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Justice Ginsburg's Call to Action: The Court, Congress, and the Lilly Ledbetter Fair Pay Act of 2009

Public Policy & Law Senior Honors Thesis

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Spring 2015

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Introduction

Common Cents: Ledbetter, The Law, and Congress

Courts are rarely at the forefront of significant social change.[1] It is not the job of the judiciary to create policy or enact law; they are bound by their function, based primarily on a finite set of precedents and statutes.[2] However, in rare, notable cases in history, as in *Ledbetter v. Goodyear*[3], the Supreme Court is the starting point for crucial social legislation. The arguments before the Court in this case became important elements that propelled the passage of the Lilly Ledbetter Fair Pay Act of 2009[4] only two years later. This would be the first bill that President Obama signed into law during his presidency.[5] A few elements of *Ledbetter* make it a significant case. The Court in *Ledbetter* considered gender equality in pay established by Congress in Title VII of the Civil Rights Act of 1964[6]. In a 5-4 decision, the Court found for the employer, while the dissent had a distinctly different

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[1] Michael J. Klarman, Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg, 32 HARV. J.L. & GENDER (2009)

[2] Paul Horowitz, *The Hobby Lobby Moment*. 128 Harv. L. Rev. 154 (2014)

[3] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)

[4] S.181, Lilly Ledbetter Fair Pay Act of 2009, 111th Cong. (2009)

[5] Sheryl Gay Stolberg, Obama Signs Equal Pay Legislation*, The New York Times*, January 29th, 2009.

[6] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241

understanding of the case. First and foremost, *Ledbetter* is a case that exemplifies competing approaches to statutory interpretation, and how these differing philosophies shape legal opinions. This thesis will explore the concrete arguments made by both the majority and the dissent in order to understand how these opinions spurred Congress to act. I will argue that Justice Ginsburg, in her dissent, demonstrated her wealth of experience as a gender rights litigator. The dissent in *Ledbetter* is unlike other dissents. It was written directly to Congress, demanding action and providing the exact framework for that action. The arguments contained in the dissent are complicated and nuanced, but they are crucial to understanding how Ginsburg created the foundation for the Lilly Ledbetter Fair Pay Act of 2009. *Ledbetter v. Goodyear* is also a rare case study for Congressional override of a Supreme Court opinion, illustrating the way in which the three branches of government communicate to create meaningful social legislation.

The *Ledbetter* case started with a woman for whom the EEOC brought suit and the 2009 Fair pay Act is named. Lilly McDaniel was born in a house with no running water or electricity in Possum Trot, Alabama on April 14th, 1938.[7] After graduating from high school, she married Charles Ledbetter and had two children. In 1979, Ledbetter applied for a position with the Goodyear Tire & Rubber Company at a local Goodyear tire factory. For the next nineteen years, Ledbetter would work alongside men and be one of the first women hired at management level. In 1998, Ledbetter was left an

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[7] Lahle Wolfe, *Personal Biography of Lilly Ledbetter*, Women in Business Profile (web. accessed March, 2015)

anonymous note in her locker that disclosed she was earning significantly less than men in the same position. In March of that same year, Ledbetter submitted a questionnaire to the Equal Opportunity Employment Commission (EEOC), and filed a formal charge in July. After she retired in November 1998, Ledbetter officially filed suit against Goodyear asserting sex discrimination under Title VII of the Civil Rights Act of 1964.[8]

Title VII of the Civil Rights Act states, ""It shall be an unlawful employment practice for an employer … 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."[9] At the District Court, Ledbetter argued that she was given a lower salary because her supervisors gave her poor evaluations due to her sex, and that a fair evaluation would have found her in equal standing to her male colleagues. Further, she argued that this damage compounded upon itself over time, and resulting in a significant wage inequality by the end of her nearly two decades with Goodyear.[10] The jury found for Ledbetter, dismissing Goodyear's claim that the evaluations had been nondiscriminatory.[11]

On the heels of Ledbetter's victory, Goodyear appealed the holding of the District Court, arguing this time that Title VII pay discrimination claims

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[8] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, syllabus (2007)
[9] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 § 7, 42 U.S.C. § 2000e et seq (1964)
[10] Ledbetter 550 U.S. 618, syllabus
[11] Ledbetter 550 U.S. 618, syllabus

are time-barred.[12] Goodyear argued that Ledbetter was required to bring her claim within 180 days of the discriminatory act. The discriminatory act, as Ledbetter described it, was a series of unfair poor evaluations given to her by her male supervisors between 1979-1981. In effect, Goodyear argued that Ledbetter had to prove that discriminatory action occurred between September 26th, 1997, and the day she filled out the EEOC questionnaire in 1998. Using this argument, the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim "cannot be based on allegedly discriminatory events that occurred before the last pay decision that affected the employee's pay during the EEOC charging period," and that there was insufficient evidence to prove that Goodyear acted in a discriminatory manner in 1997 and 1998.[13] The court held: "Because the latter effects of past discrimination do not restart the clock for filing the EEOC charge, Ledbetter's claim is untimely."[14]

Ledbetter's arguments at the Eleventh Circuit were the same ones argued before the Supreme Court on appeal. The language of Title VII states that the employee must first file an EEOC charge within 180 days "after the alleged unlawful employment practice occurred."[15] Ledbetter argued that paychecks she received within the lawful charging period of 180 days, along with a 1998 raise denial, each violated Title VII and each triggered a new

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[12] Ledbetter 550 U.S. 618, syllabus
[13] Ledbetter 550 U.S. 618, syllabus
[14] Ledbetter 550 U.S. 618, syllabus
[15] Ledbetter 550 U.S. 618, syllabus

EEOC charging period.[16] Under this reasoning, Ledbetter asserted that she filed her EEOC claim well within multiple available charging periods that were triggered by multiple acts of discriminatory employment practices – the individual paychecks. Ledbetter argued that this was a "paycheck accrual" rule that could be found in *Bazemore v. Friday*, a 1986 Title VII disparate pay case.[17] In *Bazemore,* the court found that Title VII triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.[18] The legal question for the Eleventh Circuit to decide asks which types of actions by employers trigger a new charging period of 180 days, and whether or not affected paychecks due to previous acts of explicit sex discrimination can be used as triggers.

In response, the Eleventh Circuit used as precedent *United Airlines, Inc. v. Evans*[19], *Delaware State College v. Ricks*[20], *Lorance v. AT&T Technologies, Inc.*[21], *and National Railroad Passenger Corporation v. Morgan*[22]. In these cases, the Court found that triggering a new charging period must be the result of a "discrete unlawful practice."[23] The Court wrote that in order to be a discrete unlawful practice, the employer must engage in "separately actionable intentionally discriminatory acts"[24]. It is only if the act is separate,

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[16] Ledbetter 550 U.S. 618, syllabus
[17] Bazemore v. Friday, 478 U.S. 385 (1986)
[18] Ledbetter 550 U.S. 618, syllabus
[19] United Airlines, Inc. v. Evans, 431 U.S. 553 (1977)
[20] Delaware State College v. Ricks, 449 U.S. 250 (1980)
[21] Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989)
[22] National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002)
[23] Ledbetter 550 U.S. 618, syllabus
[24] Ledbetter 550 U.S. 618, syllabus

intentional, and discriminatory that a fresh violation takes place when each act is committed, and therefore triggers a new charging period[25]. "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 a past discrimination."[26] To prove that the actions by Goodyear in *Ledbetter* were indeed not fresh violations, the Court explained that Ledbetter's "paycheck accrual" rule was invalid. Referencing *Bazemore* again, the Court focuses on the concept of a discriminatory pay structure versus a non-discriminatory action that bears negative effects due to past discriminatory action outside of the charging period. "Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate based on sex or that it later applied this system to her within the charging period of discriminatory animus, *Bazemore* is no help to her."[27]

The very nuanced focus of the Court with regard to the question of which acts trigger and which acts do not boils down, for them, to the question of discriminatory intent. The intent of the employer to discriminate against the employee is, as the Eleventh Circuit understood it, paramount to understanding the meaning of Title VII. In Ledbetter, the lower court held that in order to prove an employer's intent to discriminate, a discriminatory act must be defined as discriminatory by itself, separate from past intent. "It

[25] Ledbetter 550 U.S. 618, syllabus
[26] Ledbetter 550 U.S. 618, syllabus
[27] Ledbetter 550 U.S. 618, syllabus

is not, as Ledbetter contends, a 'paycheck accrual rule' under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period."[28] Each paycheck that Ledbetter received after her manipulated evaluations during the first decade of her work was indeed affected in a negative way. However, the Eleventh Circuit did not see these paychecks as individually discriminatory on their face, and therefore not a part of a discriminatory pay structure.

Lilly Ledbetter appealed the decision of the Eleventh Circuit. This time, her claim would be heard before the highest court in America, and it would be the very last chance to make her case. The Supreme Court accepted *Ledbetter v. Goodyear* for the October Term of 2006.[29] Arguments by Ledbetter and Goodyear were heard on November 27th, 2006, and the decision of the Court was handed down on May 29th, 2007.[30] By a 5-4 vote, the Court upheld the decision of the Eleventh Circuit, finding in favor of Goodyear. The majority opinion, written by Justice Samuel Alito, found that the claims made by Ledbetter were indeed time-barred by Title VII.

