LEDBETTER v. GOODYEAR: THE BALL IS IN CONGRESS' COURT

I. INTRODUCTION

Equal work deserves equal pay. But how often do employees know what their co-workers are paid? It is fairly easy for us to go about our lives, putting in the hours, receiving a paycheck, and assuming our pay is comparatively the same as everyone else's. An employer may even prohibit employees from knowing how much their colleagues earn. But what if, by some chance, you find out you are making far less than everyone else in your position? In fact, five years ago when you were told a raise was not possible, the person in the office next to you received one. Then, three years ago when you were celebrating a two percent raise, everyone else got five percent raises. What if the only reason behind your pay-setting decisions is that you are a woman?

Of course you would immediately think you can file a pay discrimination claim. After all, you have spent years receiving lower pay simply because of your gender. However, the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[1] precludes your claim as time-barred, in essence placing the blame on you for not finding out about the discrimination as soon as your co-workers started making more than you. Therefore, you have no remedy for the discrimination, even though it continues to haunt you in the form of every paycheck you receive.

This Note argues that *Ledbetter* was wrong to severely restrict the time in which employees can bring pay discrimination claims. To correct this error, Congress should amend the Civil Rights Act of 1964[2] to allow victims of pay discrimination to bring a claim based on each paycheck that is issued pursuant to a discriminatory pay-setting decision.

Part II outlines the congressional history and purpose behind Title VII of the Civil Rights Act of 1964's sex discrimination provision and the procedure for bringing a claim for discrimination. It then examines the reasoning behind the majority and dissenting opinions in *Ledbetter*. Part II also scrutinizes pending legislation, aimed at overruling *Ledbetter*, which likely will not pass because of its breadth and Republican opposition. Part III analyzes the *Ledbetter* decision, finding it is contrary to the language, intent, backpay provision, and 1991 amendment of Title VII. In addition, Part III contends that *Ledbetter* is

1. 127 S. Ct. 2162 (2007).
2. 42 U.S.C. § 2000e-2(a)(1) (2006).

inconsistent with precedent, prior decisions by the majority of jurisdictions, and the realities of pay discrimination claims. Part III also proposes new narrow legislation which would counteract *Ledbetter* by installing a paycheck accrual rule specific to pay discrimination claims in the Civil Rights Act of 1964. In Part IV, this Note concludes that Congress can successfully overturn *Ledbetter* with narrowly-tailored legislation aimed at generating bi-partisan support.

II. BACKGROUND

A. Title VII of the Civil Rights Act of 1964 and Pay Discrimination

Title VII of the Civil Rights Act of 1964 prohibits discrimination "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin . . . ."[3] Congress passed Title VII in the midst of the Civil Rights Movement as a response to rampant discrimination in the workplace.[4] Although Title VII provides employees with redress for injuries suffered on account of unlawful employment discrimination, Congress' primary objective and stated purpose in enacting Title VII was to deter employment discrimination in order to eliminate it altogether.[5] In particular, Congress wanted to eliminate discrimination based on race.[6] However, the Title VII language also protected other classes, including sex.[7]

1. The Purpose of Title VII's Sex Discrimination Provision

Congress added sex as a protected class the day before it voted on the Civil Rights Act of 1964 with scarcely any debate regarding the reasons for its addition.[8] Therefore, it has fallen to the courts to define the congressional purpose behind the inclusion of sex in Title VII.[9] Cases interpreting Title VII's sex discrimination provision indicate that it was intended to place women on an equal footing with men in the

3. *Id.*

4. H.R. REP. No. 88-914 (1963), *reprinted in* Civil Rights Act of 1964, 1964 U.S.C.C.A.N. 2391 (1964).

5. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998).

6. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

7. *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

8. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) ("We note, at the outset, that there is little legislative history to guide our interpretation. The amendment adding the word "sex" to race, color, religion and national origin was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate.").

9. *Id.*

workplace,[10] and the Supreme Court has stated that the sex discrimination provision "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[11]

Sadly, this nation's long history of pay discrimination remains an intractable problem for women in the workplace today. Current estimates of the gender wage gap show that a woman only earns seventy to eighty cents for every dollar a man earns.[12] The gender wage gap exists at every level of earnings, from minimum wage workers to executives.[13] Despite modest progress since the introduction of the Civil Rights Act of 1964,[14] the gap is still a dark reality of the workplace for many women, which necessitates the need for protection under Title VII.

Although Congress did not document the intent behind the sex discrimination provision, it has taken an active role in ensuring that the judiciary stays true to the initial vision of Title VII through a series of amendments. In 1989 the Supreme Court narrowed standing for employment discrimination claims by ruling in *Lorance v. AT&T Technologies*[15] that facially neutral seniority systems[16] adopted with

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10. *See* Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) ("The promise of Title VII is that women are now to be on an equal footing."); *see also* Rosenfeld v. S. Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971).

11. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)).

12. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2003, at 29 (2004), *available at* http://www.bls.gov/cps/cpswom2003.pdf (last visited Nov. 6, 2008) (reporting that the pay gap is especially pronounced for African American women and Hispanic or Latino women, who earn even less on the dollar compared to white men).

13. *See* DANIEL H. WEINBERG, U.S. DEP'T OF COMMERCE, CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 7 (2004), *available at* http://www.census.gov/prod/2004pubs/censr-15.pdf (last visited Nov. 6, 2008) (reporting that the wage gap is largest at the top of the earnings spectrum but remains significant at the bottom, especially since the effect of real-dollar differences may be felt most acutely by lower-wage workers); *see also* Stephen J. Rose & Heidi I. Hartmann, *Still a Man's Labor Market: The Long-Term Earnings Gap*, INST. FOR WOMEN'S POL'Y RES. (2004), *available at* http://www.iwpr.org/pdf/C355.pdf (last visited Nov. 6, 2008) (reporting that when earnings over a longer period of time are aggregated, the wage gap is even larger and that in their prime earning years, women earn only thirty-eight percent of what men earn over a fifteen-year period).

14. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 715 (2000) (finding that although the gender wage gap today is narrower than the 1970's measure of fifty-nine cents on the dollar, the bulk of the change occurred during the 1980s, and studies show little additional progress since 1990).

15. 490 U.S. 900 (1989).

gender-biased intent must be challenged within 180 days of the implementation of the system, even though the discriminatory impact may not be realized for years.[17] Congress disagreed[18] and superseded the holding by passing the Civil Rights Act of 1991.[19] The Act repudiated the Court's holding and extended the time period in which challenges to gender-biased seniority systems could be brought.[20] Congress therefore agreed with the dissent in *Lorance*, which recognized that "the harsh reality of [the] decision" was "glaringly at odds with the purposes of Title VII."[21]

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16. *Id.* The gender-biased seniority system at issue in *Lorance* was implemented in 1979. *Id.* at 903. Under the old system, seniority was determined on the basis of years of plant-wide service and was transferable upon promotion to a more skilled "tester" position. *Id.* at 902. The 1979 system made seniority in tester jobs dependent upon the amount of time spent as a tester. *Id.* at 902-03. In 1982, women employees who were promoted to tester positions years earlier received demotions they would not have sustained under the former seniority system. *Id.* They filed suit in 1983, alleging the system violated Title VII since although facially neutral; it had the effect of protecting incumbent tester jobs traditionally dominated by men from female employees who had greater plant-wide seniority. *Id.*

17. *See Lorance*, 490 U.S. at 911-12.

18. *See* 42 U.S.C. § 2000e-5(e)(2) (1991); *see also* H.R. REP. No. 102-40, pt. 2, at 3 (1991). The House Report found:

> *Lorance* . . . held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan is applied to harm the plaintiff. As a result, persons who are harmed by discriminatory seniority plans may be forever barred from bringing suit even before the injury occurs. Section 7 of the Act overrules Lorance and permits person[s] to challenge discriminatory employment practices when those practices actually harm them.

19. 42 U.S.C. § 2000e-5(e)(2) (1991). The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 to allow for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application. *See also* H.R. REP. No. 102-40, pt. 2. The House Report accompanying the Civil Rights Act of 1991 states that the amendment to Title VII has two primary purposes. *Id.* The "first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Id.*

20. 42 U.S.C. § 2000e-5(e)(2) (1991) ("For purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.").

21. *Lorance*, 490 U.S. at 914. *See also* Pub L. No. 102-166, § 3, 105 Stat. 1071 (1991) (intending for the 1991 Civil Rights Act "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

2. How to Bring a Title VII Discrimination Claim

Under Section 706(e) of the Civil Rights Act of 1964, an individual must file a discrimination claim with the Equal Employment Opportunity Commission (EEOC) "within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."[22] The deadline operates as a statute of limitations, beginning when the unlawful employment practice occurs and precluding suit on any time-barred claim.[23] For many employment decisions, it is easy to ascertain the date of the adverse action. However, in cases alleging pay discrimination, courts have been divided over the issue of what qualifies as an unlawful employment practice.[24]

For many years the majority of courts stated that pay discrimination is different from other forms of employment discrimination in that it is harder to identify.[25] These courts held that not only is the discriminatory pay-setting decision an unlawful practice proscribed by Title VII, but every paycheck thereafter received that continues to reflect the prior discrimination in the wage amount is also an unlawful practice.[26] Other circuits maintained that only the pay-setting decision, and not subsequent paychecks, constitute an unlawful practice, and it is this "discrete" act that must be challenged within 180 days.[27] In 2007, the stage was set for the Supreme Court to take on the issue.

B. Ledbetter v. Goodyear Tire & Rubber Co.

In *Ledbetter*, the Court directly addressed whether it was too late for a plaintiff to bring an action under Title VII for pay discrimination when they were subject to an intentionally discriminatory pay decision more than 180 days ago,[28] yet because of that pay decision still received lower wages in the form of paychecks.[29] In other words, when a pay discrimination claim is otherwise time-barred by the EEOC 180-day limitations period, do paychecks received during that 180-day period also count as an unlawful employment practice because they contain a lower amount than they should due to the prior discriminatory pay-setting decision?

22. 42 U.S.C. § 2000e-5(e)(1) (1991).
23. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002).
24. *See Ledbetter*, 127 S. Ct. at 2166.
25. *See id.* at 2179 (Ginsburg, J., dissenting).
26. *Id.*
27. *Id.*
28. *Id.* at 2162.
29. *See id.* at 2165.

1. Lilly's Story

For more than twenty years, Lilly Ledbetter was a supervisor for Goodyear Tire & Rubber Co. at a plant in Alabama.[30] Men occupied most of the supervisory positions at Goodyear, and initially Ledbetter's pay was on par with theirs.[31] However, as time went on, a wage disparity among Ledbetter and the other men performing the same work developed and grew larger and larger.[32] By 1997 the gap could not be ignored. Ledbetter was paid $3,727 per month while the highest paid male manager received $5,236 per month.[33] Even the lowest paid male manager made $4,286 a month.[34]

Ledbetter retired and filed a charge with the EEOC alleging sex discrimination under Title VII.[35] After the jury found in her favor, awarding backpay and damages, Goodyear appealed, arguing that Ledbetter's claim was time-barred with regard to all pay decisions made before September 26, 1997, 180 days before Ledbetter filed with the EEOC.[36] Although there were no overt discriminatory pay decisions made during the 180 days preceding Ledbetter's complaint,[37] she claimed the deficient paychecks Goodyear issued during that period were the result of discriminatory evaluations made on the basis of her sex years earlier, which resulted in years of unequal pay.[38] The Eleventh Circuit disagreed with Ledbetter and reversed,[39] finding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the 180-day period before an EEOC charge is filed.[40]

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30. *Ledbetter*, 127 S. Ct. at 2165.

31. *Id.* at 2178 (Ginsburg, J., dissenting).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 2165.

36. *Ledbetter*, 127 S. Ct. at 2166.

