

would put the onus on Congress to undertake or commission the empirical studies necessary for more accurate conclusions about the risk of harm posed by attempted burglary.

The competing methods of statutory interpretation at work in the *James* opinions evinced now-familiar tensions among the Justices of the Roberts court. Most obvious was the rift between the minimalists and their less restrained counterparts — whereas the former camp, represented by Justice Alito's majority opinion, left undecided every ambiguity in the ACCA that was unnecessary to the resolution of the case, Justice Scalia repeatedly emphasized the need to provide clear guidance to lower courts.⁷³ But although Justice Scalia's *James* dissent burnishes his somewhat improbable record as a champion of criminal defendants' constitutional rights,⁷⁴ he missed an opportunity to sustain his advocacy for lenity in construing criminal statutes.⁷⁵ Had he and the other Justices analyzed the case with more attention to lenity, they might have reached a more institutionally competent, empirically sound, and democratically accountable result.

C. Civil Rights Act, Title VII

Statute of Limitations. — For over four decades, workers subjected to unequal pay for discriminatory reasons have turned to Title VII of the Civil Rights Act of 1964,¹ a statute enacted with the “primary objective” of “bring[ing] employment discrimination to an end.”² They have had to contend, however, with the application of section 703, the Act's limitations period, to claims based on continuing violations³ — “arguably the most muddled area in all of employment discrimination

⁷³ The Court is set to provide further guidance next Term. See *Begay v. United States*, No. 06-11543, 2007 WL 1579420 (U.S. Sept. 25, 2007) (granting certiorari on the question of whether felony drunk driving is an ACCA predicate).

⁷⁴ See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005).

⁷⁵ See Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 198 (1994). Perhaps Justice Scalia's desire to counter the minimalism of the majority opinion led him to invoke the broad vagueness doctrine (which, if applied, would have invalidated the ACCA's residual clause in its entirety) where he might otherwise have considered a more tailored application of lenity. Cf. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (describing lenity as a circumscribed version of the vagueness doctrine).

¹ 42 U.S.C. §§ 2000e to 2000e-17 (2000). Female plaintiffs have utilized the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000), as well.

² *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

³ See 42 U.S.C. § 2000e-5(e)(1) (“A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . .”). The limitations period is 300 days if the plaintiff previously instituted proceedings in a state that has an agency dedicated to processing employment discrimination claims. See *id.*; see also Roy L. Brooks, *A Roadmap Through Title VII's Procedural and Remedial Labyrinth*, 24 SW. U. L. REV. 511, 513-14 (1995).

law.⁴ The Supreme Court seemingly clarified matters in 2002, holding in *National Railroad Passenger Corp. v. Morgan*⁵ that the operation of section 703 varied depending on whether a claim was based on a single, discrete act, such as a termination, or on “repeated conduct,” such as acts that create a hostile work environment.⁶ In light of the Court’s earlier decision in *Bazemore v. Friday*,⁷ lower courts interpreted *Morgan* to mean that cases alleging discrimination in pay were timely so long as the employer issued at least one paycheck during the charging period.⁸ Last Term, in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁹ the Supreme Court held that a Title VII claim for pay discrimination is time-barred if it is based on a pay-setting decision made outside of the statutory period, even if the employer issues a paycheck during that period. In doing so, the Court not only undercut both *Morgan* and *Bazemore*, but it also adopted an employer-based viewpoint that is illogical and contrary to the purposes of Title VII.

Lily M. Ledbetter sued her employer for paying her less than any of her male counterparts. Ledbetter worked as a supervisor at Goodyear’s Gadsden, Alabama, plant from 1979 to 1998,¹⁰ and was one of only three women to hold the position of Area Manager.¹¹ In 1982, Goodyear implemented a system of merit-based raises, basing supervisors’ salary increases on annual performance reviews¹² and keeping the resulting salaries confidential.¹³ Although Goodyear had initially paid Ledbetter as much as her male counterparts, her pay increased at a relatively lower rate under the new system.¹⁴ By the end of 1997, she was the only remaining female Area Manager and by far the lowest-paid — earning \$3727 per month, while the lowest-paid male earned \$4286 per month and the highest-paid earned \$5236 per month.¹⁵ Goodyear transferred Ledbetter and paid her replacement, a

⁴ 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1351 (Paul W. Cane, Jr. ed., 3d ed. 1996).

⁵ 536 U.S. 101 (2002).

