Id.; see infra notes 127-28 and accompanying text.
100. 127 S. Ct. at 2188 (Ginsburg, J., dissenting); see also Arthur D. Hellman, Justice O’Connor and “The Threat to Judicial Independence”: The Cowgirl Who Cried Wolf?, 39 ARIZ. ST. L.J. 845, 863 n.89 (2007) (discussing Justice Ginsburg’s call for a Congressional response to Ledbetter’s reading of Title VII and her view “that the majority’s decision was bad policy as well as a mistaken interpretation of the statutory language”); Karen Lee Torre, Ginsburg Proves Many Points, CONN. L. TRIB., Feb. 25, 2008, at 27 (noting public speech by Justice Ginsburg in which she reportedly criticized the Ledbetter majority, said the outcome would have been different if Justice O’Connor had not retired, and identified by name the members of Congress who reacted to her call for a legislative response to the Court’s decision).
101. See supra notes 22-26 and accompanying text.
focused on formal analysis; in essence a very well-done example of lofty
formalism." In the dissent, by contrast, Ledbetter’s story was presented
at length, and the common nature of the problem it raised (incremental pay
discrepancies) was analyzed as a problem that very often affects women in
the workplace. The formalism of an arguably pro-business Court resistant to an employee-protective interpretation of Title VII is on display in the
majority opinion. By contrast, the realities-cognizant approach to and
understanding of forms of pay discrimination experienced by women (and,
by extension, all groups protected by Title VII) drives the analysis of the
dissenting opinion.

This analytical divide is reflected in (1) Justices Alito’s and Ginsburg’s
disagreements over the operative meaning of Court precedent and
(2) their differing emphases on judicially-constructed employer- or
employee-protective policies. Justices Alito’s and Ginsburg’s differences are
critical given the majority’s inattention to the practical concerns and obstacles facing those who come to the EEOC and the courts to challenge allegedly unlawful compensation practices. These pliable precedents and plausible policies, and the real-world dynamics of identifying and challenging pay discrimination, are discussed in this part.

A. Pliable Precedents and Plausible Policies

In seeking the reinstatement of the jury verdict in her favor, Ledbetter
sought to persuade a majority of the Court that, under its precedents, her
EEOC charge was timely filed. “Applying precedents requires interpreting
them, interpreting them frequently entails modifying them, and modifying
them often entails extending or contracting them.” Thus, presented with


103. Nussbaum, supra note 102, at 82. Professor Nussbaum noted other differences between the majority and dissenting opinions: “The majority did not mention the fact that Goodyear kept employees’ pay secret; the dissent emphasized this fact, a key feature of the case.” Id. Furthermore, Justice Alito’s majority opinion “never alluded to the general purpose of Title VII; the dissent focused on the importance of interpreting the statute with fidelity to its core purpose . . . .” Id. (quotation marks and brackets omitted).

104. See Jeffrey Rosen, Supreme Court Inc., N.Y. TIMES, Mar. 16, 2008, (Magazine), at 38. Rosen notes that the current Court “has been surprisingly united in cases affecting business interests. Of the 30 business cases last term, 22 were decided unanimously, or with only one or two dissenting votes.” Id. at 40.

Ledbetter’s and Goodyear’s competing readings of its prior opinions, the Court could have interpreted its precedent positively, thereby “broadening its reach or at least reiterating its continuing legal relevance,” or negatively “by restricting or perhaps eliminating its reach.” As we will see, the Court chose the negative path.

1. The Precedential Backdrop

United Air Lines, Inc. v. Evans, Delaware State College v. Ricks, Lorance v. AT&T Technologies, Inc., National Railroad Passenger Corporation v. Morgan, and Bazemore v. Friday formed the precedential backdrop for the contested interpretations of Title VII proffered by Ledbetter and Goodyear. Deciding how these precedents may apply to the charge-filing issue before the Court was a critical and outcome-influential query for the Justices.

In Evans, the Court considered the timeliness of an EEOC charge challenging the company’s refusal to credit an employee with seniority for the period between the 1968 termination of her employment and her subsequent rehire in 1972. The plaintiff contended that the refusal to credit her pre-1972 seniority gave “present effects to the past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination.” Justice Stevens’ opinion for the Court, while agreeing with the logic of this argument, concluded that the charge was not timely filed within the applicable limitation period commencing with the 1968 discharge. The employer was thus entitled

106. THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 16 (2006); see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 117 (1960) (“Every lawyer knows that a prior case may, at the will of the court, ‘stand’ either for the narrowest point to which its holding may be reduced, or for the widest formulation that its ratio decidendi will allow.”).

107. In arguing that the Court chose the negative path in Ledbetter I do not contend or mean to suggest that the Roberts Court has generally abandoned principles of stare decisis in the area of employment discrimination law. Indeed, the Court in its just concluded Term followed precedent and the reasoning of prior decisions in ruling in favor of employees suing their employers for alleged statutory violations. See Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008); CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008).

113. 431 U.S. 553, 554 (1977). Carolyn Evans was forced to resign in 1968 from her position as a flight attendant pursuant to a company policy prohibiting the employment of married female flight attendants. Forced resignations under this policy were later held to violate Title VII in Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971). Evans was not a party to the Sprogis litigation.
114. Evans, 431 U.S. at 557.
115. At the time of Evans’ termination in 1968, Title VII provided that charges had to be filed with the EEOC within 90 days of the alleged unlawful employment practice. See id. at 553 n.3.
to treat the past act as lawful after [Evans] failed to file a charge of discrimination . . . . A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of the current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.\textsuperscript{116}

Accordingly, "the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists."\textsuperscript{117}

Ricks grappled with the charge-filing issue in the context of a college professor's lawsuit alleging that he was denied tenure in March 1974 because of his national origin. Signing a terminal agreement in September of that year, Ricks filed his EEOC charge in April 1975.\textsuperscript{118} The Court, in a 5-4 decision, held that Ricks' suit was based on an untimely EEOC charge and could not be maintained. Writing for the majority, Justice Powell introduced an explicit employee rights/employer protection balancing approach into the interpretive enterprise. He opined that the charge-filing period "inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."\textsuperscript{119} In Powell's view, the filing period for Ricks' charge commenced on June 26, 1974, the date on which he was notified of the college's offer of a terminal contract allowing him to teach an additional year.\textsuperscript{120} "[This] is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later."\textsuperscript{121} "Mere continuity of employment, without more, is insuf-

\textsuperscript{116} Id. at 555 (bracketed material and emphasis added).