37. Ledbetter did not claim that any intentionally discriminatory pay-setting decisions took place during the 180-day period preceding her EEOC filing. Her sole argument rested upon the paychecks she received during that time. *Id.* at 2169.

38. *Id.* at 2166.

39. Ledbetter v. Goodyear Tire and Rubber Co. Inc., 421 F.3d 1169 (11th Cir. 2005).

40. *Id.* at 1189. The Eleventh Circuit refused to accept Ledbetter's argument that each paycheck she received was an act of discrimination and thereby violated Title VII. *Id.* Instead, the court looked at the only two pay-setting decisions that occurred within the 180 days preceding Ledbetter's EEOC filing and easily concluded there was insufficient evidence to prove Goodyear acted with discriminatory intent in making them. *Id.*

2. The Supreme Court's Rejection of a Paycheck Accrual Rule for Pay Discrimination Claims

On certiorari before the Supreme Court, a 5-4 majority rejected Ledbetter's argument for a paycheck accrual rule: that each paycheck she received during the 180-day period preceding her EEOC filing violated Title VII and triggered a new EEOC charging period.[41] Instead, the Court ruled that the paychecks were mere effects of past discriminatory pay-setting decisions, which could not reset the clock for filing an EEOC charge.[42] Therefore, Ledbetter's claims were time-barred, and she had no remedy.[43]

In reaching this decision, the Court relied on precedent that the EEOC charging period is triggered only by a "discrete" unlawful practice.[44] The Court stated that only the decision to pay Ledbetter a lower wage because of her sex, not the later paychecks she received, was a discrete act which started the 180-day filing period.[45] By the Court's reasoning, for Ledbetter to have any remedy, she would have had to find out what her male co-workers were making each time they got a raise, compare it to her own wages, and then bring suit within 180 days of her learning this information. The Court also stated that Ledbetter's claim was governed by *United Air Lines, Inc. v. Evans*, where the Court rejected an argument that an airline's refusal to give seniority credit for previous employment gave present effect to a past discriminatory act and concluded that the continuing effects of discrimination which took place before the 180-day period did not constitute a present Title VII violation.[46]

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41. *Id.*

42. *Ledbetter*, 127 S. Ct. at 2169.

43. *Id.*

44. *Id.* at 2165.

45. *Id.*

46. 431 U.S. 553, 557-58 (1977). The *Ledbetter* Court rejected what they considered "basically the same" argument as Ledbetter's in *Evans*. Evans was terminated because the airline would not employ married flight attendants. *Id.* However, she did not file with the EEOC at that time. *Id.* A few years later after the airline rehired her, yet refused to take into account her seniority, Evans filed suit arguing that "while any suit based on the original discrimination was time barred, the airline's refusal to give her credit for her prior service gave 'present effect to [its] past illegal act and thereby perpetuate[d] the consequences of forbidden discrimination." *Id.* Although the Court agreed that the seniority system did continue to have an impact on her pay and benefits, it concluded that "the continuing effects of the precharging period discrimination did not make out a present violation." *Id.* at 558. Equating Evans' claim with Ledbetter's fails to take into account a major discrepancy—Evans was fired for obvious discriminatory reasons, a discrete, easy-to-identify act. Yet she failed to bring suit under Title VII at that time. Unlike termination, the pay discrimination Ledbetter suffered was very difficult to

The Court also cited *Delaware State College v. Ricks*[47] and *Lorance*,[48] also seniority system cases, where the Court determined that the plaintiffs' claims were time-barred by the EEOC 180-day limit, if calculated from the actual "discrete" discriminatory act.[49] In addition, the Court reasoned that *National Railroad Passenger Corp. v. Morgan*[50] confirmed that the term "employment practice" as used in Title VII generally refers to a "discrete act or single 'occurrence'" that takes place at a particular point in time.[51] The Court concluded that *Evans*, *Ricks*, *Lorance* and *National Railroad* made clear that the EEOC 180-day charging period is triggered only when a discrete unlawful practice takes place, and in pay discrimination cases, the only unlawful practice is the discriminatory pay-setting decision itself.[52] Convinced that "[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 [–i.e., Ledbetter's paychecks]," the Court turned to Ledbetter's main argument.[53]

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recognize. Therefore, it is understandable why Ledbetter could not bring suit within 180 days of the discriminatory pay-setting decision.

47. 449 U.S. 250 (1980). Ricks claimed he was denied tenure because of race, but was given a final one year contract. *Id.* at 252-53. He did not file with the EEOC until after that contract expired, by which time more than 180 days had passed since the decision to deny tenure. *Id.* at 254. Ricks argued that the EEOC 180-day period began on the date of his actual termination rather than the date tenure was denied. *Id.* Although the Court recognized that Rick's termination was an effect of the discriminatory tenure decision, the Court rejected Rick's argument and held that the EEOC charging period ran from "the time the tenure decision was made and communicated to Ricks." *Id.* at 258.

48. *Lorance*, 490 U.S. at 900. *See supra* note 16 for the facts of *Lorance*. The Court held that the EEOC charge was not timely because it was not filed within the specified period after the adoption in 1979 of the new seniority rule. *Id.* at 907. *But see infra* note 49.

49. *Ledbetter*, 127 S. Ct. at 2168. The Court grudgingly acknowledged in a footnote that "[a]fter *Lorance*, Congress amended Title VII to cover the specific situation involved in that case . . . the dissent attaches great significance to this amendment, suggesting that it shows that *Lorance* was wrongly reasoned as an initial matter." *Id.* at 2169.

50. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 110.

51. *Ledbetter*, 127 S. Ct. at 2169 (quoting *Nat'l R.R. Passenger Corp.*, 536 U.S. at 110-11). The Court in *National Railroad* "pointed to actions such as 'termination, failure to promote, denial of transfer, [and] refusal to hire' as examples of such 'discrete' acts," and held that "a Title VII plaintiff can only file a charge to cover discrete acts that 'occurred' within the appropriate time period." *Nat'l R.R. Passenger Corp.* 536 U.S. at 110-11.