In this way, *Ledbetter* lends itself powerfully to a study of statutory interpretation. The majority opinion, which will be discussed in Chapter 3, argues staunchly against a broad interpretation of Title VII. Justice Alito and the majority argue again and again for strict adherence to precedent, and a narrow, textualist understanding of the language in this statute. For the five

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[28] Ledbetter 550 U.S. 618, syllabus
[29] Ledbetter 550 U.S. 618, syllabus
[30] Ledbetter 550 U.S. 618, syllabus

members of the Court who found against Ledbetter, the legal question before them was nuanced, but simple. The filing period was explicitly written into the language of the law, and Ledbetter's interpretation of its meaning was unsubstantiated because it deviated too far from a strict understanding of its meaning. Justice Alito writes, "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 the statute."[31]

Justice Ruth Bader Ginsburg wrote for the 4-person dissent, and in a highly unorthodox showing of opposition, chose to read her opinion aloud from the bench. Justice Ginsburg's fiery disagreement with the majority opinion was not only noteworthy in its delivery, but also its contents. The dissent, which will be discussed at length in the following chapters, stands in direct opposition to the philosophy of statutory interpretation presented by the majority. At the end of her *Ledbetter* decision, Justice Ginsburg wrote, "Once again, the ball is in Congress's court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."[32] This direct conversation with Congress was not novel; as the opinion stated, this had happened before in a series of cases in the 1980's concerning Title VII that culminated in the Civil Rights Act of 1991. In order to create meaningful change in line with Title VII's intended "broad remedial measures,"[33]

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[31] Ledbetter 550 U.S. 618, 24
[32] Ledbetter 550 U.S. 618, 19 (Ginsburg, J. dissenting)
[33] Ledbetter 550 U.S. 618, 19 (Ginsburg, J. dissenting)

Congress had to pick up where the Supreme Court left off. Justice Ginsburg's call to action is not only relevant in *Ledbetter* as the beginning of a Congressional override, but important to note with regard to the dissent's understanding of Title VII. The focus on "broad remedial measures" clearly breaks away from the majority's prescriptive view of the statute, and adds a layer of interpretation that the majority did not recognize. For Ginsburg and the dissenters, laws represent values, and these values must be pursued during interpretation and application. For Ginsburg, the only remedy for the majority's cramped understanding of Title VII would be for them to pick up where her dissent left off.

Lawmakers did indeed pick up the hypothetical ball, and a response was almost immediate. In July of 2007, just two months after the Supreme Court opinion was handed down, lawmakers attempted to pass the Lilly Ledbetter Fair Pay Act of 2007.[34] This act would amend The Civil Rights Act of 1964 to abolish the time restrictions in Title VII, and was a direct response to the decision made in *Ledbetter v. Goodyear*. The bill made it through the House of Representatives with 93 co-sponsors, all from the Democratic Party. The final vote in the House was 225 yeas to 199 nays. The clearly partisan nature of the bill at this time became painfully evident as the bill moved to the Senate, where it did not pass.[35]

Proponents of the bill in Congress were not so easily dissuaded, however, and supporters brought the Lilly Ledbetter Fair Pay Act of 2009

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[34] "H.R.2831 - Lilly Ledbetter Fair Pay Act of 2007," Congress.gov
[35] "H.R.2831 - Lilly Ledbetter Fair Pay Act of 2007," Congress.gov

before the House and Senate during the 111th Congress in January of 2009.[36] Upon reaching the House of Representatives once again, the bill passed with 250 in support and 177 against.[37] Of the 250 in support of the new bill, only three were from the Republican Party; five Democrats joined a majority of Republicans in voting against the bill.[38] The bill reached the Senate, passing with a narrow margin: 61 supported while 36 opposed, and 1 senator, Senator Ted Kennedy of Massachusetts, did not vote due to his ailing health.[39] This time the bill passed through both the House and the Senate, and became the first piece of legislation that newly sworn President Barack Obama would sign into law.[40]

The goal of this thesis is to track and analyze the inception, growth, and life of the legal arguments found in the opinions in *Ledbetter*, as they are useful as a case study in opposing philosophies of statutory interpretation. The following sections will discuss in great detail the legal rationale behind the opinions in the Supreme Court. The next chapter will discuss the birth of Goodyear's legal arguments surrounding Title VII at the Eleventh Circuit. Chapter 3 will analyze how the petitioner and the respondent framed their arguments differently, and how these competing interpretations of Title VII came to light at the Supreme Court. Chapter 4 will then provide an analysis of the precedent case law that Justice Alito choose to support his interpretation

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[36] "S.181 - Lilly Ledbetter Fair Pay Act of 2009," Congress.gov
[37] S.181 – Lilly Ledbetter Fair Pay Act of 2009, Senate Vote Roll (2009)
[38] S.181 Senate Vote Roll
[39] S.181 Senate Vote Roll
[40] Stolberg, Obama Signs Equal Pay Legislation

of Title VII, and an analysis of Justice Ginsburg's rebuttal to these cases. This is necessary because it will illustrate the types of cases Justice Alito choose, their relationship to *Ledbetter*, and how Justice Ginsburg broke down each and every one of these arguments to create a path for Congress to act. Chapter 5 will then holistically discuss the importance of the difference of opinion at the Supreme Court, and how it affected the reading of Title VII for the justices. Finally, I will discuss the passage of the Lilly Ledbetter Fair Pay Act of 2009, and how all roads led back to Justice Ginsburg's arguments in *Ledbetter*. In *Ledbetter v. Goodyear,* this Supreme Court question became a piece of legislation of great social and historical importance. Justice Ginsburg, as a justice, advocated powerfully from the bench for women's pay equality, and her voice was joined by those in Congress and the White House.

Chapter 1:
The Eleventh Circuit

When Lilly Ledbetter filed her claim of sex discrimination against Goodyear, her case was heard before the United States District Court in the Northern District of Alabama.[41] She filed this lawsuit on November 24, 1999.[42] There, tried by a jury of her peers, Goodyear was found responsible for the discrimination that had put Ledbetter's salary behind those of similarly situated men at the same job. When Goodyear attempted to argue that the discrimination didn't happen, this jury of fathers, mothers, bosses, and employees simply didn't buy the argument. On this front, Goodyear had failed; for this jury, it was clear that Lilly Ledbetter had been treated unfairly because she was a woman.

The plaintiff in *Ledbetter v. Goodyear* at the District Court met its burden, proving it was "more likely than not that Defendant paid Plaintiff and unequal salary because of her sex."[43] Still, Goodyear contended that Ledbetter's pay claim was barred by Title VII's 180-day charging period requirement. Further, Goodyear argued that "no reasonable fact finder could

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[41] Ledbetter v. Goodyear, 421 F.3d 1169, 1 (2005)
[42] Ledbetter 421 F.3d 1169, 9
[43] Ledbetter 421 F.3d 1169, 9

conclude that [Ledbetter's] sex was a motivating factor in a salary decision made during the period covered by [the] EEOC charge."[44] While not directly responding to the claim that Lilly Ledbetter had been discriminated against, Goodyear focuses on a different question. For Goodyear, the question is not whether or not Lilly Ledbetter was discriminated against, but rather whether or not the language of Title VII allows her to charge this discrimination at the time she did.

This understanding framed the question in a very specific manner, and challenged the Court to see *Ledbetter* as a matter of adherence to the rule of law, meant to protect employers, rather than social justice for Ledbetter. Even though Goodyear attempted to frame the question around the charging period rule, the jury didn't buy it. To Goodyear's vocal arguments surrounding the time-bar of 180 days, the District court simply responded, "the jury's finding that Plaintiff was subjected to gender disparate salary is abundantly supported by the evidence."[45] In a way, the District Court completely disregards the heart of Goodyear's argument, and does not in any way explicitly address whether or not Ledbetter's EEOC charge was time-barred to protect the employer. The jury recommended $223,776 in backpay, $4,662 in mental anguish, and $3,285,979 in punitive damages for Ledbetter.[46]

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[44] Ledbetter 421 F.3d 1169, 9
[45] Ledbetter 421 F.3d 1169, 9
[46] Ledbetter 421 F.3d 1169, 10

When Goodyear appealed this decision, *Ledbetter v. Goodyear* found itself before the United States Court of Appeals for the Eleventh Circuit.[47] Presiding Judges Tjoflat, Dubina, and Pryor heard oral arguments from both the appellant and appellee regarding Goodyear's position that "Ledbetter may prevail only if she can prove that unlawful discrimination tainted an annual review of her salary made within 180 days of her filing a charge of discrimination with the EEOC."[48] Because of the District Court's evident disregard for Goodyear's charging period argument, the question before the Eleventh Circuit court focused solely on this issue of the requirement in "this species of disparate pay cases,"[49] involving an employer who conducts annual reviews. Interestingly, Goodyear also continually denied on appeal "that sex played any role in the setting of her salary."[50] The Eleventh Circuit refused to adopt this position definitively, "because we need not do so to determine whether Goodyear is entitled to the judgment as a matter of law."[51] The jury had already found that Ledbetter had indeed been discriminated against, but for the Eleventh Circuit, these findings were irrelevant. They had fully and strictly adopted the framework set by Goodyear. At the Eleventh Circuit, *Ledbetter* ceased to be a case about gender discrimination; *Ledbetter* became a case about the language of Title VII.

[47] Ledbetter 421 F.3d 1169, 1
[48] Ledbetter 421 F.3d 1169, 6
[49] Ledbetter 421 F.3d 1169, 6
[50] Ledbetter 421 F.3d 1169, 6
[51] Ledbetter 421 F.3d 1169, 6

Judge Tjoflat, writing for the Eleventh Circuit, began the opinion by describing the Goodyear Gasden Plant, where Lilly Ledbetter had worked. In this opinion, the Court explains in detail the structure of employment at the Gasden plant, as well as the structure of authority. Simply, the tire plant employed "tire builders" who were unionized, hourly workers, supervised by floor-level mangers called "area managers." Ledbetter was an "area manager" by the time she retired. Above Ledbetter and the other area managers was a Business Center Manager, or BCM. Judge Tjoflat continues by describing the merit compensation system in place at the Gasden plant, in which BCMs would annually review all employees, including area managers, for merit-based raises.[52] The background presented to the Eleventh Circuit is relevant in this discussion because it highlights the incredibly narrow focus that this lower Court chose to pursue. Despite all of the facts that proved pertinent at the District Court, the circuit court focused entirely on the timely filing requirement and the burden on Ledbetter within the filing period.