\textsuperscript{117} Id. at 558. Justice Marshall argued that the plaintiff's "cause of action accrued, if at all, at the time her seniority was recomputed after she was rehired," and that treating her "as a new employee even though she was wrongfully forced to resign" constituted a continuing violation of Title VII. Id. at 561-62 (Marshall, J., dissenting).

\textsuperscript{118} Ricks v. Del. State Coll., 449 U.S. 250, 253-54 (1980). "Like many colleges and universities, Delaware State has a policy of not discharging immediately a junior faculty member who does not receive tenure. Rather, such a person is offered a 'terminal' contract to teach one additional year. When that contract expires, the employment relationship ends." Id. at 252-53. Ricks' employment with the college ended in June 1975. Id. at 253.

\textsuperscript{119} Id. at 256 (internal quotation marks omitted). The "limitations period, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from the burden of defending claims arising from employment decisions that are long past." Id. at 256-57. Justice Powell cautioned that the limitations period "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." Id. at 262 n.16.

\textsuperscript{120} See id. at 261-62. Justice Stevens, the author of the Court's \textit{Evans} decision, argued that the filing period began to run as of the June 1975 expiration of the terminal agreement. Id. at 266 (Stevens, J., dissenting). Requiring the filing of a charge while a professor was still employed by the university "may prejudice any pending reconsideration of the tenure decision and also may impair the teacher's performance of his or her regular duties. Neither of these adverse consequences would be present in a discharge following a relatively short notice such as two weeks." Id. at 262 n.2.

\textsuperscript{121} Id. at 258 (emphasis in original).
ficient to prolong the life of a cause of action for employment discrimination."\textsuperscript{122}

\textit{Lorance} determined that the at-issue EEOC charge was not timely filed because the limitations period began to run upon the adoption of a collectively-bargained seniority plan and not at a later date when employees were adversely affected by that plan’s terms.\textsuperscript{123} Justice Scalia’s opinion for the Court recognized that under “a different theoretical construct” the employer could have committed a continuing violation of Title VII occurring “not only when the contractual right was eliminated but also when each of the concrete effects of that limitation was felt.”\textsuperscript{124} But, he concluded, that theory was contradicted by \textit{Evans} and \textit{Ricks}. “Like Evans, petitioners in the present case have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.”\textsuperscript{125}

Congress did not agree with \textit{Lorance’s} interpretation and application of Title VII and legislatively overruled the Court’s decision (and other Title VII rulings) in the Civil Rights Act of 1991 (CRA).\textsuperscript{126} As amended by the CRA, Title VII § 706(e) now provides that “an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose” in three instances: (1) “when the seniority system is adopted,” (2) “when an individual becomes subject to the seniority system,” or (3) “when a person aggrieved is injured by the application of the seniority system or provision of that system.”\textsuperscript{127} What remained in the wake of this amendment? One analyst posited that “[i]n light of § 706(e)(2)’s narrow scope, \textit{Lorance} continues to be viable in non-seniority system situations, and thus the pro-plaintiff change made to Title VII . . . is of relatively limited reach.”\textsuperscript{128} On that view, \textit{Lorance’s} time-of-decision-not-time-of-consequence analysis was not completely interred by the CRA and was “a loaded weapon ready for the hand”\textsuperscript{129} of later courts

\begin{itemize}
\item \textsuperscript{122} Id. at 257; cf. \textit{Chardon v. Fernandez}, 454 U.S. 6 (1981) (per curiam) (holding that the statute of limitations period for employees’ lawsuits alleging First Amendment violations commenced on the date the employees were notified of their discharges and not on the last day of their employment).
\item \textsuperscript{123} See \textit{Lorance v. AT&T Techs., Inc.}, 490 U.S. 900, 905-06 (1989). In 1979 the employer and the employees’ union representative entered into a collective bargaining agreement changing the calculation of the competitive seniority of workers in the company’s job tester classification. Demoted during a 1982 recession, a number of female testers filed a charge with the EEOC in 1983 and alleged that the 1979 plan change was the product of an intentionally discriminatory conspiracy to discourage women from seeking employment in tester jobs traditionally held by males. \textit{Id.} at 902-03.
\item \textsuperscript{124} Id. at 906.
\item \textsuperscript{125} Id. at 908.
\item \textsuperscript{129} \textit{Korematsu v. United States}, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
\end{itemize}
addressing the charge timeliness issue in the non-seniority context. (The Court picked up and fired the Lorance weapon in Ledbetter.)