52. *Ledbetter*, 127 S. Ct. at 2169.

53. *Id.* Ledbetter argued that none of the cases the Court relied on in ruling against her involved discriminatory pay decisions. *Id.* at 2174. However, the Court maintained that the reasoning in the cases was applicable to pay cases because the various unlawful employment decisions in all those cases eventually affected wages. *Id.*

Ledbetter relied primarily on *Bazemore v. Friday*[54] in arguing that her claim was not time-barred.[55] Unlike any of the cases the majority relied upon, *Bazemore* was a pay discrimination case like Ledbetter's, in which the Court stated 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 . . . ."[56] Ledbetter argued that *Bazemore* set forth a paycheck accrual rule under which each paycheck that was tainted by the effects of past discrimination, even if not accompanied by present discriminatory intent, triggers a new EEOC charging period.[57] The Court disagreed that *Bazemore* set forth such a rule and distinguished *Bazemore* from Ledbetter's claim on the ground that it concerned a facially discriminatory pay structure that intentionally paid all black employees less because of their race.[58] The Court reasoned in that situation the employer intentionally discriminated each time it issued a check using the discriminatory structure.[59] The Court, however, reiterated that in typical pay discrimination cases, a new violation does not occur when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied."[60]

Finally, the Court rebuffed Ledbetter's other argument, that Title VII limitations periods should be interpreted in the same manner as limitations periods under the Equal Pay Act,[61] the Fair Labor and Standards Act,[62] and the National Labor Relations Act.[63] These would allow Ledbetter to base her claim on the date she received her paychecks.[64] The Court rejected all these analogies, emphasizing that Title VII is simply different from these other statutory remedies,

54. 478 U.S. 385 (1986). *Bazemore* concerned a pay discrimination claim brought by black employees against the North Carolina Agricultural Extension Services. *Id.* at 389-90. The black and white employees were originally separated into two branches, with the black employees receiving less money. *Id.* After the two branches were merged, black employees brought suit claiming "the pay disparities attributable to the old dual pay scale persisted." *Id.* at 391. The Supreme Court held that the error of this system was "too obvious to warrant extended discussion" and ruled in favor of the employees. *Id.* at 395.

55. *Ledbetter*, 127 S. Ct. at 2172.

56. *Bazemore*, 478 U.S. at 395.

57. *Ledbetter*, 127 S. Ct. at 2172.

58. *Id.* at 2173.

59. *Id.*

60. *Id.* at 2174 (quoting *Lorance*, 490 U.S. at 911).

61. 29 U.S.C. § 206(d) (2006).

62. 29 U.S.C. § 207 (2006).

63. 29 U.S.C. § 160 (2006).

64. *Ledbetter*, 127 S. Ct. at 2176.

especially in that the Equal Pay Act and the Fair Labor Standards Act do not require proof of a specific intent to discriminate.[65]

3. Justice Ginsburg's Dissent

Justice Ginsburg wrote a spirited dissent joined by three other justices, which argued that the majority opinion completely ignored the realities of pay discrimination and the differences between pay disparities and other easy-to-identify discrete adverse acts such as termination, promotion, or hiring decisions.[66] The dissent stated that Ledbetter's claim was indeed governed by *Bazemore*, which did set forth a paycheck accrual rule confirming that paychecks affected by past pay-setting discrimination are each separate violations of Title VII.[67] The dissent emphasized this was not simply because the paychecks are related to a discriminatory decision made before the 180-day period, but because *each paycheck is a discriminatory action in itself.*[68]

The dissent also pointed out that pay discrimination which evolves over time is more akin to hostile work environment claims in the sense that it is not based on any one particular paycheck, but on the cumulative effect of individual acts.[69] Using this analogy, the dissent found that Ledbetter had proven that over time, "the repetition of pay decisions undervaluing her work gave rise to the current discrimination over" which she filed suit.[70]

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65. *Id.* Ledbetter originally asserted an Equal Pay Act (EPA) claim as well, which does not require the filing of a charge with the EEOC or proof of intentional discrimination. *Id.* Although the record is not clear, it seems the district court dismissed the EPA claim. *Id.* Ledbetter objected to the dismissal of the claim, but it seems she eventually elected to abandon the EPA claim. *Id.* The Supreme Court stated that had Ledbetter not dropped the EPA claim, "she would not face the Title VII" statute of limitations obstacles that she now confronts. *Id.*

66. *Ledbetter*, 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting). Justice Ginsburg stated:

> The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. 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 . . . [p]ay disparities are thus significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory.

Id. (quoting *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114).

67. *Id.* at 2180.

68. *Id.*

69. *Id.* at 2181.

70. *Id.*

The dissent maintained that pay discrimination cases are extremely different from the cases the majority relied upon in reaching their decision.[71] In both *Evans*, which involved a constructive discharge, and *Ricks*, where the plaintiff was denied tenure, the facts involved "a single immediately identifiable act of discrimination."[72] Therefore, while it was reasonable to expect the plaintiffs in those cases to bring suit within 180 days of the discriminatory act, the same reasoning cannot be applied to repetitive pay discrimination claims like Ledbetter's that evolve over time and are difficult to identify.[73]

The dissent also criticized the majority for relying on *Lorance*, a gender-biased seniority system case that was superseded by Congress in the Civil Rights Act of 1991.[74] The dissent pointed out that Congress had overturned *Lorance* because that opinion's restrictive holding was inconsistent with the purpose of Title VII.[75] The dissent then looked to legislative intent in drawing similarities between Ledbetter's claim and *Lorance*, concluding that "[j]ust as Congress' 'goals in enacting Title VII . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first [180] days,' Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption."[76]

The dissent concluded that the majority's treatment of Ledbetter's sex discrimination claim was completely inconsistent with the strong protection Congress intended to secure against employment discrimination and argued that Ledbetter's claim fell squarely within what ought to be an illegal, redressable sex discrimination claim.[77] Thoroughly disappointed with the majority's reading of Title VII, Justice Ginsburg openly invited Congress to overturn the result in *Ledbetter*, stating that "[o]nce again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[78]

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71. *Id.* at 2182.