The Eleventh Circuit relied on a prior case, *AMTRAK v. Morgan,*[53] when considering the timely filing requirement. *Morgan*, a Supreme Court case decided in 2002, also concerned filing employment discrimination claims. Specifically, *Morgan* considered "whether, and under what circumstances, a Title VII plaintiff may file suit on events that fall outside [the timely filing] period."[54] The circuit court distinguished *Morgan* from *Ledbetter*,

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[52] Ledbetter 421 F.3d 1169, 7
[53] AMTRAK v. Morgan, 536 U.S. 101 (2002)
[54] Ledbetter 421 F.3d 1169, 12

categorizing *Morgan* as a case involving hostile environments, while *Ledbetter* concerns "discrete acts of discrimination." Judge Tjoflat concedes that if Lilly Ledbetter had chosen to focus primarily on a single instance of discrimination, a refusal of raise in 1997, she would not be challenged by the timely-filing rule. In Judge Tjoflat's words, she would have been "limited the damages she could have recovered, rendered useless evidence relevant only to other persons in the plant upon which she wanted the jury to rely, and forced her to prove that [Goodyear] acted with discriminatory intent." However, because Ledbetter is choosing to pursue discrimination on a larger scale, she is extrapolating her claim past what Title VII allows. Judge Tjoflat disregards the ruling of the lower court and Ledbetter's rationale because "what Ledbetter did – what the lower court allowed her to do – was to point to the substantial disparity between her salary and those of the male area managers in tire assembly…"[55] In the circuit court's understanding of Title VII, Ledbetter was not allowed to put at issue all salary-related decisions during her employment at Goodyear, because that would "put an onus on Goodyear to provide a legitimate, non-discriminatory reason for every dollar difference between her salary and her male co-workers' salaries."[56]

Judge Tjoflat reasoned, "There must, however, be some limit on how far back to plaintiff can reach. If it were otherwise, the timely-filing requirements would be completely illusory…"[57] While the court of appeals

[55] Ledbetter 421 F.3d 1169, 13
[56] Ledbetter 421 F.3d 1169, 13
[57] Ledbetter 421 F.3d 1169, 13

agrees that Ledbetter could have charged Goodyear for the denial of raise in 1997, it also agrees that there are cases when the plaintiff can reach past the 180-day filing period to prove discriminatory intent through a hostile environment or discriminatory pay structure. Here, the circuit court raises an important point that the petitioner's brief in *Ledbetter v. Goodyear* would address. While the circuit court agrees that there must be a period of time during which the petitioner should be allowed to reach past the 180-day cycle, it does not create a standard "in the text of Title VII, or in the decisions of this or any other court."[58] Instead, the court of appeals decided, "an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period."[59]

The argument that the Eleventh Circuit used to support Goodyear boils down to a question of technicality. A lawsuit that clearly highlighted the social issue of pay discrimination because of sex was reformulated and reframed as an exercise in textualist statutory interpretation. For the Eleventh Circuit, Title VII is a text that demands strict obedience; the timely filing rule is restrictive so that it may protect employers from overdue claims. The court found that in order to win her case, Ledbetter had to prove her case within the 180-day charging period. Because Ledbetter was unable to meet this burden, and could not prove that the single denial of raise in 1997

[58] Ledbetter 550 U.S. 618, Pet'rs Br. 11
[59] Ledbetter 421 F.3d 1169, 15

had a discrete discriminatory intent, her case was lost. The circuit court reversed the judgment of the lower court, and Ledbetter filed for appeal once more.

The Court granted cert. on June 26th, 2006.[60] The merits briefs for the petitioner and respondent are framed so differently that they seem to focus on different facts, and certainly different arguments. The Petitioner's statement framed *Ledbetter* as a case concerning social justice, civil rights, and corporate discrimination. Ledbetter argues that even thought the district court clearly found that "Goodyear Tire and Rubber Company was paying petitioner less than her male counterparts because of her sex,"[61] the Eleventh Circuit chose to ignore this fact. Ledbetter acknowledges that there is indeed a 180-day filing period described in Title VII, but rejects the court of appeals' understanding that the 1997 raise denial must be discriminatory on its face and isolated from other incidents. The Petitioner argues vehemently against this interpretation of Title VII, reasoning, "Goodyear could not be held liable for continuing to pay petitioner less than her male colleagues for equal work even if the jury properly concluded that this disparity was the result of intentional sex discrimination."[62] Framed in this way, the petitioner challenges the court to interpret the question in *Ledbetter* differently from the Eleventh Circuit.

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[60] Ledbetter 550 U.S. 618, Pet'rs Br. 12
[61] Ledbetter 550 U.S. 618, Pet'rs Br. 2
[62] Ledbetter 550 U.S. 618, Pet'rs Br. 2

On the other hand, the Respondent's brief frames the question in *Ledbetter* in a completely different way. The counterstatement offered by Goodyear spends little to no time describing the facts of Ledbetter's time as an employee at Goodyear. Instead, the respondent focuses heavily on what they understand as an unacceptable application of Title VII: "Ledbetter seeks to challenge the collective effects of those 19 years of salary determinations…"[63] The focus is immediately placed on the 180-day charging period, and stays concentrated on the technicality of this requirement. Without responding on the grounds of discrimination or women's rights arguments made by Ledbetter, Goodyear actively defends itself on the basis that Ledbetter is attempting to sidestep a burden created for the plaintiff in Title VII. For Ledbetter, Goodyear is exemplary of corporate greed and injustice for women in the workplace, while for Goodyear, Ledbetter is trying to shirk her responsibility as written into the law. For Ledbetter, this is a matter of social justice; for Goodyear, this is a matter of law.

Despite the overall framing of her argument, Ledbetter doesn't rely solely on arguments appealing to emotionality and gender equality; the petitioner's brief focuses heavily on precedent to make their case. "In *National Railroad Passenger Corp. v. Morgan*[64] this 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."[65] The

[63] Ledbetter 550 U.S. 618, Resp't Br. 2
[64] Morgan 536 U.S. 101 (2002)
[65] Brief for Petitioner 13

petitioner defines "employment practice" as the Court did in *Bazemore v. Friday*[66]. In *Bazemore*, the Court held, "an employer commits a discrete violation of Title VII each and every time it pays similarly situated employees differently for a discriminatory reason prohibited by the statute."[67] Under this reasoning, Ledbetter argued that *Bazemore* and *Morgan* together create a standard for timely filing that Judge Tjoflat inappropriately interpreted at the Eleventh Circuit. This standard is faithful to precedent, and orders that "each paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements prior discriminatory decision made outside the limitations period."[68]

Next, Ledbetter argues that the rule of *Morgan* and *Bazemore* set by the Court comports with the language and purposes of Title VII. Here is perhaps the most important difference between the petitioner and the respondent. While both must be faithful to precedent, Ledbetter is the only party that attempts to argue about legislative intent with regard to statutory interpretation. In each precedent case, the Court opted to protect the employee from discrimination with respect to compensation. The petitioner argues, "The most natural reading of this language is that Congress intended to prohibit the actual payment of disparate wages on the basis of sex or race,

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[66] 478 U.S. 385 (1986)
[67] Brief for Petitioner 13
[68] Brief for Petitioner 13

not simply the decision to pay a disparate wage."[69] The real-life application of Title VII is a major point of argument for Ledbetter, as it is not a point that the respondent can effectively argue against. As written by the Court in *Albemarle Paper Co. v. Moody*[70], "the purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination." The rule suggested by the petitioner is faithful to these purposes, and Ledbetter argues that it should therefore be the standard by which *Ledbetter* should be decided.

Further, the Petitioner substantially argues for the realities of workplace discrimination. Ledbetter considers the Eleventh Circuit rule unreasonable, pointing out that unless an employee seeks relief within six months, "she may never seek even prospective relief and must quit her job and find a new one in order to regain an enforceable right to equal pay for equal work."[71] This expectation is certainly unreasonable, but Ledbetter argues that under the Eleventh Circuit's judgment, this is a very real threat to women working in America because "many of the post-*Bazemore* cases involve discrimination in the assignment of an employee's initial salary." In addition, "[F]ew employees are willing to begin their first six months of employment by filing a charge," and "New employees may be grateful just to have a job, are likely to gave less support from their new co-workers."[72] While an employee would ideally file within six months of the perceived

[69] Ledbetter 550 U.S. 618, Pet'rs Br. 22
[70] Moody 422 U.S. 405, 418 (1975)
[71] Ledbetter 550 U.S. 618, Pet'rs Br. 25
[72] Ledbetter 550 U.S. 618, Pet'rs Br. 25

discrimination, Ledbetter argues that "her understandable reluctance to do so should not condemn the employee to a career as a second-class employee."[73] Perhaps more importantly in a case like *Ledbetter*, her status as a minority female in a majority male work environment certainly may have prevented her from complaining. Indeed, Ledbetter discloses that her own supervisor called her a "troublemaker," and said that the "plant did not need women."[74]

Finally, Ledbetter explained that for disparate pay issues, delays in charging should not only be accepted, but also expected. Simply, she argues that this delay is due to "the lack of information about the pay received by fellow employees and the justification for any disparities."[75] The lack of notice for employees regarding their pay in relation to their co-workers is simply a reality of having a job. It is not at all uncommon, as Ledbetter argues, for companies to keep pay levels confidential, or for workers to be reluctant to share salary information with others. "In such cases, the plaintiff will have little reason even to suspect discrimination."[76] In Ledbetter's case, she was not made aware of her pay discrepancy until significantly after the initial discrete act of discrimination had happened. To hold her to the 180-day charging period would not only be unreasonable, but unjust.

The respondent makes no such argument. Justice, fairness, and rights are not at all argued by Goodyear. Instead, Goodyear continues to focus on a

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[73] Ledbetter 550 U.S. 618, Pet'rs Br. 25
[74] Ledbetter 550 U.S. 618, Pet'rs Br. 8
[75] Ledbetter 550 U.S. 618, Pet'rs Br. 26
[76] Ledbetter 550 U.S. 618, Pet'rs Br. 26

very technical portion of Title VII. They, too, rely on precedent, but argue that *Ledbetter* is easily distinguishable from the winning plaintiffs in *Bazemore* and *Morgan*. Goodyear relies heavily on the reasoning of the Eleventh Circuit, repeating over and over that Ledbetter's claim is time-barred, and any attempt to conflate past discrimination with alleged discriminatory pay checks during the charging period is inconsistent with the law. Ledbetter had argued for the language and purposes of Title VII as a law representing values, and Goodyear argues, "To honor both the text and the purposes of section 706(e), this Court has repeatedly stressed the need to identify the *precise* 'unlawful employment practice' at issue."[77] Approaching the same argument from conflicting sides, Goodyear frames the issue as one of following the rules and respecting the text of Title VII as nothing more than a text.