Morgan held that Title VII “precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period,” with “termination, failure to promote, denial of transfer, or refusal to hire” included in the discrete-act category.130 Explaining this holding and focusing on the statutory text in his opinion for a unanimous Court, Justice (and former EEOC chair) Thomas131 noted that the “operative terms” of Title VII § 706(e) are:

“[S]hall,” “after . . . occurred,” and “unlawful employment practice.”
“[S]hall” makes the act of filing a charge within the specified time mandatory . . . . “[O]ccurred” means that the practice took place or happened in the past. The requirement, therefore, that the charge be filed “after” the practice “occurred” tells us that a litigant has up to 180 or 300 days after the unlawful practice happened to file a charge with the EEOC.132

Justice Thomas rejected the argument that the prohibition of an “unlawful employment practice” includes the proscription of “an ongoing violation that can endure over a period of time.”133 “There is simply no indication that the term ‘practice’ converts related discrete acts into a single unlawful employment practice for the purposes of timely filing.”134 As the term “practice” refers to “a discrete act or single ‘occurrence,’”135 “discrete 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.”136

The unanimity of the Morgan Court with respect to the charge-filing requirement in discrete act cases disintegrated when the Court turned to the question of the timely filing of hostile work environment discrimination charges. A five-Justice majority fashioned a different rule for environmental claims: “so long as an act contributing to that hostile environment takes place within the statutory time period” the “entire scope of a hostile environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability . . . .”137 Justice Thomas reasoned that, unlike a discrete discriminatory act occurring on a

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132. 536 U.S. at 114 (emphasis in original and citation omitted); see also id. at 110 (“A discrete retaliatory or discriminatory act ‘occurred’ on the day that it ‘happened.’ A party, therefore, must file a charge within 180 or 300 days of the date of the act or lose the ability to recover for it.”).
133. Id. at 114, 132.
134. Id. at 111.
135. Id.
136. Id. at 113.
137. Id. at 105. Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented from this part of the Court’s opinion. Justice O’Connor argued that while a hostile environment claim is “not completely reducible to particular discriminatory acts, each day the worker is
specific day, hostile environment claims are “based on the cumulative effect of individuals acts” occurring over a number of days or even years. 

Hostile environments are thus “composed of a series of separate acts that collectively constitute one ‘unlawful employment practice’” challengeable in a charge filed within 180 or 300 days of any act that is part of the environment. The correctness of this treatment of hostile environment claims was reinforced, in Justice Thomas’s view, by the fact that Title VII does not preclude the recovery of compensatory or punitive damages for those portions of a hostile environment preceding the charge-filing period, and by the additional fact that a successful plaintiff can recover backpay covering a two-year period prior to the filing of the underlying EEOC charge.

_Bazemore_, the fifth significant case in the Court’s EEOC charge-filing jurisprudence, addressed the statute of limitations issue in a pattern-or-practice case filed by black employees of the North Carolina Extension Service. There, the Court held that the employer had a duty to eradicate salary disparities between black and white employees originating in employment practices preceding March 24, 1972, the date on which Title VII became applicable to public employers. Justice Brennan, in a concurring opinion joined by all the members of the Court, reasoned that pre-Title VII pay discrimination “does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks.”

Justice Brennan then made clear that pay discrimination could be an ongoing and actionable phenomenon. “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.” _Evans_ did not suggest a different rule, Brennan stated, as the “critical question” asked and answered in the negative in that case was “whether any present violation exists.” He noted that the _Bazemore_ plaintiffs alleged “that in continuing to pay blacks less than simil-

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138. Id. at 124 (O’Connor, J., concurring in part and dissenting in part).
139. Id. at 115.
140. See 42 U.S.C. § 2000e-5(g)(1) (Supp. V 2000). “If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay.” _Morgan_, 536 U.S. at 119.
143. Id. at 395-96.
144. Id. at 396 n.6 (Brennan, J., concurring in part).
larly situated whites" the employer was not making "employment decisions in a wholly nondiscriminatory way." Thus, "[o]ur holding in no sense gives legal effect to the pre-1972 actions, but, consistent with Evans . . ., focuses on the present salary structure, which is illegal if it is a mere continuation of the pre-1965 discriminatory pay structure."146

2. Same Precedents, Different Readings

Evans, Ricks, and Lorance were the most problematic precedents for Ledbetter’s position that her EEOC charge was timely filed. In each of those cases the Court rejected a continuing violation theory and endorsed a decision-not-consequences approach to the commencement of the filing period. Taking the same approach, Justice Alito’s Ledbetter opinion made the point that nondiscriminatory acts occurring within the 180- or 300-day period preceding the filing of a charge do not render timely unchallenged acts of discrimination occurring before, and therefore falling outside of, that period. As he stated, “current effects alone cannot breathe life into prior, uncharged discrimination . . . such effects in themselves have no legal consequences.”147

Justice Alito also relied on Morgan, wherein employee claims were separated into discrete act and hostile work environment categories.148 Accepting this dichotomous conceptualization of Title VII claims and squeezing Ledbetter’s pay discrimination claim “into old categories by main force,” he posited that failing to challenge a “discrete act” of pay discrimination in a timely manner was the same as failing to timely challenge a “discrete act” of discharge, denial of tenure, or a change in a policy governing the calculation of a worker’s seniority. On that view, the discrete act charge-filing period is triggered by the employer’s decision regarding an employee’s pay (and hiring, firing, etc.) and the communication of that decision to the employee.150

This problematic application of Title VII to the pay discrimination charge brought by Ledbetter is revealed by an exploration of, first, the different types of adverse employment actions employees experience in the nation’s workplaces and, second, the Court’s effort to force those variant claims into Morgan’s two-sphere universe.

145. Id. (internal quotation marks omitted).
146. Id.
147. Ledbetter, 127 S. Ct. at 2169.
148. See id.
149. PosNER, supra note 1, at 182.
150. See also Lewis v. City of Chicago, 528 F.3d 488 (7th Cir. 2008) (holding, in disparate-impact case, that the Title VII charge-filing period commenced on the date of the scoring of allegedly discriminatory tests and not on the subsequent date on which hiring decisions utilizing the test were made), cert. granted, 130 S.Ct. 47 (2009); Freeman v. N. State Bank, No. 07-1251, 2008 WL 2369262 (4th Cir. June 10, 2008) (holding that employee’s failure to file charge with EEOC challenging low bonus within 180 days after the occurrence of that discrete act bars any Title VII claims related to that matter).
Consider, for example, four employees and four adverse employment actions: (1) Employee 1 has been advised by the company’s president that a promotion she sought has been awarded to a male coworker. (2) Employee 2’s supervisor tells her that she must have sexual intercourse with him in order to keep her job; when she rejects his extortionate entreaty he terminates her employment. (3) Employee 3 is subjected to hostile-environment sexual harassment by her supervisor. (4) Employee 4’s periodic and confidential salary increases are lower than the increases awarded to her male counterparts; consequently, over time, and as a result of the incremental pay increases, her salary falls behind and is significantly less than the salaries paid to similarly situated men.