72. *Ledbetter*, 127 S. Ct at 2182 (Ginsburg, J., dissenting) ("No repetitive, cumulative discriminatory employment practice was at issue in either case.").

73. *Id.*

74. *Id.* at 2184 ("The Court's extensive reliance on *Lorance* . . . is perplexing for that decision is no longer effective . . . [u]ntil today, in the more than [fifteen] years since Congress amended Title VII, the Court had not once relied upon *Lorance*. It is mistaken to do so now.").

75. *Id.*

76. *Id.* (quoting *Lorance*, 490 U.S. at 914 (Marshall, J., dissenting)).

77. *Id.* at 2187-88.

78. *Ledbetter*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

C. Congress' First Shot

In the wake of *Ledbetter*, civil rights groups and Democratic congressional leaders attacked the ruling as contrary to the purpose of Title VII and a dangerous setback to civil rights.[79] Within two months of the decision, Congress was already taking steps to counteract the Supreme Court decision by introducing legislation.[80] On July 31, 2007, the House of Representatives passed the Lilly Ledbetter Fair Pay Act,[81] which would amend the Civil Rights Act of 1964 to provide for a paycheck accrual rule. The Act would amend Title VII to read:

> An unlawful employment practice occurs when . . . a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits,

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79. *See* Press Release, Senator Edward M. Kennedy, Statement of Senator Edward M. Kennedy on the Supreme Court Decision in Ledbetter v. Goodyear Tire and Rubber Co., (May 29, 2007), *available at* http://help.senate.gov/Maj_press/2007_05_29.pdf (last visited Nov. 6, 2008). Senator Kennedy stated that the *Ledbetter* decision "strikes at the heart of civil rights laws requiring equal pay for equal work." *Id.* He warned that "[m]any victims of pay discrimination who didn't immediately realize they were being paid less than others will have no remedy, even though the discrimination continues with every paycheck." Reemphasizing that women continue to only earn seventy-seven cents for every dollar earned by men, Senator Kennedy stated that "the nation needs strong laws against pay discrimination. This is not what Congress intended when we passed the landmark Civil Rights Act of 1991, and we need to restore full protection against wage discrimination." *Id. See also* Press Release, Senator Barack Obama, Kennedy, Specter, Obama, *Senators Work to Overturn Supreme Court Decision on Pay Discrimination*, (Jul. 20, 2007), *available at* http://obama.senate.gov/press/070720-kennedy_specter/ (last visited Nov. 6, 2008) ("I was deeply disappointed in the . . . ruling . . . [t]his strikes at the heart of equality in this country.").

80. *See* H.R. REP. No. 110-237 (2007). In the House Report that accompanied the Lilly Ledbetter Fair Pay Act of 2007, Congress made a number of findings. *Id.* It found the Supreme Court in *Ledbetter* "significantly impaire[d] statutory protections against discrimination that Congress established and that have been the bedrock principles of American law for decades." *Id.* Congress also noted that "the *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decision . . . contrary to the intent of Congress." *Id.*

81. H.R. 2831, 110th Cong., 1st Sess. (2007), *available at* http://www.govtrack.us/-congress/bill.xpd?bill=h110-2831 (last visited Nov. 6, 2008) (tracking the history of the Lilly Ledbetter Fair Pay Act). The bill passed by a margin of 225-199. Of the 225 majority, 223 Democrats and 2 Republicans voted for the bill. *Id.* Of the 199 minority, 193 Republicans and 6 Democrats voted against the bill. *Id.*

or other compensation is paid, resulting in whole or in part from such a decision or other practice.[82]

Democratic supporters of the bill claim this simply restores the law as interpreted prior to the Court's decision.[83] However, Republican critics of the bill point out vague language that they claim goes beyond reversing *Ledbetter*.[84] For example, the bill extends the paycheck accrual rule to any "other practice" that affects an individual's wages, benefits, or other compensation in the future.[85] Opponents of the bill interpret this language to mean the statute of limitations would not only be expanded for pay discrimination claims, but could also apply to those "discrete" employment decisions like promotion and termination decisions, which are much easier to identify and can realistically be recognized within 180 days.[86]

On April 23, 2008, the Lilly Ledbetter Fair Pay Act stalled in the Senate when a cloture motion prevented consideration of the bill.[87] President Bush has also threatened to veto the bill if it ever reaches his desk, claiming that it would completely eliminate the statute of limitations for pay discrimination and other employment-related claims.[88] Because of the bill's breadth and Republican opposition, it is

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82. H.R. 2831.

83. *See* Wolter Kluwer Law and Business, *House passes Lilly Ledbetter Fair Pay Act*, (Aug. 8, 2007), *available at* http://hr.cch.com/news/payroll/080907a.asp (last visited Nov. 6, 2008) ("This is a restoration of the statute of limitations, not the elimination of it.") (quoting Rep. Robert Andrews, D-NJ); *see also* Press Release, Congressman Dutch Ruppersberger, *Ruppersberger Supports Lilly Ledbetter Fair Pay Act of 2007*, (July 31, 2007), *available at* http://www.house.gov/list/press/md02_ruppersberger/Ledbetter_-Fair_Pay_Act.html (last visited Nov. 6, 2008) ("The Congressman co-sponsored the bill that clarifies original Congressional intent to ensure that victims of workplace discrimination can use past history of pay discrimination as they seek remedies in a court of law.").

84. Andy Naylor, *Time is Money*, MONDAQ BUS. BRIEFING, Aug. 24, 2007, *available at* http://www.mondaq.com/article.asp?articleid=51636 (last visited Nov. 6, 2008).

85. H.R. 2831.

86. *See* Naylor, *supra* note 84. *But see* Wolter Kluwer Law and Business, *supra* note 83 ("To rebut claims that the legislation would lead to an increase in the number of cases filed, Democratic leaders cited the Congressional Budget Office's conclusion that the bill would not significantly affect the number of discrimination claims.").