⁶ *Id.* at 115; see LINDEMANN & GROSSMAN, *supra* note 4, at 938–39 (C. Geoffrey Wierich ed., 3d ed. Supp. 2002) (noting the Court’s clarification of the doctrine).

⁷ 478 U.S. 385 (1986) (per curiam).

⁸ See, e.g., *Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007 (7th Cir. 2003).

⁹ 127 S. Ct. 2162 (2007).

¹⁰ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1173–75 (11th Cir. 2005).

¹¹ See *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting); see also Brief for the Petitioner at 7, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 2610990. As an Area Manager, Ledbetter supervised small groups of line workers. *Ledbetter*, 421 F.3d at 1172.

¹² See Brief for the Respondent at 1–2, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 3014119.

¹³ See *Ledbetter*, 127 S. Ct. at 2181–82 (Ginsburg, J., dissenting).

¹⁴ *Ledbetter*, 421 F.3d at 1173–76; *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507253, at *1 (N.D. Ala. Sept. 24, 2003).

¹⁵ *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting); see also *Ledbetter*, 2003 WL 25507253, at *1 (noting that Ledbetter and a similarly situated male coworker were paid at the

male with less than four years' seniority whom she had previously supervised, more than double what it had paid her.¹⁶ After Ledbetter retired, someone sent her an anonymous letter detailing her years of unequal treatment.¹⁷ In March 1998, she filed a questionnaire with the Equal Employment Opportunity Commission (EEOC),¹⁸ and in November 1999, she filed suit under Title VII and the Equal Pay Act¹⁹ (EPA) in the Northern District of Alabama.²⁰

A jury found in Ledbetter's favor. Although the court had granted Goodyear summary judgment on the EPA claim,²¹ it let the Title VII claim proceed, allowing Ledbetter to present evidence of discrimination from throughout her tenure.²² The jury returned a special verdict recommending an award of over \$3,000,000 in backpay, compensation for mental anguish, and punitive damages.²³ The trial court remitted Ledbetter's award to the statutory maximum of \$300,000 of compensatory and punitive damages plus \$60,000 of backpay, and denied Goodyear's renewed motion for judgment as a matter of law.²⁴

A unanimous panel of the Eleventh Circuit reversed. The court held that in pay discrimination cases in which salaries are periodically reviewed and reestablished by the employer, plaintiffs could not reach beyond "the last [pay-setting] decision . . . immediately preceding the start of the limitations period."²⁵ It concluded that no reasonable jury could find that the relevant decisions — a 1998 recommendation that Ledbetter not receive a raise and a 1997 decision not to consider her for a raise²⁶ — were motivated by intentional discrimination.²⁷ Con-

same rate in April 1979, but that from 1996 to 1998, Ledbetter's annual salary was \$44,724, while her coworker's was \$59,028). Amazingly, Ledbetter was not the lowest-paid female Area Manager during her tenure. See Brief for the Plaintiff-Appellee at 8–9, *Ledbetter*, 421 F.3d 1169 (No. 03-15264-GG), 2004 WL 4072444.

¹⁶ Brief for the Plaintiff-Appellee, *supra* note 15, at 7.

¹⁷ See *NewsHour with Jim Lehrer* (PBS television broadcast Nov. 27, 2006) (transcript available at http://www.pbs.org/newshour/bb/law/july-deco6/wage_11-27.html).

¹⁸ *Ledbetter*, 421 F.3d at 1175. Ledbetter initially claimed Goodyear had forced her to transfer for discriminatory reasons; she added her compensation claim in July. *Id.* The courts focused on the March date for the limitations-period analysis. See *Ledbetter*, 127 S. Ct. at 2166 n.1.

¹⁹ 29 U.S.C. § 206(d) (2000).

²⁰ Complaint, *Ledbetter*, 2003 WL 25507253 (No. 99-C-3137-E), 1999 WL 34804272.

²¹ *Ledbetter*, 127 S. Ct. at 2165. The EPA provides relief similar to that provided by Title VII in gender discrimination cases without an analogous limitations period. See *Ledbetter*, 127 S. Ct. at 2186 (Ginsburg, J., dissenting). As Justice Ginsburg noted, plaintiffs facing ethnic or religious discrimination cannot sue under the EPA and are thus impacted more negatively by the Court's reading of Title VII. *Id.*

²² See *Ledbetter*, 421 F.3d at 1175.

²³ See *id.* at 1176.