Goodyear further describes Ledbetter's focus on equal pay for women as a "policy argument" that the Court cannot use to inform their reading of Title VII. Despite the fact that women receive lower salaries, are often in male dominated industries, and face discrimination, Goodyear argues that these issues are separate from Title VII and the issue at hand in *Ledbetter* because they are not instructive for statutory interpretation. This is perhaps the greatest disagreement between the plaintiff and the respondent. Goodyear attacks Ledbetter's "sweeping assertions"[78] about the discrimination she faced as unsupported, and cites certain years when she received higher

[77] Ledbetter 550 U.S. 618, Resp't Br. 9
[78] Ledbetter 550 U.S. 618, Resp't Br. 36

raises than her male counterparts. The respondent also argues that it is not the job of the Court to consider policy questions, but rather to apply the law as written by Congress. Because Congress has passed legislation such as the Equal Pay Act and Title VII, Goodyear considers this to be enough attention paid to protect employees who are being treated unfairly. Finally, Goodyear argues that Ledbetter is unreasonably asking the Court to rewrite Title VII so that it would favor her right to challenge past acts, against precedent and a strict reading of the text.

Without explicitly saying so, both Goodyear and Ledbetter frame their arguments around opposing philosophies of statutory interpretation. One, textualism, is an adherence to the law as a text, and clearly distinguishes the judge's job as that of a translator. Another, what Justice Steven Breyer describes as "active liberty,"[79] asks that judges consider the values that lawmakers intended to embody in the text of law. In the oral arguments and opinions to follow in *Ledbetter v. Goodyear*, the delineation between these two schools of thought becomes loudly evident.

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[79] Steven Breyer, *Active Liberty* (Alfred A. Knopf, NY 2005)

Chapter 2:
Framing the Supreme Court Opinions

The Civil Rights Act of 1964 was a landmark piece of legislation that outlawed discrimination on the basis of race, color, religion, sex, or national origin.[80] Title VII of this law prohibits employers from discriminating against their employees because of these qualities, and outlines the requirements for employees who may choose to bring suit against employers for violating these conditions. *Ledbetter v. Goodyear* is a highly nuanced exercise in statutory interpretation. A central question is whether Ledbetter meet her burden as outlined in Title VII. At the eye of the storm is the justices' understanding of the text, and how they believe it should be understood in Ledbetter's case.

Title VII, under a category entitled "Unlawful Employment Practices," states, "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,

[80] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241

sex, or national origin."[81] Under this law, employers like Goodyear are not allowed to discriminate with regard to any employee's hiring, discharging, compensation, terms, conditions, or privileges of employment because of race, sex, or nationality. In *Ledbetter* the original issue surrounds Goodyear's alleged violation of Title VII, in discriminating against Lilly Ledbetter by paying her less than her male counterparts because of her sex.

As described in previous chapters, however, this issue changed on appeal at the Eleventh Circuit, as the question no longer concerned whether or not the actual discrimination happened, but rather whether or not Ledbetter fulfilled her burden as the plaintiff. Indeed, Title VII states that civil action taken under "Unlawful Employment Practices" must be filed with the Equal Employment Opportunity Commission "within one hundred and eighty days after the alleged unlawful employment practice occurred."[82] On appeal, *Ledbetter v. Goodyear* changed from a case focused on the injustices against Ledbetter to a case questioning her fulfillment of this one hundred and eighty day charging period requirement. While Ledbetter maintained that she did fulfill this requirement, Goodyear argued that she did not, and her argument fell short of the law's enforcement provision.

When the central issue of *Ledbetter* changed, so did its legal focus. Ledbetter conceded that the most egregious sex discrimination against her happened years before she filed with the EEOC, and fell significantly outside of the allotted charging period. However, she argued that compensation or

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[81] Civil Rights Act of 1964, 2000e-2. *[Section 703]*
[82] Civil Rights Act of 1964, Title VII SEC. 2000e-5. *[Section 706]*

pay is different in nature from other "discrete acts of discrimination" like termination or failure to hire because pay is recurring and oftentimes compounding. Using precedent, Ledbetter brought before the Supreme Court the argument that for issues of compensation, each individual paycheck is its own discrete act of discrimination if it is negatively affected by previous pay decisions, even if those decisions were outside of the charging period. Therefore, as long as Lilly Ledbetter was paid within the one hundred and eighty day period, that single negatively affected paycheck could qualify as the "alleged unlawful employment practice" required by Title VII. Goodyear disagreed with this reading of the law, arguing that it was a skewed interpretation of the text. According to the employer, Ledbetter had to point to a specific, isolated, and intentional act of sex discrimination within the charging period in order to file suit.

At the Supreme Court, Justice Alito and the majority found in favor of Goodyear. They agreed with the respondent's argument that Ledbetter's argument was unfaithful and inconsistent with precedent case law. A careful dissection of the arguments contained therein is a tale of two interpretations. The Majority and the Dissent frame their arguments differently, as the merits briefs did, and approach the text with distinctly contrasting methods. Statutory interpretation is at the heart of many issues before the Supreme Court, but it is especially prominent in cases like *Ledbetter*, when the questions before the Court are so technical and so dependent on the specific wording of the text.

For Goodyear, and for the majority, this was a cut and dried case of textualist interpretation. The text calls for "discrete acts of discrimination," so that is what the Court must narrow its search to accommodate. The text calls for a one hundred and eighty day charging period, so any deviation from that would interrupt the very integrity of Congress's power in the democratic process. For Ledbetter, and for the dissenters, the law is much more than a text; they are not textualists, because they understand the law to embody values and larger purposes than word choice and strict textualism. To these judges, to interpret law based on the greater values that the lawmakers intended is not only the correct method of statutory interpretation, but it is the only method that allows judges to participate fully and truly in the democratic process.

Famously, in 1997, Justice Antonin Scalia wrote a book entitled *A Matter of Interpretation*[83] about his philosophy of statutory and constitutional interpretation. This text is a paradigm of textualist thought, and Scalia is perhaps the best-known strictly textualist member of the Supreme Court. *A Matter of Interpretation* champions the philosophy of textualist interpretation of the law, and argues that it is the single best way for judges to respect the American democratic process. In 2005, Justice Stephen Breyer wrote a book in response to Scalia's textualist approach called *Active Liberty*. Breyer argues against Scalia's claim that the Court has a responsibility to interpret a law as a fixed text. Instead, Breyer adopts the

[83] Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, Princeton, NJ 1998)

view that judges have a more involved role in statutory interpretation. This role is what Breyer calls "active liberty,"[84] a philosophy that encourages judges to understand laws as an embodiment of values held by the lawmakers. In his view, judges have the obligation to understand laws as more than the language of the text. He implores them to interpret the values held within the law and engage in active liberty so they can fully participate properly in the democratic process. These often competing philosophies manifest themselves in many of the cases that come before the Court. While not all of the justices are as committed to one or another as Scalia and Breyer, there are cases in which the Court is divided exactly on these lines. *Ledbetter* is one of them.

Ledbetter v. Goodyear was a victory for the textualist camp. The explicit necessity in *Ledbetter* for close statutory interpretation is the perfect case study for the philosophy that Justice Antonin Scalia championed in *A Matter of Interpretation.*[85] Scalia's strict adherence to this philosophy requires him the assert that "[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[86] While Justice Scalia did not write the majority opinion in *Ledbetter*, Justice Alito's opinion reflects perfectly this principle. Of course, Scalia did sign on to the majority opinion, along with justices Thomas, Kennedy, and Roberts. The dissent, led by Justice Ginsburg, saw *Ledbetter* in a completely different light.

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84 Breyer, Active Liberty
85 Scalia, A Matter of Interpretation
86 Scalia, A Matter of Interpretation, 24

Because of the social significance of both Title VII and the actual facts of Ledbetter's case, Justice Ginsburg repeated again and again arguments that supported Justice Breyer's philosophy of active liberty. For the dissent, Title VII was about more than the words on the page – it was about the pursuit of civil rights and the objectives that Congress expected to achieve by passing this law.

In both the majority opinion and the dissenting opinion, Justices Alito and Ginsburg discuss and argue about the importance of precedent for *Ledbetter*. Because cases involving Title VII and the charging period question have been raised before the Court previously, both sides agree that understanding relevant case law is instructive for the decision in this case. The differences begin when Justices Alito and Ginsburg frame and analyze the rationale of each precedent case. At times, the majority and the dissent understand precedent so differently that it is necessary to check that they are referencing the same case. This, again, can be attributed directly to competing philosophies of statutory interpretation.

Justice Alito begins by explaining that *Ledbetter* "calls upon us to apply established precedent in a slightly different context"[87]. The legal question in *Ledbetter* considers is "[w]hether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally

[87] Ledbetter, 550 U.S. 618, 1

discriminatory pay decisions that occurred outside the limitations period."[88] The words that the textualists considered in Ledbetter were contained in Title VII; the law requires the 180-day charging period, so any extension of that period must find merit in precedent. Alito's opinion in this case clearly focuses on the specific language of relevant case law and statutes. For the majority, Ledbetter's fate could hinge on the difference between a single word or another.

In direct contrast to the majority opinion, Justice Ginsburg begins the dissent by highlighting the gravitas of the legal question in *Ledbetter*. Relying on data provided by the plaintiff, the dissent begins, "Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236."[89] By beginning with the injustice that has already occurred, Ginsburg frames the focus of the dissent's opinion. While they will of course address the specific legal question before the Court, Ginsburg highlights in her opinion that there are issues of civil rights and important social values at stake.