87. *See supra* note 81. The Senate fell short by four votes of the sixty needed to begin consideration of the bill.

88. Press Release, President George W. Bush, *Statement of Administration Policy H.R. 2831—Lilly Ledbetter Fair Pay Act of 2007*, (July 27, 2007), *available at* http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf (last visited Nov. 6, 2008).

> [T]he Administration strongly opposes the Ledbetter Fair Pay Act of 2007. H.R. 2831 would allow employees to bring a claim of pay or other

unlikely that the Lilly Ledbetter Fair Pay Act will succeed in overturning the Supreme Court's decision in *Ledbetter*. However, parties on both sides continue to question the *Ledbetter* decision, especially since the issue took center stage in the 2008 presidential campaign.[89] The question on most people's minds is: Did the Supreme Court make the correct decision in *Ledbetter*?

III. ANALYSIS

Analysis of Title VII, precedent, and the realities of pay discrimination all prove that the Supreme Court was wrong to severely limit an employee's ability to bring pay discrimination claims. The *Ledbetter* decision is contrary to the broad language and intent of Title VII, as well as inconsistent with precedent and prior decisions by the majority of jurisdictions and the EEOC. The holding also completely ignores the realities of how pay discrimination claims arise in the workplace. As Justice Ginsburg suggested,[90] it is up to Congress to counteract *Ledbetter* by amending the Civil Rights Act of 1964.

Because its first effort is unlikely to succeed, Congress must craft more narrow legislation. A bill which amends Title VII to install a paycheck accrual rule specific to pay discrimination claims would reinstate the rule used in the majority of circuits before *Ledbetter*.[91] Such

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> employment-related discrimination years or even decades after the alleged discrimination occurred. H.R. 2831 constitutes a major change in, and expanded application of, employment discrimination law. The change would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved. Furthermore, the effective elimination of any statute of limitations in this area would be contrary to the centuries-old notion of a limitations period for all lawsuits. If H.R. 2831 were presented to the President, his senior advisors would recommend that he veto the bill.

Id. A presidential veto would kill any hopes of the Lilly Ledbetter Fair Pay Act succeeding, since the bill did not pass in the House with enough votes to override a veto. *See* Stephen Allred, *Congress Acts to Overturn the Supreme Court's Recent Wage Discrimination Decision*, McGuire Woods LLP News (McGuire Woods LLP, New York., N.Y.), Aug 9, 2007, *available at* http://www.hmw.com/workcite/20070809.htm (last visited Nov. 6, 2008).

89. *See* The Political Voices of Women, *Good Week for Women Voters for Obama Campaign*, *available at* http://politicsanew.com/2008/09/21/good-week-for-women-voters-for-obama-campaign/ (last visited Nov. 6, 2008). Lilly Ledbetter was very active in Senator Barack Obama's presidential campaign. She spoke at the Democratic National Convention and even appeared in a television campaign ad to promote equal pay.

90. *Ledbetter*, 127 S. Ct. at 2188 (Ginsburg, J., dissenting).

91. In pay discrimination cases the majority of circuits took the view that discriminatory paychecks constitute cognizable harms, and therefore, a plaintiff may raise a pay discrimination claim to challenge each paycheck received during the 180-day limitations period. *See* Wedow v. City of Kansas, 442 F.3d 661 (8th Cir. 2006).

an amendment would also serve the purpose of Title VII while addressing the realities of pay discrimination.[92]

A. Ledbetter *is Contrary to Title VII*

As a preliminary matter, *Ledbetter's* outcome is contrary to the language and intent of Title VII. The plain text of Title VII prohibits "discrimina[tion] against any individual with respect to his compensation."[93] The most natural reading of this language indicates that Congress intended to prohibit the *actual payment* of unequal wages on the basis of sex or race, not simply the decision to pay an unequal wage. Although Congress did not expressly note the reasons for its inclusion of sex as a discriminatory basis, it is well-known that the main purpose of Title VII was to provide a remedy for employees injured because of employment discrimination,[94] and to assure equality of employment opportunities.[95] There was no dispute that Lilly Ledbetter suffered unequal pay for years because of her sex, and that she met the statutory criteria for damages under Title VII.[96] Yet, according to the majority, Title VII offered no remedy.[97] By precluding an otherwise actionable Title VII claim, the Court, in essence, frustrated the purpose of Title VII.

To defend its holding that Ledbetter's claim was time-barred, the Court strictly interpreted the EEOC 180-day charging period.[98] The Court asserted that in the context of pay discrimination, only the discriminatory pay-setting decision, and no later remnants of it, constitutes an unlawful employment practice.[99] Such a rule essentially means an employee will be subject to unequal pay for equal work unless she recognizes the discrimination very soon after it begins, which is rare since, because of a need for privacy and employers' policies, pay

92. Such a rule would take into account the differences between pay disparities and those other easy-to-identify discrete adverse acts such as termination, promotion, or hiring decisions which Justice Ginsburg spoke of in her *Ledbetter* dissent.

93. 42 U.S.C. 2000e-2(a)(1) (2006).

94. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

95. *See* Teamsters v. United States, 431 U.S. 324, 348 (1977).

96. *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting) ("Ledbetter proved to the jury the following: She was a member of a protected class; she performed work substantially equal to work of the dominant class (men); she was compensated less for that work; and the disparity was attributable to gender-based discrimination.").

97. *Id.* at 2165-77.

98. *See* 42 U.S.C. § 2000e-5(e)(1) (1991) (mandating that an individual must file a charge of discrimination with the Equal Employment Opportunity Commission "within one hundred and eighty days after the alleged unlawful employment practice occurred").

99. *Ledbetter*, 127 S. Ct. at 2167.

discrimination is difficult to recognize. The ultimate result is that the majority of these potential claims will never be filed.