Identifying the commencement of the EEOC charge-filing period for the claims of Employees 1 and 2 is not difficult. Upon being advised that she did not receive the promotion, Employee 1 knows of and has experienced an adverse and perhaps discriminatory event triggering the running of the 180- or 300-day period within which an EEOC charge challenging the denial of that promotion must be filed. Similarly, the discharged Employee 2, having experienced tangible job detriment sexual harassment,\(^\text{151}\) knows that she has been subjected to conduct arguably proscribed by Title VII and must bring a charge within 180 or 300 days of her firing.

Prior to the Court’s 2002 decision in *Morgan* the beginning of the charge-filing period for Employee 3’s hostile-environment harassment claim was not as “easy to identify.”\(^\text{152}\) As discussed above, the Court recognized that “[h]ostile environment claims are different in kind from discrete acts” and “are based on the cumulative effect of individual acts.”\(^\text{153}\) As “the employer may be liable for all acts that are part of this single claim,” an employee’s charge filed within 180 or 300 days “of any act that is part of the hostile work environment” is timely filed.\(^\text{154}\) Accordingly, Employee 3’s charge will be timely so long as it is filed within the requisite time period following any constituent act of the challenged environmental harassment.

Employee 4’s pay discrimination claim—Ledbetter’s claim—presents the interesting and important issue of determining the point in time at which the filing of an EEOC charge would satisfy the requirements of Title VII. Like the adverse employment action experienced by Employee 1 (the denial of a promotion) and Employee 2 (discharge), Employee 4 has experienced possibly discriminatory conduct on the part of her employer: lower com-

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151. In sexual harassment cases, “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
153. Id. at 115.
154. Id. at 118.
pensation than her male colleagues assertedly caused by sex discrimination. Unlike Employees 1 and 2, however, Employee 4 could not immediately have known that her employer’s salary-setting decisions did violate or may have violated Title VII, especially where the employer’s confidentiality rules proscribe and workplace norms inhibit the dissemination of salary information among coworkers.\textsuperscript{155} Knowing that the employer decided to increase her salary by a particular amount, standing alone, is not an “easy to identify” “discrete act.” “‘Equality’ is a relative concept; it involves a comparison.”\textsuperscript{156} Thus, while the amount of a particular pay raise may be of concern to Employee 4, it may not, without more, provide her with sufficient information relative to the question whether that increase, as compared to the increases given to similarly situated males, violates Title VII. Like Employee 3’s hostile environment claim, Employee 4’s initial suspicion that her pay level is the product of sex discrimination may eventually ripen into a viable Title VII action based on the cumulative effect of subsequent pay decisions carried forward to and reflected in Employee 4’s current wage or salary.

If this is correct, Justice Alito’s employment of the decision-not-consequences analytic and placement of Ledbetter’s pay discrimination claim in the \textit{Morgan} discrete act category is questionable. Where a plaintiff seeks to challenge a pattern of incremental disparities in pay culminating in significant and ultimately actionable pay inequality, Justice Alito’s approach equates an employee’s knowledge of the amount of the increase with the quite different proposition that a discriminatory pay decision has been made and communicated to her. In other words, and to reiterate, knowing that one’s salary has been increased, without more and with no accompanying comparative data, is not the same as and does not constitute communication or knowledge of an intentional and sex-based act by the employer. Serial acts may reveal or raise inferences of unlawful disparate treatment not apparent from a single discrete act viewed in isolation.

One can imagine “discrete act” compensation cases in which an employee will have sufficient information raising the question of differential and perhaps unlawful treatment. For example, if an employer advised a female employee “that men supporting families were paid more than she was”\textsuperscript{157} the employee would know of the employer’s decision \textit{and} intent to discriminate and could immediately file a charge with the EEOC, just as she could in termination and failure to hire or promote cases. However, for the reasons previously noted, not all allegedly discriminatory pay cases will be so easy to identify.

\begin{itemize}
\item[155.] See supra note 5 and accompanying text.
\item[156.] Owen M. Fiss, \textit{A Theory of Fair Employment Laws}, 38 U. Chi. L. Rev. 235, 244 (1971).
\end{itemize}
For all these reasons, Justice Alito’s treatment of Ledbetter’s charge is not the best or better analysis of the timeliness of the type of pay discrimination challenged in her lawsuit against Goodyear. As Justice Ginsburg persuasively argued in her dissent, Ledbetter’s claim, based “on the cumulative effect of individual acts,”\textsuperscript{158} was more like a hostile environment action. Recall Justice Ginsburg’s observation that Ledbetter’s claim had “a closer kinship to hostile work environment claims than to charges of a single episode of discrimination.”\textsuperscript{159} Like hostile-environment harassment, incremental and sex-based salary decisions do not initially constitute but may subsequently ripen into an allegedly unlawful employment practice. A signal of potentially illegal activity is just that—an indicator that the employer may be engaging in conduct warranting further scrutiny and perhaps at some point an antidiscrimination law challenge. Whether and when this activity is sufficient to state a claim may not be easily answered from a prospective estimate as opposed to a retrospective evaluation of the totality of the facts and circumstances relative to the employer’s treatment of the plaintiff-employee and her workplace comparators. This cumulative approach, and not the disaggregated focus on each individual salary decision, would provide statutory protection to individuals experiencing incremental pay discrimination.