²⁴ *Id.*; see also *Ledbetter*, 2003 WL 25507253, at *2 (citing 42 U.S.C. § 1981a(b)(3)(D) (2000)).

²⁵ *Ledbetter*, 421 F.3d at 1183. That is, if there had been one such decision in the preceding 180 days, the jury could consider both that decision and the one immediately preceding it.

²⁶ *Id.* at 1184–85.

²⁷ *Id.* at 1185–86.

sequently, the court reversed the trial court's decision and ordered it to dismiss the complaint.²⁸

The Supreme Court affirmed. Writing for the Court, Justice Alito²⁹ held that the employer's pay-setting decision, and not its issuance of a paycheck, was the action to be analyzed within the *Morgan* framework.³⁰ Consequently, because Ledbetter could allege intentional discrimination only with respect to acts occurring more than 180 days before she filed her EEOC charge, her claim was time-barred. Reasoning that a Title VII claim involves both harm and intent elements, the Court refused to allow Ledbetter to recover for discriminatory acts outside of the filing period regardless of any harmful effect they might have had on her pay within the relevant period.³¹

The Court emphasized that any analysis of the timeliness of a Title VII claim requires a court to identify the specific employment practice at issue.³² Ledbetter based her claim on the issuance of paychecks she received during the filing period, alleging that each constituted a separate act of discrimination.³³ She argued in the alternative that Good-year's 1998 decision to deny her a raise "carried forward intentionally discriminatory disparities from prior years."³⁴ The Court concluded that both arguments failed "because they would require [the Court] in effect to jettison the defining element of the legal claim" — discriminatory intent.³⁵ Because Ledbetter did not assert that discriminatory intent was present in the issuance of paychecks or in the raise decision, but only that this conduct "gave present effect to discriminatory conduct"³⁶ in the past, her claim failed.

The Court pointed to several earlier decisions for support. It relied on its holding in *United Air Lines, Inc. v. Evans*³⁷ 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."³⁸ It also relied on similar holdings in *Delaware State College*

²⁸ *Id.* at 1189–90.

²⁹ Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

³⁰ *See Ledbetter*, 127 S. Ct. at 2165, 2169.

³¹ *See id.* at 2171–72.

³² *See id.* at 2172.

³³ *Id.* at 2167.

³⁴ *Ledbetter*, 126 S. Ct. at 2167 (quoting Reply Brief for the Petitioner at 20, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 3336479) (internal quotation mark omitted).

³⁵ *Id.*

³⁶ *Id.* at 2169.

³⁷ 431 U.S. 553 (1977).

³⁸ *Ledbetter*, 127 S. Ct. at 1167–68 (omission in original) (quoting *Evans*, 431 U.S. at 558) (internal quotation mark omitted). In *Evans*, a flight attendant who had been constructively discharged for discriminatory reasons sued after her employer rehired her but refused to credit her

*v. Ricks*³⁹ and *Lorance v. AT&T Technologies, Inc.*⁴⁰ Ledbetter had pointed to *Bazemore* to support a “paycheck accrual rule” as an exception to the *Evans* line of cases.⁴¹ In *Bazemore*, African American employees brought a claim for disparate treatment in compensation. Before 1965, their employer, a state agency, had segregated employees into a “white branch” and a “Negro branch,” compensating African Americans at a lower rate. After Congress extended Title VII to public employers in 1972, the employees sued, alleging that pay disparities from the old system persisted.⁴² The Court reversed the dismissal of their claims in a per curiam opinion.⁴³ Justice Brennan, in a separate concurring opinion that every Justice joined, concluded that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.”⁴⁴ Justice Alito stated that this language did not give rise to a paycheck accrual rule; *Bazemore* held only that an employer that adopted a *facially* discriminatory pay structure was subject to such a rule.⁴⁵

The *Ledbetter* Court concluded that a paycheck accrual rule would alter the elements of a Title VII claim and undermine the reasons underlying the limitations period. Disparate treatment claims have two elements: an employment practice and discriminatory intent.⁴⁶ Accepting a paycheck accrual rule would “shift intent from one act . . . to a later act that was not performed with bias or discriminatory motive.”⁴⁷ Further, the Court noted, “[s]tatutes of limitation serve a policy of repose,”⁴⁸ and the EEOC filing deadline in particular “protect[s] employers from the burden of defending claims arising from employment decisions that are long past.”⁴⁹ This policy is particularly important when dealing with the intent element because “the employer’s in-

past service for seniority purposes. The Court held that, once the limitations period after the discharge had expired, the employer “was entitled to treat [the termination] as lawful.” *Id.*

³⁹ 449 U.S. 250 (1980) (holding that the limitations period began to run when the employer informed the plaintiff, a college librarian, that it would deny him tenure and retain him for only one more year, not after that year ended).