This defining element in the eyes of the majority is the need to prove discriminatory intent on the part of the employer. *Ledbetter* is a disparate treatment claim, and the plaintiff is therefore required by the language of Title VII to prove that the employer acted with discriminatory intent in the

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[88] Pet. for Cert. i. 550 U.S. 618 (2007)
[89] Ledbetter 550 U.S. 618, Pet'rs Br. 4.

specific employment practice at issue. Ledbetter argued "[T]he paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period."[90] Similarly, a specific denial for a raise in 1998 was "unlawful because it 'carried forward' the effects of prior, uncharged discrimination decisions."[91] The Court attacks this rationale as insufficient, arguing that discriminatory acts that occurred prior to the charging period that had continuing effects during the charging period do not fulfill the burden that Title VII has outlined for the plaintiffs in cases of disparate treatment. Alito writes: "[T]his argument is squarely foreclosed by our precedents."[92]

The dissent points out that the majority's interpretation of the statute would place the burden on Ledbetter to file charges year-by-year, each time Goodyear failed to increase her salary to match her male counterparts. "The Court's insistence on immediate context overlooks common characteristics of pay discrimination."[93] These common characteristics include the small, incremental development of pay disparity that occurs over a long period of time, and the oftentimes hidden nature of pay information among employers. Ginsburg argues that in cases of pay disparity, the Court is often faced with plaintiffs who are in a nontraditional environment, and these individuals are especially reluctant to ask for comparative pay information. She considers "both the pay-setting decisions and the actual payment of a discriminatory

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[90] Ledbetter 550 U.S. 618, Pet'rs Br. 5
[91] Ledbetter 550 U.S. 618, Pet'rs Br. 5
[92] Ledbetter 550 U.S. 618, 5
[93] Ledbetter 550 U.S. 618, 1 (Ginsburg, J. dissenting)

wage"[94] as unlawful practices for the purposes of Title VII. Justice Ginsburg describes each individual paycheck as individual actions "infected by sex-based discrimination"[95], and that the prior pay-setting decisions are not themselves actionable, but certainly relevant in determining whether or not unlawful practices occurred during the charging period. The dissent passionately states that this interpretation of sex-based pay discrimination in relation to Title VII is "more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose."[96]

[94] Ledbetter 550 U.S. 618, 4 (Ginsburg, J. dissenting)
[95] Ledbetter 550 U.S. 618, 4 (Ginsburg, J. dissenting)
[96] Ledbetter 550 U.S. 618, 4 (Ginsburg, J. dissenting)

Chapter 3:
A Matter of Precedent

The previous chapters have discussed how Justice Alito and Justice Ginsburg frame, understand, and argue *Ledbetter* differently. In this chapter, we will discuss how the majority and dissenting opinions specifically understand the application of precedent case law in their interpretation of the question before them. This is important because while *Ledbetter v. Goodyear* certainly raised questions about the philosophies of statutory interpretation, it is also a rare case of a Justice providing explicit, remedial instructions for Congress from the bench. In examining these arguments closely, we can more fully understand Justice Ginsburg's blueprint for Congress. Not only is the dissent loudly calling for an interpretation that takes into account realities of workplace discrimination, but also it calls and arms Congress with a legal framework with which to amend and clarify Title VII's language. In the following cases, Justice Alito will bring precedent case law from cases involving termination or refusal to hire in gender and race discrimination Title VII claims. Each and every time Justice Ginsburg will advocate that pay discrimination that Ledbetter experienced must be

recognized as a form of Title VII discrimination. Indeed, Justice Ginsburg's dissent concretely instructs Congress to rewrite the law.

United Air Lines v. Evans

The first case cited by the majority is *United Air Lines, Inc. v. Evans*[97], in which the court rejected an argument that was fundamentally the same as Ledbetter's. In *Evans*, a female flight attendant was fired in 1968 because the airline had an unlawful policy of discrimination against married female flight attendants. While the Court agreed that this policy was certainly unlawful under Title VII, United Air Lines could be held responsible for this discharge because the employee, Evans, did not file a claim with the EEOC within the 180-day charging period. The relevant question in *Evans* arose when Evans was rehired by the airline in 1972, and was treated as a new employee under a seniority system. Evans sued because she was suffering pay cuts and benefit shorts as a "new employee" under this system, 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 perpetuated the consequences of forbidden discrimination."[98]

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[97] Evans, 431 U.S. 553 (1977)
[98] Ledbetter 550 U.S. 618, 6

For the Court, the critical question in *Evans* was "whether any present violation existed."[99] Justice Stevens wrote for the Court, "United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination" within the required charging period. Further, Stevens wrote that "a discriminatory act which is not made the basis for a timely charge… is merely an unfortunate event in history which has no present legal consequences."[100] Alito equates the question and diagnosis in *Evans* to be perfectly parallel to the question in *Ledbetter*, and writes, "It would be difficult to speak to the point more directly."[101]

Justice Ginsburg dismisses the Court's reading of *Evans* in its entirety. The dissent understands *Evans* and *Ledbetter* to have distinguishable facts and circumstances, and argues that the question at issue in *Evans* was notably different from the question at issue before the Court in *Ledbetter* because the present question involves pay. Ginsburg argued that pay disparities like Ledbetter's are markedly different from a case involving promotions and seniority systems like *Evans* because those systems involve other employees, who would stand to benefit from Evans remaining at a junior position. In *Ledbetter*, and in all disparate pay cases, Justice Ginsburg argues the discrimination "can be remedied at any time solely at the expense of the employer who acts in a discriminatory fashion."[102]

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[99] Ledbetter 550 U.S. 618, 6
[100] Ledbetter 550 U.S. 618, 6
[101] Ledbetter 550 U.S. 618, 6
[102] Ledbetter 550 U.S. 618, 6

Further, Justice Ginsburg argued that *Evans* involved a single, immediately distinguishable act of discrimination: the termination of Evans's employment. Ginsburg agrees that *Evans* should be held to the standard of discrete unlawful acts, and that she was rightfully constrained by the charging periods. However, Ginsburg argues that *Evans* and *Ledbetter* are incomparable. Because Ledbetter did not have the advantage of clearly communicated discrimination that Evans had, she cannot be held to the same standard. Justice Ginsburg argues that it would be wholly unreasonable to place the onus on employees to bring a charge of discrimination in pay when they are oftentimes unaware of how their pay compares to the pay of their co-workers. While Evans could not argue that she was unaware that she was being fired, Ledbetter could certainly argue that she was simply unaware that she was being paid less than her male counterparts. This argument, for Ginsburg, makes issues of pay disparity categorically different from other discrete discriminatory acts because pay disparities cannot always be perceived, and are often deliberately made secret by employers. While the majority does not take this into consideration, Ginsburg furthers her argument that Title VII was intended to protect employees against discrimination, and not to protect employers from employees.

Delaware State College v. Ricks

Next, Alito cites another precedent that he believes is instructive in *Ledbetter*. *Delaware State College v. Ricks*[103] concerned a college professor who alleged that he had been discharged because of his race. Ricks was denied tenure in June 1974, but was then given a final, one-year non-renewable contract on June 30, 1975. Ricks filed a claim with the EEOC when his contract ended after his actual termination in April of 1976. In that case, the Court argued that Ricks failed to identify any specific discriminatory intent on the part of the college between the time he was denied tenure and his termination. Because the denial of tenure was the only specific discriminatory act that Ricks could identify, the Court decided that the EEOC charging period began at "the time the tenure decision was made and communicated to Ricks."[104]

Alito also argues that in *Ricks*, the alleged discriminatory intent of the college in the denial of tenure could not be then attached to the termination of employment years later. The Court states that agreeing with Ledbetter would not only overrule the sound legal arguments in these precedent cases, but it would also "distort Title VII's 'integrated, multistep enforcement procedure.'"[105] In *Ricks*, the Court explained, "The EEOC filing deadlines 'protect[s] employers from the burden of defending claims arising from employment decisions that are long past.'"[106] Because Ricks was unable to

[103] Ricks*,* 449 U.S. 250 (1980)
[104] Ledbetter 550 U.S. 618, 7
[105] Occidental Life Insurance Company of California v. EEOC, 432 U.S. 355, 359 (1977)
[106] Ricks*,* 449 U.S. 250, 256-257

point to any specific instance of discriminatory treatment during the charging period, he was not allowed relief. Justice Alito uses the Court's previous argument that Title VII does, in part, protect employers to argue that this reasoning should be instructive in *Ledbetter*.

To the Court's argument in *Ricks*, Ginsburg responds just as she did for *Evans*. Both cases involved single, obvious, and intentionally discriminatory acts. Mrs. Evans was fired for being married, and Professor Ricks was denied tenure for being black. While these acts are undeniably discriminatory, both of these plaintiffs are responsible for failing to bring suit within the allotted charging period. Once again, Ginsburg understands these facts to be distinguishable from those presented in *Ledbetter* and the question at hand. Ledbetter could not possibly be held to the same standard as Evans and Ricks because pay discrimination is not comparable to discrimination in the form of refusal of tenure or termination of employment.

Ginsburg argues that because of these realities of pay discrimination, *Ledbetter* is significantly different from cases involving termination, failure to promote, or refusal to hire. In these cases, the plaintiffs are properly notified of the discrimination simply because of the type of notification that is required. Pay discrimination cases are inherently different because they often do not involve fully communicated discrete acts that are "easy to identify"[107] as discriminatory. In most cases of pay disparity, the employee is not made aware of the discrimination until "the disparity becomes apparent

[107] Morgan, 536 U.S. 101, 114

and sizeable."[108] In *Ledbetter*, Ginsburg argues that Lilly Ledbetter only had knowledge and cause to sue after she calculated "future raises…as a percentage of current salaries."[109] Ginsburg argues that the norm for employees to give employers the benefit of the doubt "should not preclude [Ledbetter] from later challenging the then current and continuing payment of a wage depressed on account of sex."[110]

Lorance v. AT&T

Similarly, in *Lorance v. AT&T Technologies Inc.*[111], the question of discriminatory pay structure was raised. At an AT&T plant, seniority designated raises, benefits, and safety from lay-offs. Before 1979, all employees in the plant were given seniority based on total years working at the plant. In 1979, a new agreement was made that "testers" at the plant would be given seniority based on years working at that position versus years working at the plant overall. It is important to note here that the "testers" were a higher-paying mostly male dominated job. When the plant had to enforce lay-offs several years later, female testers were the first to be laid off due to low seniority as calculated under the new 1979 "tester" provision.