Consider now Ledbetter’s reliance on Bazemore’s statement that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to” the applicable limitations period.\textsuperscript{160} That declaration of a paycheck accrual rule, one recognized and followed by a number of federal courts of appeals\textsuperscript{161} and now endorsed by Congress in the LLFPA, was the basis for Justice Ginsburg’s argument that paychecks perpetuating past discrimination are, upon each and every issuance thereof, new and actionable acts of discrimination.\textsuperscript{162} However, as previously discussed, Justice Alito dropped Bazemore into the dustbin of the distinguishable,\textsuperscript{163} opining that because the Court’s 1986 decision dealt with a facially discriminatory pay system intentionally adopted and retained by the employer, each paycheck issued by the employer in that case constituted “a current violation, not the carrying forward of a past act of discrimination.”\textsuperscript{164} The Ledbetter majority’s acceptance of this description of Bazemore, one posited by Goodyear’s counsel in the oral argument before

\begin{itemize}
\item \textsuperscript{158} Ledbetter, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).
\item \textsuperscript{159} Id.
\item \textsuperscript{160} 478 U.S. 385, 395 (1986) (per curiam) (Brennan, J., concurring in part).
\item \textsuperscript{161} See supra note 54 and accompanying text.
\item \textsuperscript{162} See Ledbetter, 127 S. Ct. at 2180 (Ginsburg, J., dissenting).
\item \textsuperscript{163} See supra notes 55-57 and accompanying text.
\item \textsuperscript{164} Ledbetter, 127 S. Ct. at 2173 n.5.
\end{itemize}
the Court\textsuperscript{165} and proposed by the United States in its \textit{amicus} brief,\textsuperscript{166} gutted Ledbetter’s case. No current violation with a newly triggered charge-filing period occurred under Goodyear’s “facially nondiscriminatory and neutrally applied” pay system.\textsuperscript{167} An exemplar of a negative interpretation and application of precedent,\textsuperscript{168} the Court’s restrictive reading of \textit{Bazemore} “ended a nearly twenty-year reign of lower court precedent applying \textit{Bazemore} to individual pay decisions that were not based on facially discriminatory pay systems” and “effectively marks the death knell of \textit{Bazemore} because one would rarely find today such a clear case of a facially discriminatory pay scale . . . .”\textsuperscript{169}

As can be seen, Ledbetter was unable to convince a majority of the Court that her case was governed by (her reading and understanding of) \textit{Bazemore}. The risk in relying on and attempting to convince judges that prior case law “compels them to rule in one’s favor” is that the judges may not agree that precedent controls the case before them.\textsuperscript{170} In the absence of controlling precedent the advocate must “convince the judges that the position for which he is contending is the more reasonable one in light of all relevant circumstances, which include but are not exhausted in the case law, statutory text, and the other conventional materials of legal decision making.”\textsuperscript{171} Once the Court distinguished \textit{Bazemore} and gave it no precedential power relative to Ledbetter’s pay discrimination claim, her case turned on the Court’s view of the reasonableness of her proposed construction of Title VII which would commence a new charge-filing limitations period upon the issuance of each paycheck reflecting the current and continuing effects of a discriminatory act occurring several or many years ago. Faced with the choice between the 180- or 300-day limitations period found in the “statute as written”\textsuperscript{172} or an undefined period in which (as hypothesized by the Court) employees could sue and challenge decades-old employment decisions, it is not surprising that a majority of the Court chose the former approach over Ledbetter’s.

\textsuperscript{165} See Transcript of Oral Argument, \textit{supra} note 67, at 45 (Goodyear counsel Glen Nager argues that “a facially discriminatory policy necessarily evidences present intent each time it is applied, and that is the important distinction”).

\textsuperscript{166} See Brief for the United States as Amicus Curiae Supporting Respondent at 13-14, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074) (“Challenges to applications of a facially discriminatory policy do not depend on the theory that a practice is unlawful because it perpetuates a prior unchallenged discrete act. Rather, such challenges depend on the recognition that when a facially discriminatory policy remains in effect, unlawful intentional discrimination is presently occurring with the delivery of each paycheck pursuant to the policy.”) (emphasis in original).

\textsuperscript{167} See \textit{Ledbetter}, 127 S. Ct. at 2174.

\textsuperscript{168} See \textit{supra} note 107 and accompanying text.

\textsuperscript{169} Selmi, \textit{supra} note 67, at 235.

\textsuperscript{170} Posner, \textit{supra} note 66, at 220. Judge Posner argues that appellate advocates mistakenly “think they can win by rubbing the judges’ nose in the precedents.” \textit{Id}.

\textsuperscript{171} \textit{Id}.

\textsuperscript{172} 127 S. Ct. at 2169.
3. Judicial Policy Preferences

The Court’s deeply divided Ledbetter decision illustrates the significance of the Justices’ policy preferences and the promises or perils thereof.

Justice Alito’s opinion for the Court endorsed a policy of repose protecting employers from stale employee claims.\textsuperscript{173} That policy preference provides an analytical foundation for the Court’s “discrete act” classification of Ledbetter’s claim as well as his application of a decision-not-consequence analysis to the lawsuit. Triggering the running of the EEOC charge-filing period immediately upon each and every discrete act of pay discrimination, and not at a later date when the accumulation of smaller pay increments ripen into a discernible and easier to identify claim, protects employers from the posited “stale claim” problem.

Reasoning from this baseline, Justice Alito dismissed the laches defense\textsuperscript{174} as insufficient protection for employers charged with intentional salary discrimination of the type claimed by Ledbetter. This aspect of his opinion prefers a definite statute of limitations over a “vague concept of laches, which would leave a potential defendant in the dark as to when the deadline for a suit against him had passed so that he could go about his business without the threat of liability hanging over his head and so without having to preserve evidence and take other protective measures against a possible suit.”\textsuperscript{175} Correct or not, the best view or not, the Court took sides in an important dispute over the meaning and protective scope of Title VII.