⁴⁰ 490 U.S. 900 (1989) (holding that a challenge to an allegedly discriminatory seniority system had to be brought within 180 days of the system’s enactment).

⁴¹ *Ledbetter*, 127 S. Ct. at 2172.

⁴² *Bazemore v. Friday*, 478 U.S. 385, 389–91 (1986) (Brennan, J., concurring in part).

⁴³ *Id.* at 388 (per curiam).

⁴⁴ *Id.* at 395 (Brennan, J., concurring in part).

⁴⁵ *Ledbetter*, 127 S. Ct. at 2173.

⁴⁶ *Id.* at 2171.

⁴⁷ *Id.* at 2170.

⁴⁸ *Id.* (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554–55 (1974)).

⁴⁹ *Id.* (alteration in original) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 256–57 (1980)) (internal quotation marks omitted).

tent is almost always disputed, and evidence relating to intent may fade quickly with time.”⁵⁰

Justice Ginsburg dissented.⁵¹ She argued that, within the *Morgan* framework, pay discrimination claims are more analogous to hostile environment claims than to claims based on discrete acts.⁵² In contrast to claims arising from decisions to hire or terminate, claims for pay discrimination rest “not on one particular paycheck, but on ‘the cumulative effect of individual acts.’”⁵³ Ledbetter’s pay, for example, fell behind that of her male counterparts because of “insidious discrimination building up slowly but steadily.”⁵⁴ Justice Ginsburg also argued that the majority misread *Bazemore*, which had found paychecks that perpetuated past discrimination actionable as fresh discrimination rather than as “‘related’ to a decision made outside the charge-filing period.”⁵⁵ Finally, Justice Ginsburg argued that the majority’s rule ignored the realities of the workplace as well as Title VII’s “broad remedial purpose.”⁵⁶ Although discrete acts are “generally public events, known to co-workers,” pay decisions are often hidden from sight.⁵⁷ The majority’s holding essentially required courts to treat “[k]nowingly carrying past pay discrimination forward . . . as lawful conduct.”⁵⁸ Justice Ginsburg noted that Congress had responded to a similarly “cramped interpretation” in the past,⁵⁹ and stated that, once again, “the ball is in Congress’s court.”⁶⁰

Ledbetter is problematic for several reasons. The Court undercut both *Bazemore* and *Morgan* and advanced a reading of those cases that is at odds with the broad, preventative purpose of Title VII. The Court’s holding, however, left open certain avenues of redress for fu-

⁵⁰ *Id.* at 2171. The Court also rejected Ledbetter’s argument that courts could police stale claims through the equitable doctrine of laches, concluding that “Congress plainly did not think that laches was sufficient in this context,” *id.*, and refused to accept Ledbetter’s analogies to other statutory schemes, *see id.* at 2176–77 (citing section 10 of the National Labor Relations Act, 29 U.S.C. § 160(b) (2000)), or to address her policy arguments, *see id.* at 2177.

⁵¹ Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer.

⁵² *Ledbetter*, 127 S. Ct. at 2180 (Ginsburg, J., dissenting).

⁵³ *Id.* at 2181 (quoting Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 115 (2002)); *see also* Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/05/some_reflection.html (May 29, 2007) (stating that all of the differences between the dissent and the majority followed from this crucial distinction).

⁵⁴ *Ledbetter*, 127 S. Ct. at 2181 (Ginsburg, J., dissenting).

⁵⁵ *Id.* at 2180 (quoting *id.* at 2174 (majority opinion)).

⁵⁶ *Id.* at 2188.

⁵⁷ *Id.* at 2181. Like Goodyear, many employers keep such information confidential. *See* GLORIA STEINEM, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 356 (1983).

⁵⁸ *Ledbetter*, 127 S. Ct. at 2187–88 (Ginsburg, J., dissenting).

⁵⁹ *Id.* at 2188 (noting that Congress superseded several Court decisions in the 1991 Civil Rights Act). Justice Ginsburg chided the majority for relying on *Lorance* despite this fact. *See id.* at 2183.