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[108] Ledbetter 550 U.S. 618, 3 (Ginsburg, J. dissenting)
[109] Ledbetter 550 U.S. 618, 3 (Ginsburg, J. dissenting)
[110] Ledbetter 550 U.S. 618, 3 (Ginsburg, J. dissenting)
[111] *Lorance v. AT & T Technologies Inc.*, 490 U.S. 900 (1989)

The female testers filed suit with the EEOC, alleging that this scheme was adopted with discriminatory intent to protect incumbent male testers from women who wanted the same job. In *Lorance*, Alito highlights the Court's previous opinion that "the EEOC charging period ran from the time when the discrete act of illegal intentional discrimination occurred, not from the date when the effects of his practice were felt."[112] Because the plaintiffs' claim alleges that the signing of the new "tester" provision of the seniority system is the discrete act of discrimination against female testers, he argues that it is the signing that triggers the limitations period.

With regard to *Lorance*, Justice Ginsburg argues against the majority's use of this precedent because "it too involved a one-time discrete act: the adoption of a new seniority system that 'has its genesis in sex discrimination.'"[113] The workers in *Lorance* were obviously notified of the new seniority system, and therefore should have filed suit in a timely manner. Again, this does not apply to Ledbetter because she was never made aware of the discrimination against her. In addition, Ginsburg argues, "The Court's extensive reliance on *Lorance, ante,* at 7-9, 14, 17-18, moreover, is perplexing for that decision is no longer effective."[114] In the 1991 Civil Rights Act, Congress superseded the holding in *Lorance*. While the women in *Lorance* were not granted relief because they did not file their claim within the charging period, Congress provided in 1991:

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[112] Ledbetter 550 U.S. 618, 7 (Ginsburg, J. dissenting)
[113] Ledbetter 550 U.S. 618, 10 (Ginsburg, J. dissenting)
[114] Ledbetter 550 U.S. 618, 10 (Ginsburg, J. dissenting)

> "For the 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 the provision of the system."[115]

It is clear in the Civil Rights Act of 1991 that Congress disagreed with the findings in *Lorance*, and that even if the Court had no choice but to find in favor of the employer under Title VII, this was not consistent with the lawmakers' intention, and the law's remedial purpose. Justice Ginsburg writes, "Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption."[116]

Congress overruled the Court's decision in *Lorance* in 1991 with new legislation because the Court could not properly parse the intention of the law when deciding that case. Justice Ginsburg argues that the same does not apply for *Ledbetter*, as the Court can take the *Lorance* override as instruction. The dissent also argues: "A clue to congressional intent can be found in Title VII's backpay provision."[117] The backpay provision in Title VII requires that an employee receive backpay for up to two years in order for a discrimination charge to be filed. Justice Ginsburg argues that this provision indicates that Congress has acknowledged "challenges to pay discrimination commending before, but continuing into, the 180-day filing period." (12).

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[115] Ledbetter 550 U.S. 618, 10 (Ginsburg, J. dissenting)
[116] Ledbetter 550 U.S. 618, 12 (Ginsburg, J. dissenting)
[117] Ledbetter 550 U.S. 618, 12 (Ginsburg, J. dissenting)

AMTRAK v. Morgan

The final case that Alito references is also the most recent. *National Railroad Passenger Corporation v. Morgan*[118] also considered a disparate treatment claim. Morgan was a black man who worked for the National Railroad Passenger Corporation, commonly referred to as AMTRAK. He filed a complaint with the EEOC after working for the company for a number of years, citing a hostile work environment in which he was subjected to racially discriminatory and retaliatory acts. The relevance in *Morgan* lies in the definition of "employment practice" asserted by the majority opinion. The Court explained in *Morgan* that "the statutory term 'employment practice' generally refers to "a discrete act or single 'occurrence'" that takes place at a particular point in time. "Termination, failure to promote, denial of transfer, [and] refusal to hire"[119] are all cited by the Court as examples of possible discrete acts for which plaintiffs may sue, buy only if the discrete acts occurred within the appropriate time period."[120] The Court held that Morgan could not charge AMTRAK with those individual acts of discrimination because they fell outside of the charging period. However because he was making a hostile work environment claim, he could use those previous individual acts to bolster his case as long as at least one subsequent discriminatory act happened within the charging period.

[118] Morgan 536 U.S. 101
[119] Morgan 536 U.S. 101
[120] Ledbetter 550 U.S. 618, 8

The Court understands the opinion in *Morgan* to describe discrete acts of discrimination, as "an act that constitutes a separate actionable unlawful employment practice that is temporarily distinct."[121] Alternatively, *Morgan* describes a hostile work environment as "a succession of harassing acts, each of which 'may not be actionable on its own' and 'cannot be said to occur on any particular day.'"[122] The majority contends that in *Morgan*, theactionable wrong is the environment, not individual actions that then create the environment. Because Ledbetter alleged a series of individual acts instead of a systematic wrong that resulted in a succession of discriminatory acts, the Court did not find this argument sufficient. Justice Alito argues that because Ledbetter is not making a hostile work environment claim, she cannot use the same legal reasoning that allowed Morgan to cite previous instances of discrimination.

Not surprisingly, Justice Ginsburg does not agree with Justice Alito's reading of *Morgan*. She quotes the text, in which the Court "set apart, for purposes of Title VII's timely filing requirement, unlawful employment actions of two kinds."[123] *Morgan* established both "discrete acts" that are "easy to identify" as discriminatory, and acts that are recurring and cumulative in impact. Once again, Justice Ginsburg asserts that pay discrimination is markedly different from other forms of unlawful employment practices like termination, failure to promote, denial of transfer,

[121] Ledbetter 550 U.S. 618, 19
[122] Ledbetter 550 U.S. 618, 19
[123] Ledbetter 550 U.S. 618, 5 (Ginsburg, J. dissenting)

or refusal to hire. In all of these discrete acts, the employee is obviously informed of the employer's discrimination because the effects can be observed physically. To this end, pay discrimination, in which the employee often does not have the capacity to gauge pay disparity, cannot be reviewed under the unlawful employment action of "discrete acts." According to the dissent, *Morgan* supports their reading that *Ledbetter* does not fall into the category of discrete discrimination because it is not one of the discrete acts that are listed.

Therefore, *Ledbetter* and pay disparity cases like it would fall into the category of unlawful practices that are recurring and cumulative. In *Morgan*, the Court distinguished these acts "different in kind from discrete acts" because they are "based on the cumulative effect of individual acts."[124] The Court placed hostile work environment claims in this second category because "their very nature involves repeated conduct."[125] In cases of hostile work environment, Title VII's charging period rule is thus more flexible because some components of the unlawful action would certainly fall outside of the charging period; such is the nature of recurring, cumulative unlawful employment practices.

The dissent found that "pay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination."[126] In response to the

[124] Ledbetter 550 U.S. 618, 5 (Ginsburg, J. dissenting)
[125] Ledbetter 550 U.S. 618, 6 (Ginsburg, J. dissenting)
[126] Ledbetter 550 U.S. 618, 6 (Ginsburg, J. dissenting)

majority's assertion that Ledbetter's sex discrimination could be understood as a series of discriminatory acts by individuals rather than a hostile work environment, Ginsburg responds that this is an unreasonable distinction. Alito writes that in *Morgan*, "the actionable wrong is the environment, not individual actions that then create the environment."[127] Ginsburg dismisses this as an unrealistic understanding of a hostile workplace, as a hostile environment cannot exist without individual actions that create the environment. Like Ledbetter's claim, *Morgan* rested not on one particular paycheck but on '"the cumulative effect of individual acts.'"[128]

Justice Ginsburg devotes a significant section of the dissent to criticize the majority's opinion as out of step with the realities of workplace discrimination. While the majority has categorized Ledbetter's pay discrimination case as the same or similar to other cases of employment discrimination, Ginsburg argues that there is a major difference between pay cases and other employment cases. Specifically, pay cases are different because they do not fit within the category of singular discrete acts easy to identify. As the Court notes in *Morgan*, a worker knows immediately "if she is denied a promotion or transfer, if she is fired or refused employment."[129] These events are also generally known to co-workers and can be considered public events. "Compensation disparities, in contrast, are often hidden from

[127] Ledbetter 550 U.S. 618, 19
[128] Morgan 536 U.S. 101, 115
[129] Ledbetter 550 U.S. 618, 7

sight."[130] The remedial purpose of Title VII, Justice Ginsburg argues, was to protect employees from discrimination. In her view, the majority's reading of *Morgan* in this case focused on technical details, but failed to recognize the purpose and intent of Title VII.

Bazemore v. Friday

While all of the cases analyzed above were introduced by the majority and subsequently rejected by the dissent, Justice Ginsburg relies heavily on another case, *Bazemore v. Friday,*[131] to make her argument. With regard to Ledbetter's argument under Title VII, Justice Ginsburg and the dissenters pose this legal question: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?"[132] As in the petitioner's brief, the dissent argues that according to precedent in *Bazemore* and rulings of lower courts, "the unlawful practice is the current payment of salaries infected by gender-based discrimination – a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man."[133] Justice Ginsburg argues that the Court must consider "what activity qualities as an unlawful employment practice in cases of discrimination with respect to compensation"[134], and that there are two possible answers. The first

[130] Ledbetter 550 U.S. 618, 7 (Ginsburg, J. dissenting)
[131] Bazemore v. Friday, 478 U.S. 385 (1986)
[132] Bazemore 478 U.S. 385, 110
[133] Ledbetter 550 U.S. 618, 3 (Ginsburg, J. dissenting)
[134] Ledbetter 550 U.S. 618, 4 (Ginsburg, J. dissenting)

answer, which the majority has adopted, considers unlawful employment practices to be the pay-setting decision, and that decision alone, as the unlawful employment practice. The second answer, which the dissent asserts, can be found in the Court's unanimous decision in *Bazemore*. This decision found that both the pay-setting decision and any subsequent affected paychecks are unlawful employment practices based upon the remedial purpose of Title VII.