Compare and contrast Justice Alito’s policy views with Justice Ginsburg’s employee-protective approach and her focus on the impact of the Court’s decision on employees subjected to the cumulative effects of past pay discrimination.\textsuperscript{176} Valuing the protection of the employee’s right to sue, Justice Ginsburg’s analysis is consistent with her reading of Title VII’s text and Court precedent, with her determination that employers may invoke the laches defense against unreasonably delayed EEOC charges, and with her focus on the realities and dynamics of pay discrimination\textsuperscript{177} (more on this below).

Ledbetter thus experienced the reality that policy preferences (for example, protecting employers from stale claims or protecting employees’ ability to sue their employers) can play a significant role in the Justices’ interpretation and application of statutes.\textsuperscript{179} The existence and impact of this reality is all the more pronounced in those cases in which a judge, employing judicial discretion, chooses between plausible, defensible, and

\textsuperscript{173} See supra notes 58-60 and accompanying text.
\textsuperscript{174} See Posner, supra note 65 and accompanying text.
\textsuperscript{175} Posner, supra note 65, at 179.
\textsuperscript{176} See 127 S. Ct. at 2187-88 (Ginsburg, J., dissenting).
\textsuperscript{177} See supra notes 88-92 and accompanying text.
\textsuperscript{178} See infra 228-34.
\textsuperscript{179} See generally Posner, supra note 65.
reasonable policy propositions in cases presenting contested readings of statutory provisions and judicial precedents. Resort to policy preferences in those circumstances, especially in decisions in which the Court splits 5-4, can influence if not determine the outcome.

As mentioned previously, the differing employer-protective and employee-protective policies found in *Ledbetter* are both plausible and defensible. Plausibility and defensibility present open areas of adjudicative and jurisprudential flexibility for judges as they "confront interpretive choices, many of which have multiple resolutions that can be justified by craftsman-like arguments."\(^{180}\) Guided by "no external metric," a jurist with analytical choices cannot "escape the need to decide what seems most persuasive among two or more plausible alternatives, and [there is] no algorithm that will resolve for her the conflicting claims of plausibility."\(^{181}\) Thus, once her case entered the world of plausible interpretive and policy choices, Ledbetter and her counsel faced the daunting task of convincing the Court that the employer-protective policy of repose should not be the baseline from which the Court reasoned. Five Justices were not convinced.

**B. The Dynamics and Realities of Pay Discrimination**

As noted above, Ledbetter failed to persuade a majority of the Court that pay discrimination was different from and was harder to detect than other forms of employment discrimination. Justice Alito expressed his belief that he had to "apply the statute as written"\(^{182}\) and that he was not free to change what he perceived to be Title VII's balancing of the interests of aggrieved employees and the interest in the prompt processing of discrimination charges. By contrast Justice Ginsburg argued that pay decisions and disparities in compensation are "often hidden from sight,"\(^{183}\) and that applying Title VII without taking into account the "realities of wage discrimination"\(^{184}\) deprives employees of the protections, and strips away the remedial objectives, of the statute.

Justice Alito's conclusion that he was bound by and could not go beyond the text of Title VII warrants comment. That approach gives the appearance of an obvious and indisputable statutory filing requirement when, in fact, the Court's treatment of the paycheck accrual rule was contrary to the holdings of a number of federal courts of appeals.\(^{185}\) Of course, the fact

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181. Id. (bracketed material added); see also Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, in *Judges On Judging: Views From the Bench* 229 (David M. O'Brien ed. 1997) ("there is no table of logarithms for statutory construction").
183. Id. at 2181 (Ginsburg, J., dissenting).
184. Id. at 2184.
185. See *supra* note 54 and accompanying text.
that a five-Justice majority of the Court disagreed with and rejected the analysis of a sizeable number of federal judges who had recognized the paycheck accrual rule does not mean, on that ground alone, that the Court erred in ruling against Ledbetter. But the lower courts' employee-protective readings of Title VII and the Court's precedents reveal that providing an answer to the question presented in Ledbetter was not simply a matter of reading the text of § 706(e) and finding a clear, unambiguous answer set forth therein. Rather, the declaration that the Court was simply applying the statute as written creates the illusion of certainty and masks the fact that the Court made a conscious choice between erring on the side of protecting employers and not employees. Whether that was the proper choice is certainly debatable; that a choice was in fact made is not.

Unlike Justice Alito, Justice Ginsburg went beyond a formalist examination of the statutory text. She argued, persuasively, that the realities of pay discrimination had to be considered as the Court sought the applicable meaning of the relevant statutory provision. Examples of a realities-cognizant interpretative approach can be found in prior decisions in which the Court considered workplace realities as it resolved contested issues of statutory meaning. For example, in Faragher v. City of Boca Raton the Court, interpreting Title VII § 703(a)(1), held that an employer may be vicariously liable for supervisory hostile-environment sexual harassment subject to an affirmative defense created by a Court engaging in a "quasi-legislative balancing of employer harm prevention and employee harm avoidance." The plaintiff-employee in Faragher argued that "offending supervisors can abuse their authority to keep subordinates in their presence while they make offensive statements, and that they implicitly threaten to misuse their supervisory powers to deter any resistance or complaint."

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186. See supra note 52 and accompanying text.
188. See 42 U.S.C. § 2000e-2(a)(1) (Supp. V 2000) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). As interpreted and glossed by the Court, § 703(a)(1) prohibits workplace sexual harassment, see Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), "is not limited to 'economic' or 'tangible' discrimination," Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993), and is not limited to the regulation of employment "'terms' and 'conditions' in the narrow contractual sense." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).
189. Faragher, 524 U.S. at 807 (an employer may raise an affirmative defense to liability or damages in a hostile-environment claim and must prove (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (setting out the same affirmative defense).
191. Faragher, 524 U.S. at 801.
Agreeing with those arguments, the Court made clear its understanding of the dynamics and the realities of the interaction between a harassed employee and a harassing supervisor. The supervisor’s “actions necessarily draw upon his superior position over the people who report to him, or those under them,” the Court noted, and the “power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.”