However, contrary to the *Ledbetter* decision, in Title VII's backpay provision, Congress allowed for backpay damages for a period of up to two years before the discrimination charge is filed.[100] This provision indicates that Congress contemplated pay discrimination claims traceable to a decision made before the 180-day limitations period, comparable to Ledbetter's. As the dissent in *National Railroad* pointed out, if Congress intended to limit liability to conduct occurring within the 180-day period preceding the EEOC filing, it is doubtful that Congress would have allowed recovery for up to two years of backpay[101]

In addition, analyzing the 1991 amendment to the Civil Rights Act sheds light on the congressional intent behind Title VII.[102] As previously discussed, Congress disagreed with the restrictive holding of *Lorance* and therefore superseded it in the Civil Rights Act of 1991 by extending the time period in which claims against gender-biased seniority systems could be brought.[103] However, at that time, the Supreme Court's ruling in *Bazemore*,[104] the primary case Lilly Ledbetter relied on in bringing her claim, had already been decided. This case held that in cases of facially discriminatory pay systems, each discriminatory paycheck constitutes an independent unlawful employment practice in violation of Title VII.[105] If Congress had intended to limit claims of pay discrimination, it could have superseded *Bazemore*'s holding in the Civil Rights Act of 1991 as it did with *Lorance*.[106] However, Congress did not even mention *Bazemore*.[107] Therefore, the Civil Rights Act of 1991 can be viewed as reflecting the intent of Congress to overturn *Lorance*, which cut back on an employee's ability to bring discrimination claims, and as an endorsement of *Bazemore*, which enhanced an employee's ability to bring pay discrimination claims. This again shows that Congress views Title VII's language and intent as broad and inclusive, unlike the

100. 42 U.S.C. § 2000e-5(e)(1) (1991) ("Back pay shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

101. *Nat'l R.R. Passenger Co.*, 536 U.S. at 114 ("The fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period [i.e., two years] indicates that the [180-day] timely filing provision was not meant to serve as a specific limitation . . . [on] the conduct that may be considered . . . .").

102. 42 U.S.C. § 2000e-5(e)(2) (1991).

103. *See supra* notes 18-19 and accompanying text.

104. *Bazemore*, 478 U.S. at 385.

105. *Id.* at 395-96.

106. *See* 42 U.S.C. § 2000e-5(e)(2) (1991).

107. *Id.*

Supreme Court's holding that left Lilly Ledbetter no protection against discrimination.

B. Ledbetter *is Inconsistent with Precedent*

The holding in *Ledbetter* is also inconsistent with precedent. In *National Railroad*, the Court held that recurring violations of Title VII are separately actionable and that a new limitations period arises for each repetition of an unlawful employment practice.[108] To exemplify this principle, the Court in *National Railroad* pointed to their prior decision in *Bazemore*, which held that an employer commits a violation of Title VII every time it pays similarly-situated employees differently for an illegal discriminatory reason.[109] Applying this reasoning to *Ledbetter*, it would seem as though each paycheck that gives a woman less pay than a similarly-situated man because of her sex is a separate violation of Title VII as well, and likewise starts a new 180-day charging period in which to bring a claim.

Most likely realizing this contradiction, the majority in *Ledbetter*, claimed that *National Railroad* only stood for the proposition that Title VII plaintiffs can only file suit over "discrete" discriminatory acts that occur within the 180 days preceding filing with the EEOC.[110] The majority did not consider the paychecks Ledbetter received as the result of a series of discriminatory pay-setting decisions to be "discrete" acts.[111] The majority also distinguished *Bazemore* from *Ledbetter* in that the employer operated an openly discriminatory pay structure which was adopted to put black employees on a lower pay scale because of race, as opposed to Ledbetter's single claim of sex discrimination.[112] However, this minor distinction seems unreasonable when considering that in both *Bazemore* and *Ledbetter*, the employer made a discriminatory pay-setting decision that violated Title VII, and as a result of that decision, each plaintiff received disparate paychecks.[113] Furthermore, far from precluding her claim, the fact that there was no openly discriminatory pay structure at Ledbetter's Goodyear plant makes the need for greater Title VII protection even more dire. Because it was difficult, if not impossible, to find out the wages of her male co-workers, it is unrealistic

108. *Nat'l R.R. Passenger Co.*, 536 U.S. at 101, 115.

109. *Bazemore*, 478 U.S. at 395-96 ("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.").

110. *Ledbetter*, 127 S. Ct. at 2169.

111. *Id.*

112. *Id.* at 2173.

113. *See Bazemore*, 478 U.S. at 390.

to expect that Ledbetter could have filed suit within 180 days of the discriminatory pay-setting decisions.

In addition, the *Ledbetter* decision is contrary to the view that the majority of the circuits held before the decision.[114] Many circuits interpreted *Bazemore* as establishing a paycheck accrual rule: that discriminatory paychecks constitute cognizable harms; and therefore, a plaintiff may bring a pay discrimination claim to challenge each paycheck received during the 180-day limitations period.[115] For example, the Tenth Circuit has consistently held that discriminatory paychecks are not only the effects of past discrimination, but are fresh violations of Title VII every time they are issued.[116] The Second Circuit has also held that any paycheck issued within the statute of limitations period is actionable under Title VII, even if the paychecks are the result of a discriminatory pay decision made outside of the statutory period.[117] Furthermore, for years the EEOC has also interpreted Title VII to permit employees to challenge disparate pay each time it is received.[118]

C. Ledbetter *Ignores the Realities of Pay Discrimination Claims*

By holding that pay discrimination claims must be brought very quickly after the discriminatory pay-setting decision occurs, *Ledbetter* virtually ignores the realities of pay discrimination in the workplace. Wages have historically been considered of a private nature, which in turn benefits employers who wish to keep wages low. One of Justice Ginsburg's main arguments in her dissent pointed out that workers often

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114. *See Ledbetter*, 127 S. Ct. at 2184 (Ginsburg, J., dissenting).

115. *See generally Wedow*, 442 F.3d 661; Forsyth v. Fed'n Employment & Guidance, 409 F.3d 565 (2nd Cir. 2005); Shea v. Rice, 409 F.3d 448 (D.C. Cir. 2005); Goodwin v. Gen. Motors Corp., 275 F.3d 1005 (10th Cir. 2002); Anderson v. Zubieta, 180 F.3d 329 (D.C. Cir. 1999).