Bazemore was also a disparate treatment pay claim, brought against the North Caroline Agricultural Extension Service.[135] Prior to 1965, the Service had a "white branch" and a "Negro branch," with the latter receiving significantly less pay. In 1965, the two branches merged, but blacks were still receiving significantly less pay than whites in the Service. When Title VII was extended to public employees in 1972, black members of the Service sued for equal compensation. Because of the history of discrimination against the "Negro branch" in the Service, "pre-existing salary disparities continued to linger on"[136] after the branches were combined. The Court found in *Bazemore* that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[137] Justice Ginsburg argues that this principle is wholly applicable to *Ledbetter*. Similarly, each week's paycheck that delivers less to a woman than to a similarly situated

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[135] Bazemore 478 U.S. 385, 389-390
[136] Ledbetter 550 U.S. 618, 5
[137] Bazemore 478 U.S. 385, 395

man is a wrong actionable under Title VII. This reading, Justice Ginsburg argues, is more faithful to precedent.

For Ginsburg, *Bazemore* simply affirmed the argument that both the pay-setting decision and the actual payment of discriminatory wage are unlawful employment practices. Justice Alito argued in the majority opinion that *Bazemore* was not about allowing both the pay-setting decision and the subsequent paychecks to act as triggers. Instead, the majority understood *Bazemore* to be focused on discriminatory pay structures. The majority understood the facts of the case in *Bazemore* to be sufficiently distinguishable from the facts in *Ledbetter* to disregard Ledbetter's interpretation. Specifically, the Court argues that *Bazemore* dealt with a "facially discriminatory pay structure"[138] that explicitly places employees on a lower scale because of race, "which is to say that they had engaged in fresh discrimination."[139] Alito argues that this was not the case in *Ledbetter*, and the argument for the paycheck accrual rule disregards the heart of Brennan's reasoning in *Bazemore*. Alito writes that "Ledbetter's interpretation is unsound"[140] because it would dispense with the need to prove actual discriminatory intent with each unlawful employment practice.

> "*Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a

[138] Ledbetter 550 U.S. 618, 15
[139] Ledbetter 550 U.S. 618, 16
[140] Ledbetter 550 U.S. 618, 14

> new charging period is not triggered when an employer issues paychecks pursuant to a system that is 'facially nondiscriminatory and neutrally applied.'"[141]

In order to make a claim under the rule in *Bazemore*, the majority argues that Ledbetter must have adduced evidence that Goodyear adopted its performance-based pay structure in order to discriminate on the basis of sex. Because Ledbetter argued that Goodyear agents discriminated against her individually, which then caused subsequent pay deductions, *"Bazemore* is of no help to her."[142] In the next chapter, we will discuss how Alito's interpretation of case law failed to properly analyze and use case law.

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[141] Ledbetter 550 U.S. 618, 18
[142] Ledbetter 550 U.S. 618, 18

Chapter 4:
Majority Failure

After dissecting the legal arguments, both the majority and dissenters finally consider how far interpretations should reach into policy issues like the ones in the *Ledbetter* case. The majority argues that they are bound by their duty to interpret the laws created by Congress, and that the dissent's interpretation of the law extends into the unacceptable realm of policymaking. The dissent responds that they are not overstepping, but rather, they are appropriately weighing the consequences of their decision in conjunction with the text and the law's purpose. Justice Alito argues that even if Goodyear discriminated against Ledbetter because of her sex, the Court's hands are tied by the requirements of the statute: "We have repeatedly rejected suggestion that we extend or truncate Congress' deadlines."[143]

According to the majority, the importance of the charging limitations written into the statute reflects the intent of Congress, and should not be changed by the Court. Despite this, Alito agrees that the charging period is comparatively short, but reconciles this by explaining, "Congress clearly

[143] Ledbetter 550 U.S. 618, 10

intended to encourage the prompt processing of all charges of employment discrimination."[144] The shortness of the deadline in Title VII suggests strong preferences in Congress for quick resolution, and the Court must enforce the law rather than rewrite it: "Ultimately, 'experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'"[145] For these reasons, the majority concluded that employment practices not explicitly discriminatory in each instance cannot be considered triggers for new charging periods, and that Ledbetter's claim was untimely.

Further, Alito responds to the Plaintiffs' policy claims that because pay discrimination is harder to detect than other forms of discrimination, plaintiffs should be given more time to respond. To this, the Court simply states that they are in no position to evaluate these arguments because these requests have no basis in the statute or in precedent. In a strictly textualist manner, Justice Alito ends by saying, "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 the statute."[146]

The legal arguments in the majority opinion focus heavily on three points: precedent, fidelity to the text, and the role of the Court as an active policy maker. In response to Ledbetter's arguments about the nature of pay

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[144] Ledbetter 550 U.S. 618, 13
[145] Ledbetter 550 U.S. 618, 13
[146] Ledbetter 550 U.S. 618, 24

claims and interpretation of the discrete act of discrimination necessary to trigger the charging period, Alito sees inconsistency with the relevant precedents involving other Title VII cases. For the majority, *Ledbetter* is bound inexplicably to *Evans, Ricks, Lorance,* and *Morgan*. In their view, the facts and questions in these cases are indistinguishable from the case at hand, and therefore must follow the rationale in previous rulings. Alito argues that the Court must remain faithful to Title VII's language and resist broader interpretation of the text that constitutes policy. Instead of focusing on the broad remedial purpose of Title VII as Justice Ginsburg does in the dissent, Justice Alito insists upon strict, textualist statutory interpretation. For the majority, Title VII is not vague. Ledbetter did not fulfill her burden as the plaintiff in this case, and the Court cannot stray beyond the language of the law.

On the other hand, Justice Ginsburg reads the precedent cases differently because she believes that pay disparities are categorically different from the other forms of pay discrimination found in the majority's precedents. In order to more robustly draw this distinction, Justice Ginsburg argues that it is not unusual for management to refuse to publish employee pay levels. In *Goodwin v. General Motors Corp.*[147], the plaintiff did not know what her colleagues earned until a printout listing salaries at General Motors seven years after she began to work there. In *McMillan v. Massachusetts*

[147] Goodwin v. General Motors Corp., 275 F. 3d 1005, 1008-1009 (CA10 2002)

Society for the Prevention of Cruelty to Animals,[148] the plaintiff worked for the employer for years before that a salary disparity existed.

The same was found in *Ledbetter*, as Goodyear admitted that it kept salaries confidential from employees, and all employees had little to no access to the earnings of their colleagues. Ginsburg further argues that pay disparity is markedly different from denial of raise because cases like Ledbetter's do not concern whether or not the plaintiff was given a raise. Ledbetter was given raises throughout her time at Goodyear, but the important factor to consider is how much those raises were in comparison to her similarly situated male counterparts. The discovery of pay disparity takes time, and the employee may not notice the disparity until a consistent pattern of discrimination develops. Even then, the dissent notes that the discovery of *significant* pay disparity takes even more time, and it is only likely for a plaintiff to file suit if the disparity is significant enough and the employer's discriminatory intent is pointed enough.

Further, unlike refusal to promote, denial of transfer, and refusal to hire, the employer has something to gain by paying a woman less than her male counterpart. If an employer refuses to hire, promote, or transfer a woman because of her sex, they will still have to pay a man to take those positions in order to reach company goals. However, in cases of pay disparity, employers stand to gain from keeping a woman in a company, promoting her, but choosing to pay her less than men in the same position.

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[148] McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals, 140 F. 3d 288, 296 (CA1 1998)

"When a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented."[149]

Citing multiple cases from the U.S. Court of Appeals, Justice Ginsburg also argues that the Court's ruling in this case falls out of step with the interpretations of many other courts. In these cases, "a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation…"[150] The dissent points out that even the EEOC Compliance Manual provides 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."[151] Time and time again, both the lower courts and the EEOC have supported the argument that both the pay-setting decision and the actual payment of discriminatory wage may individually be considered unlawful employment practices.

In the majority opinion, Justice Alito also argued that the limiting of the charging period is crucial to "protect employers from the burden of defending claims arising from employment decisions long past."[152] To this point, Justice Ginsburg first responds that Ledbetter's discrimination was not long past; indeed, the pay discrimination she faced only grew with time. Furthermore, the dissent argues that employers would not be "left defenseless" against unreasonable delay on the part of the employee. The

[149] Ledbetter 550 U.S. 618, 9 (Ginsburg, J. dissenting)
[150] Ledbetter 550 U.S. 618, 13 (Ginsburg, J. dissenting)
[151] EEOC Compliance Manual 2-IV-C(1)(a), p. 605:0024(14)
[152] Ledbetter 550 U.S. 618, 11

employer has various defenses from which to choose, ranging from waiver, estoppel, equitable tolling, to laches. Indignantly, Justice Ginsburg also responds to Justice Alito's assertion in the majority opinion that her reasoning would allow a plaintiff to sue on a single decision "made 20 years ago 'even if the employee had full knowledge of all the circumstances relating to the decision at the time it was made.'"[153] Ginsburg calls this hypothetical "fool-hardy" and "a last-ditch argument."[154]

Justice Ginsburg spends the last few pages of the dissent rejecting the majority's dismissal of "policy issues." Justice Ginsburg argues that the purpose of the law is simple: to protect employees from discrimination. The purpose of a law is not a policy issue. It is the only framework under which proper statutory interpretation can be achieved. The parsing of intentional versus unintentional structure, discrete versus compounding discriminatory acts are all, at the end of the day, irrelevant in the face of the law's purpose. Ginsburg argues that the majority has lost sight of the purpose of Title VII by focusing too narrowly on text of Title VII. Under this literalist reading, "Knowingly carrying past pay discrimination forward must be treated as lawful conduct."[155] Ginsburg passionately dissents, arguing that Ledbetter has met her burden wholly. "The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination

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[153] Ledbetter 550 U.S. 618, 16 (Ginsburg, J. dissenting)
[154] Ledbetter 550 U.S. 618, 16 (Ginsburg, J. dissenting)
[155] Ledbetter 550 U.S. 618, 19 (Ginsburg, J. dissenting)

Congress intended Title VII to secure."[156] The dissent calls the Court's opinion in *Ledbetter* "a cramped interpretation of Title VII, incompatible with the statute's broad remedial measures."[157] Justice Ginsburg ends by calling on Congress to act to "correct this Court's parsimonious reading of Title VII," just as it did in *Lorance* and the Civil Rights Act of 1991.