This understanding of Title VII’s antidiscrimination mandate was thus cognizant of, and not divorced from, the realities of the workplace as experienced by employees seeking legal recourse for employer misconduct.

The real-world impact of adverse employment actions was also recognized by the Court in Burlington Northern & Santa Fe Railway Co. v. White, wherein the Court held that Title VII’s anti-retaliation provision covered and extended beyond employment-related harms occurring at the workplace. In so holding the Court opined that “[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace,” and noted that “the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” A work schedule change “may make little difference to many workers, but may matter enormously to a young mother with school age children.” Likewise, not being invited to lunch by one’s supervisor “is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.” Workplace realities and context again mattered, as they did in Faragher; that they did not matter to the Ledbetter

192. Id. at 803.
194. See 42 U.S.C. § 2000e-3(a) (Supp. V 2005) (making it unlawful to discriminate against an employee or applicant “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter”).
195. The Court declared that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Burlington N., 548 U.S. at 68 (quotation marks and internal quotation marks and citations omitted).
196. Id. at 63.
197. Id. at 69.
198. Id.
199. Id.; see also Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn., 129 S. Ct. 846, 852 (2009) (holding that Title VII’s anti-retaliation provision extends to an employee who answers questions during an employer’s internal investigation of another employee’s sexual harassment complaint; “[i]f it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others”).
majority in the context of a Title VII challenge to a particular form of pay
discrimination was a reflection and consequence, not of an obvious textual
command, but of an unwillingness to consider the implications of an ap-
proach to statutory interpretation blind to real-world conditions.

New realities of a practical nature faced employees in the wake of
Ledbetter. Given the commencement of Title VII’s 180- or 300-day
charge-filing period at the “particular point in time” of the employer’s
decision setting an individual’s pay, an employee would have to err on the
side of promptly filing a charge with the EEOC whenever she even sus-
pected that an unlawful employment practice may have occurred. Suppose,
for example, that pursuant to company policy an employer makes and an-
nounces salary decisions once a year, in December, and that an employee is
informed at that time that her current pay for the coming year will be, say,
two percent higher than her current pay, or that she will receive no increase.
Suppose that she does not know and cannot gain access to confidential sal-
ary information indicating the percentage increases awarded to her similarly
situated male colleagues. Under Ledbetter, the timer governing the filing of
a sex-based pay discrimination charge she may wish to file with the EEOC
would begin to run at the time she is notified of the employer’s decision and
would expire before the employer makes another salary decision at the end
of the following year.

Given that reality, the hypothetical employee in the preceding para-
graph would have to file a clairvoyant charge, a lucky guess charge, or a
just-in-case charge. The clairvoyant charge would be filed by the em-
ployee who somehow knows that her pay is not only lower but is unlaw-
fully lower than that received by her male coworkers. The lucky guess
charge would be filed by the employee who suspects (perhaps correctly) but
does not know that her lower pay was the result of intentional sex discrimi-
nation. And the just-in-case charge would be filed by the employee who
does not know or have any reason to suspect that she has been discrimi-
nated against, but does know that a failure to file a charge within 180 or 300
days will provide the employer with a defense against any lawsuit based on
an untimely EEOC charge. Not filing charges early and if need be
would subject the employee, as it did Ledbetter, to the risk of judicial dis-
missal of her Title VII lawsuit on statute of limitations grounds.

One post-Ledbetter and pre-LLFPA avenue not definitively closed to
pay discrimination plaintiffs was resort to a discovery or knowledge rule, an
issue not raised by Ledbetter or addressed by the Ledbetter Court.

200. Ledbetter, 127 S. Ct. at 2165.
201. See Selmi, supra note 67, at 237 (“As the law now stands, plaintiffs would be advised to adopt
a Chicago-voting strategy: file early, and file often”).
2162 (2007) (No. 05-1074) (arguing that a discovery rule could “blunt[ ] to some extent” the concern
that the Title VII limitations period could pass before an employee had a reasonable basis for a pay
Under that rule (noted but not resolved in the Court’s 2002 *Morgan* decision), the EEOC charge-filing period would commence at a point in time different from that found in the Court’s discrete act regime and in the dissent’s paycheck accrual approach. Generally, under a discovery rule a statute of limitations for a cause of action begins to run “not [on] the date on which the wrong that injures the plaintiff occurs, but [on] the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured.”

A claim would not accrue “when a person has a mere hunch, hint, suspicion, or rumor of a claim” although suspicions “do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.”

When did Ledbetter discover or reasonably should have discovered that her salary reflected and may have been the product of unlawful sex discrimination? Testifying before a committee of the House of Representatives a few weeks after the Court’s May 2007 decision, Ledbetter stated that during her employment with Goodyear she “had heard rumors that some of the men were getting up to $20,000 a year extra for overtime work. . . . I figured their salaries must be higher than mine, but I didn’t have any

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claim, and noting that “this Court has not yet recognized any discovery rule under Title VII, much less one calibrated to the discovery of how much other workers are paid”) (emphasis in original); Reply Brief for Petitioner at 15, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007) (No. 05-1074) (“The traditional paycheck accrual rule accommodates the need for continuing access to a remedy for continuing pay discrimination, while eliminating the need for a discovery rule and balancing employers’ legitimate interests in avoiding unfair prejudice from unwarranted delay”).