116. *See, e.g.*, *Goodwin*, 275 F.3d at 1009-10.

117. *See, e.g.*, *Forsyth*, 409 F.3d at 573. The court recognized that pay scales "involve a number of individual and separate wrongs rather than one course of wrongful action. And, each repetition of wrongful conduct may, as *Morgan* taught, be the basis of a separate cause of action for which suit must be brought within the limitations period beginning with its occurrence." *Id.* The court drew from *Bazemore* in finding that "[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." *Id.*

118. *See* EEOC COMPLIANCE MANUAL Sec. 2-IV-C(1)(a) (stating that "repeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period."); *see also* Albritton v. Postmaster Gen., 2004 WL 2983682 (E.E.O.C. Dec. 17, 2004) (citing and applying the above quoted policy).

do not know the salary of other employees in the workplace, thus they are barred from meeting the requirements of *Ledbetter*.[119] Information concerning pay is especially difficult to obtain, given that many private-sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers.[120] In addition, the problem of concealed pay discrimination often evolves where a female employee is not denied a raise, but a similarly-situated male employee is consistently given higher raises.[121] In such a circumstance, it is particularly likely that the female employee will not learn of the pay disparity until years later, if ever.[122] In this sense, pay discrimination is quite different from other "discrete" adverse actions that the majority associated it with, such as termination, failure to promote, and refusal to hire.[123] Those types of decisions involve fully communicated acts that are transparent and much easier to identify.[124] Because pay discrimination is evidenced by subtle acts that are difficult to recognize, it is a different breed and deserves different treatment than other types of employment discrimination.

D. A Realistic Legislative Solution

To counteract *Ledbetter* by amending the Civil Rights Act of 1964, Congress should draft more specific legislation that has a better chance of survival. Trimming down the Lilly Ledbetter Fair Pay Act to eliminate the "vague" language that is so troubling to Republicans might generate bi-partisan support.[125] For example, Congress could remove some broad phrases to explicitly limit the bill to overturning the *Ledbetter* decision and restoring the rule the majority of circuits applied before *Ledbetter*:

> An unlawful employment practice occurs when a discriminatory compensation decision ~~or other practice~~ is adopted, when an individual becomes subject to a discriminatory compensation decision ~~or other practice~~, or when an individual is affected by

119. *Ledbetter*, 127 S. Ct. at 2178-79 (Ginsburg, J., dissenting).

120. *Id.* ("Comparative pay information . . . is often hidden from the employees view. Employers may keep under wraps the pay differentials maintained among supervisors [and] [s]mall initial discrepancies may not be seen as [enough] for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.").

121. *Id.* ("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.").

122. *Id.*

123. *Id.* at 2181.

124. *Id.*

125. *See* Naylor, *supra* note 84.

> application of a discriminatory compensation decision ~~or other practice~~, including each time wages [or] benefits ~~or other compensation~~ [are] paid, resulting in whole or in part from such a decision ~~or other practice~~.[126]

Limiting the installation of a paycheck accrual rule to cover pay discrimination claims alone could appease those critics who fear the amendment would be used to broaden the statute of limitations on all employment claims.[127] Opponents of the bill should also be reminded that such an amendment could not unduly extend the statute of limitations even for pay discrimination claims, since the Title VII backpay provision continues to limit the damages that an employee can recover to two years.[128]

In spite of modest concessions, the amendment would still serve the purpose behind Title VII's sex discrimination provision by allowing those women subjected to pay discrimination to seek remedy when they have suffered a discriminatory pay-setting decision and continue to be discriminated against in the form of paychecks.[129] Finally, such a rule is uniquely tailored to address the realities of pay discrimination in the workplace. As discussed, it is very difficult for victims of pay discrimination to discover unequal pay.[130] However, because the rule considers discriminatory paychecks unlawful employment practices, it ensures that once employees do uncover pay discrimination, they can bring an EEOC charge within the 180-day deadline.[131]

IV. CONCLUSION

When analyzed, the *Ledbetter* decision to limit an employee's ability to bring pay discrimination claims is contrary to the broad language and intent of Title VII as enacted by Congress. The two year backpay provision and expansive 1991 amendment of Title VII are further evidence that the Supreme Court has unduly restricted Title VII's statute of limitations. The *Ledbetter* holding is also inconsistent with precedent, prior decisions by the majority of jurisdictions and the EEOC, and

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126. H.R. 2831 (strikethrough added).

127. *See* Naylor, *supra* note 84.

128. 42 U.S.C. § 2000e-5(e)(1) (1991).

129. This serves the stated goal of Title VII by moving women closer to an equal footing with men in the workplace. *See Weeks*, 408 F.2d at 236.

130. *See supra* note 66 and accompanying text.

131. Unfortunately there are many women who will never find out that they are paid less than their male counterparts in order to take advantage of such a rule. *See* BUREAU OF LABOR STATISTICS, *supra* note 12, at 29.

ignores the realities of pay discrimination claims. As the law stands, more and more pay discrimination claims will go unnoticed and uncorrected. In light of this error, Congress can and should counteract *Ledbetter* by passing legislation to amend Title VII.

Although the Lilly Ledbetter Fair Pay Act of 2007 is a positive step in the right direction, the bill is overly broad and faces great opposition from Republican leaders. Yet, while the *Ledbetter* decision stands, workers throughout the country who continue to receive unequal paychecks based on past pay discrimination, have no redress. Therefore, Congress should continue to work at amending Title VII by narrowing the scope of new legislation to focus specifically on counteracting *Ledbetter*. Installing a paycheck accrual rule for pay discrimination claims in Title VII would recognize the uniqueness of those claims by restoring the law as interpreted prior to *Ledbetter*. This rule would also reinforce the broad principles of equality set forth in Title VII. Armed with narrowly-tailored legislation aimed at generating bi-partisan support, Congress can succeed at overruling *Ledbetter*.

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