Justice Ginsburg's arguments in this dissent would eventually be answered in the Lilly Ledbetter Act of 2009. This dissenting opinion is among the most famous written by Ginsburg, and she took the unorthodox path of reading the dissent aloud from the bench when the *Ledbetter* opinion was handed down. The fervent disagreement expressed by Justice Ginsburg in this opinion goes beyond the nuanced question of time limitations were the focus of the majority. Justice Ginsburg addresses both these smaller legal technicalities as well as a larger question about consequences of the Court's decision. The latter argument caught fire, spurring Congress to action.

It is important to note here that for the dissent, the majority's use of precedent is entirely out of step with the issue presented by Ledbetter. Not only does Justice Ginsburg argue that the majority's interpretation of Title VII is inconsistent with the law's purpose, she argues that it is inconsistent with the intended application of the law. This, she acknowledges, is an issue that only Congress can remedy. As a woman who graduated from Columbia Law School during a time when women didn't get law degrees, Justice Ginsburg cut her teeth by litigating many famous gender rights cases for the American

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[156] Ledbetter 550 U.S. 618, 19 (Ginsburg, J. dissenting)
[157] Ledbetter 550 U.S. 618, 19 (Ginsburg, J. dissenting)

Civil Liberties Union Women's Rights Project.[158] As counsel of record for multiple landmark gender rights Supreme Court cases like *Reed v. Reed*[159] and *Frontiero v. Richardson*[160], Justice Ginsburg not only formulated many of the arguments supporting gender rights issues, but she also understood how advocacy could affect Congress. Ginsburg's background and expertise prepared her to both fully understand the issues present in *Ledbetter*, and write a powerful dissenting opinion that successfully countered the majority's arguments, and provided lawmakers with a blueprint for remedial action.

[158] Tribute: The Legacy of Ruth Bader Ginsburg and the WRP Staff, ACLU.org
[159] Reed v. Reed, 404 U.S. 71 (1971)
[160] Frontiero v. Richardson, 411 U.S. 677 (1973)

Chapter 5:
The Ball in Congress's Court

The aftermath of the *Ledbetter* decision is significant in its own right. Indeed, only in July of 2007, just two months after the Supreme Court opinion was handed down, lawmakers attempted to pass the Lilly Ledbetter Fair Pay Act of 2007.[161] This act would amend The Civil Rights Act of 1964 to abolish the time restrictions in Title VII, and was a direct response to the decision made in *Ledbetter v. Goodyear*. Congressional overrides of this kind are rare, making the journey from *Ledbetter v. Goodyear* to the Lilly Ledbetter Fair Pay Act of 2009 a unique one.

The literature on the cause of congressional overrides is limited, and some of the best-known studies are dedicated to empirical analysis rather than to a study of particular case. Professor William Eskridge published a landmark study in 1991 in which he analyzed the factors that contribute to congressional overrides over a twenty-three year period and developed a theoretical model to understand "the interaction between the Court,

[161] "H.R.2831 - Lilly Ledbetter Fair Pay Act of 2007," Congress.gov,

Congress, and the President." [162] In 2012, Eskridge and Matthew R. Christensen updated the original study and included the Ledbetter case in the data of congressional overrides of Supreme Court statutory interpretation decisions.[163] More recently, another scholar, Richard L. Hasen, published his own empirical study that criticized the Eskridge and Christensen findings and proposed a new theory for understanding congressional overrides.[FOOTNOTE NEEDED FOR THIS ARTICLE].

While Eskridge, Christensen, and Hasen compiled data on why congressional overrides occur, this thesis is focused on the significance of the *Ledbetter* congressional override. In this regard, Martha Chamallas's article, "*Ledbetter*, Gender Equity and Institutional Context"[164] is most relevant. Unlike Eskridge, Christensen, and Hazen, Chamallas looks at *Ledbetter* individually as both a Supreme Court case and a piece of legislation. Her findings center around Justice Ginsburg's dissent, and her "trademark approach to gender equality in the workplace."[165] She argues that what makes *Ledbetter* unique is Justice Ginsburg's opinion, as it displays "sensitivity for the institutional context in which employment and other types of decisions are made," and "an equally deep appreciation for how legal doctrine is likely to translate into norms and practices in real-world

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[162] Eskridge, William N. Jr., "Overriding Supreme Court Statutory Interpretation Decisions" (1991). *Faculty Scholarship Series.* Paper 3836.
[163] Eskridge, William N. *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*. Yale Law Journal. Vol. 92:1317. 2012.
[164] Chamallas, Martha. *Ledbetter, Gender Equity and Institutional Context.* Ohio State Law Journal. Vol. 70:4. 2009.
[165] Chamallas, 1038.

settings."[166] Chamallas' conclusion is supported by the legal analysis presented in the previous chapters.

Justice Ginsburg accurately predicted Congress's next move when she made reference to the Civil Rights Act of 1991[167]. Indeed, as discussed in Chapter 4 the Ledbetter Act contains the exact language of her dissenting opinion. In 1991, Congress and President George W. Bush passed the first law since the Civil Rights Act of 1964 that addressed and modified conditions for employees who sued their employers for discrimination.[168] The provisions in the Civil Rights Act of 1991 acted as overrides for the decisions handed down by the Court in these cases, among others.

In *Ledbetter*, Justice Ginsburg found no difference between the duty of Congress in 2007 and the duty that Congress took up in 1991. In her dissent, she not only foresaw the role her dissent might play in Congress, but she also included precise statutory language that Congress would later actually write into the bill. It is clear that Justice Ginsburg was both confident in the strength of her argument, and also confident that her arguments would be instructive to the legislative branch. Chamallas writes, "Justice Ginsburg's dissent presented a cogent analysis of the relevant legal precedents, ably countering the majority's contention that the outcome of the case was compelled by statutory language..."[169]

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[166] Chamallas, 1038.
[167] Pub. L. 102-166
[168] Pub. L. 102-166
[169] Chamallas, 1042.

The Lilly Ledbetter Fair Pay Act of 2007, brought to the House floor by Democrats, made it through the House of Representatives with 93 co-sponsors, all from the Democratic Party. The final vote in the House was 225 yeas to 199 nays. The clearly partisan nature of the bill at this time became even more evident as the bill moved to the Senate, where it failed to pass.[170] But, the supporters of the bill persisted, and the Lilly Ledbetter Fair Pay Act of 2009 came before the House and Senate during the 111th Congress in January of 2009.[171] Upon reaching the House of Representatives once again, the bill passed with 250 members in support and 177 opposed.[172] The bill reached the Senate, passing with a narrow margin. This time 61 supported the bill while 36 opposed it, and Senator Ted Kennedy of Massachusetts, a staunch supporter, did not vote due to his ailing health.[173] The Lilly Ledbetter Fair Pay Act finally passed in 2009 to protect Title VII's broad remedial purpose, just as Justice Ginsburg had instructed Congress to do in her dissent.

The text of the Ledbetter Act of 2009 is short. Spanning only three pages, this Act focuses narrowly on the filing period. The preamble of the Lilly Ledbetter Fair Pay Act of 2009 states that the Act is meant "to amend title VII of the Civil Rights Act of 1964…[and] to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory

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[170] "H.R.2831 - Lilly Ledbetter Fair Pay Act of 2007," Congress.gov
[171] "S.181 - Lilly Ledbetter Fair Pay Act of 2009," Congress.gov
[172] S.181 – Lilly Ledbetter Fair Pay Act of 2009, Senate Vote Roll
[173] S.181 – Lilly Ledbetter Fair Pay Act of 2009, Senate Vote Roll

compensation decision…"[174] Lawmakers specifically address the Court in their findings, which state, "The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation…"[175] Moreover, Congress replicates the exact language of Justice Ginsburg's dissent when they conclude, "The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights law that Congress intended."[176] Congress goes so far as to call these principles of equal compensation "the bedrock principles of American law for decades."[177]

As discussed earlier, the principal disagreement between Justice Alito's majority and Justice Ginsburg's dissent concerned the definition of "unlawful employment practice" as it triggers the charging period. To this end, Congress writes in 2009,

> "Section 706(e) of the Civil Rights Act of 1964 is amended by adding at the end the following: '(3)(A) For the purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decisions or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in while or in part from such a decision or any other practice.'"[178]

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[174] Pub. L. 102-166, S.181, 1
[175] Pub. L. 102-166, S.181, 1
[176] Pub. L. 102-166, S.181, 1
[177] Pub. L. 102-166, S.181, 1
[178] Pub. L. 102-166, S.181, 1-2

Justice Ginsburg's argument that compensation deserved its own specific definition, separate from other types of workplace discrimination, is included in this amendment, and quoted almost word for word. Congress acknowledges "discrimination in compensation" as a form of discrimination that deserves and demands its own set of rules. Congress effectively affirms Ledbetter's understanding of a paycheck accrual rule. For plaintiffs like Ledbetter, who are subject to compounding discriminatory paychecks, this amendment provides broader and more robust protection that is consistent with Ginsburg's reading of Title VII. It is hard to ignore the amount of instruction that Congress took from Justice Ginsburg in the language of the amendment; not only did her dissent directly challenge Congress to act, but it also provided lawmakers with the framework they needed to understand the omissions in Title VII's original language.

The Lilly Ledbetter Fair Pay Act makes explicit reference to sex discrimination, thereby eliminating any ambiguities that existed in the original text of Title VII. This achievement, which is at the center of the Court case and the legislation, underscores the importance and power of Justice Ginsburg's dissent .As a woman who had experienced sex discrimination in her career, Justice Ginsburg cut her teeth championing gender rights cases before the Supreme Court. In her article Chamallas makes a similar point when she states, "Justice Ginsburg's name is synonymous with gender

equality."[179] Her dissent in *Ledbetter* is both a thoughtful consideration of the special circumstances women face in Title VII cases and a blueprint for Congress to remedy the misinterpretation of Justice Alito and the majority. It is clear that Justice Ginsburg's dissent was indeed the clarion call to action that set Congress on the road to enacting the Lilly Ledbetter Fair Pay Act of 2009, thereby advancing the cause of gender equality in the workplace.

[179] Chamallas, 1037.

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