203. See 127 S. Ct. at 2177 n.10 (“Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue”). The discovery rule was noted in an *amicus* brief submitted in support of Ledbetter. Assuming *arguendo* that all Title VII claims are subject to a discovery rule, the brief argued that that “[r]eliance on a discovery rule, however well-crafted, is an inadequate and undesirable solution to the predicament employees face” in pay discrimination cases. Brief of the National Partnership for Women & Families et al. as Amici Curiae in Support of Petitioner at 18, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (No. 05-1074).

204. See 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.” Justice O’Connor, joined on this point by Justice Breyer, expressed her belief “that some version of the discovery rule applies to discrete-act claims.” Id. at 123 (O’Connor, J., concurring in part and dissenting in part).

205. Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) (bracketed material added); see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68, 86 (2005) (under a discovery rule “the clock begins to run not on the date an injury has occurred, but on the date that the plaintiff discovers or should have reasonably discovered the injury”). But see Hamilton v. 1st Source Bank, 928 F.2d 86, 86 (4th Cir. 1990) (the statute of limitations for filing Age Discrimination in Employment Act charge was not tolled until the plaintiff learned during discovery of evidence regarding another claim that he was paid less than younger employees; his claim was barred because “the 180-day period for filing claims begins to run from the time of the alleged discriminatory act” and not from the plaintiff’s discovery thereof).

proof—just rumors." Under the discovery rule knowledge of such rumors may have given rise to a duty requiring Ledbetter to make additional factual inquiries, directed to Goodyear personnel, relative to a possible pay discrimination claim. Ledbetter also told the committee that she filed her EEOC charge shortly after she “started to get some hard evidence of what men were making when someone anonymously left a piece of paper in my mailbox at work, showing what I got paid and what three other male managers were getting paid.” And a “little while after I filed my EEOC complaint, someone sent me an anonymous package showing what the other male managers were getting paid compared to me.” Moving beyond just suspicion and to possession of facts evincing both an injury and its cause, it could be argued that at that point in time Ledbetter had discovered the basis for a Title VII claim, and that the EEOC charge-filing limitations period commenced upon that discovery and not at an earlier time.

Would Ledbetter’s claim have been saved by a discovery rule triggering the charge-filing limitations period on the date when she received the comparative pay data from anonymous sources? Would the commencement of the period at that point in time best promote the purposes and policies of Title VII? An example of the way in which the discovery rule did protect an employee’s pay discrimination claim is found in a pre-Ledbetter federal court of appeals’ decision, Goodwin v. General Motors Corporation. There, a printout of employee salaries “somehow appeared on [the plaintiff’s] desk and on the desks of some co-workers.” The court reasoned that the plaintiff, who alleged race-based pay discrimination, “had no way of knowing” that she was paid less than her white coworkers “(and hence about the assertedly race-based discrimination) until she received the salary information . . . at which time she promptly initiated this action.” Accordingly, the court concluded, “[i]t makes no sense to suggest that [the plaintiff] should or even could have filed her complaint before she knew about any adverse decisions.”

While a discovery rule is more employee-protective than the Ledbetter Court’s reading of Title VII, Congress has now mooted the issue given the enactment of the statute of limitations provisions of the LLFPA. The legis-

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208. Id.
209. Id.; see also Lilly Ledbetter, Equal Work, Unequal Pay, CHRISTIAN SCI. MONITOR, Jul. 31, 2007, at 9 (noting that “over the years, unbeknownst to [her], [her] raises were always smaller” and that she did not know what her colleagues made “until years after the fact”).
210. 275 F.3d 1005 (10th Cir. 2002).
211. Id. at 1008 (bracketed material added).
212. Id. at 1011.
213. Id. at 1011 n.6.
lature's embrace and codification of Bazemore's determination that each paycheck issued to an employee is a new and current violation and not just the carrying forward of past discrimination rejects the Ledbetter Court's description and proffered distinction of Bazemore. Moreover, Congress has expressed its agreement with the policy preferences articulated in Justice Ginsburg's realist and employee-focused dissent. Congress' action has statutorily displaced the formalistic approach and employer-protective analysis found in Justice Alito's majority opinion. In this instance of institutional dialogue between the Court and Congress, Congress, having the last word, has spoken.

IV. Conclusion

Many have understandably criticized Ledbetter's loss-by-technicality as "unfair." It is unfair to require employees to file clairvoyant, lucky guess, and just-in-case EEOC charges each and every time they are advised of their employers' decisions concerning their salaries, and to preclude otherwise viable lawsuits on statutes of limitations grounds where employees have not yet discovered and do not know that they have been subjected to allegedly unlawful treatment. Under the Ledbetter Court's holding and analysis, however, "unfair" was not the same as "illegal" and remediable.

The Ledbetter Court's negative answer to the question whether Title VII's charge-filing period commenced anew with the issuance of each allegedly discriminatory paycheck revealed and was grounded in a formalist approach to the statutory issue and dispute before the Court, an approach institutionally blind and consequently indifferent to the realities and dynamics of the particular form of pay discrimination challenged. While the Ledbetter rule governing the timely filing of pay discrimination claims has been interred by the LLFPA, the existence and consequential impact of the formalist-realist divide and the oppositional camps on display in the Court's decision must be critiqued by those who will continue to turn to the courts and seek remediation of Title VII and other statutory employment discrimination violations.

Lilly Ledbetter convinced a jury that the lower salary she received during her employment with Goodyear was the result of sex-based compensation decisions prohibited by the statute. That victory did not stand, however, as a majority of the Court, employing pliable precedents and expressing policy preferences in employer-protective ways, held that an untimely charge negated her win on the merits. But others will now gain from the legislative reaction to her loss. As Ledbetter stated on the day President

214. See supra notes 51-57 and accompanying text.
215. See MAYER, supra note 2 and accompanying text.
Obama signed the LLFPA, "Goodyear will never have to pay me what it cheated me out of. In fact, I will never see a cent. But with the president's signature today I have an even richer award."