⁶⁰ *Id.* at 2188.

ture claimants. Of greater significance is how the Court reached its holding. The majority adopted an employer-based viewpoint that is itself illogical and contrary to both longstanding precedent and the purpose of Title VII. This approach not only signals that any fix Congress enacts will likely be short-lived, but also has consequences beyond the confines of Title VII's charge-filing requirements.

Ledbetter does not follow from the framework of *Morgan* and *Bazemore*, under which each paycheck is a discrete and actionable harm for the purposes of claims based on discriminatory pay disparities. In *Morgan* itself, the Court approved of *Bazemore*, noting that “when considering a discriminatory salary structure, . . . *although the salary discrimination began prior to the date that the act was actionable under Title VII*, ‘[e]ach week’s paycheck . . . is a wrong actionable under Title VII.’”⁶¹ Both before and after *Morgan*, courts in nine federal circuits held with little difficulty that “[a]ny paycheck given within the [charge-filing] period . . . would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period.”⁶² The Eleventh Circuit departed from this rule but at least attempted to follow *Bazemore*, holding that although the issuance of a paycheck would not allow the plaintiff to allege discrimination in any pay-setting decision leading up to that paycheck, it would allow the plaintiff to challenge the most recent pay-setting decision.⁶³

The *Ledbetter* Court effectively abandoned *Bazemore*. It read the case as standing only for the proposition that when “an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees,”⁶⁴ but that is far from what *Bazemore* held. The employer in *Bazemore* had maintained a facially discriminatory pay structure in the past, but it eliminated the system’s facially discriminatory elements six years before the plaintiffs filed suit.⁶⁵ The system at issue was discriminatory in effect, not facially discriminatory.⁶⁶ It was, in fact, a merit-based pay system similar to Goodyear’s.⁶⁷

⁶¹ Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112 (2002) (emphasis added) (quoting *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part)).

⁶² Forsyth v. Fed’n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005); see also *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1181 n.17 (11th Cir. 2005) (citing cases from the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

⁶³ See *Ledbetter*, 421 F.3d at 1184.

⁶⁴ *Ledbetter*, 127 S. Ct. at 2173.

⁶⁵ See *Bazemore*, 478 U.S. at 390–91 (Brennan, J., concurring in part); *id.* at 397 n.8 (“This lawsuit involves two distinct types of salary claims: those of employees subject to the premerger discriminatory pay structure and those hired after the merger of the black and white branches.”).

⁶⁶ Cf. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

⁶⁷ Compare *Bazemore*, 478 U.S. at 397 n.7 (Brennan, J., concurring in part) (explaining that the system sorted employees into quartiles based on their performance, influencing their compen-

Ledbetter's departure from *Morgan* was more subtle. *Morgan* had read *Bazemore* to hold that each discriminatory paycheck was "a wrong actionable under Title VII."⁶⁸ The *Ledbetter* Court ruled that the issuance of each paycheck — an act that is usually automated⁶⁹ — is actionable only if accompanied by discriminatory intent.⁷⁰ *Ledbetter* also undermined *Morgan*'s conclusion that claims such as those for hostile environment sexual harassment could be based on conduct outside of the charging period by focusing on a single pay-setting decision as the applicable employment practice, despite the fact that such a decision is important only in connection with decisions made in the past. For example, in 1993, *Ledbetter* received "the largest percentage [salary] increase given to any Area Manager, though the smallest in absolute dollars,"⁷¹ and two years later she received performance awards that justified her being awarded an even larger raise;⁷² despite these large increases, she was still paid much less than males performing comparable work. Had *Ledbetter* challenged either raise, she would have simply failed to state a claim.

The Court's holding also undercuts Title VII's purpose. As the Court previously explained, the statute's "primary objective" . . . is not to provide redress but to avoid harm."⁷³ Despite the fact that the Act elsewhere allows recovery for two years of backpay,⁷⁴ *Ledbetter* effectively limits recovery in many cases to 180 or 300 days of backpay, reducing the deterrent effect. Moreover, in the words of the dissent, the majority's holding "force[s] plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay

sation), *with Ledbetter*, 421 F.3d at 1175 (noting that employees who ranked near the bottom in performance measures received no raises at all).

⁶⁸ Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112 (2002) (quoting *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring in part)).

⁶⁹ See *Ledbetter*, 421 F.3d at 1182.

⁷⁰ See *Ledbetter*, 127 S. Ct. at 2169.

⁷¹ *Ledbetter*, 421 F.3d at 1173.

⁷² *Id.* In a bizarre footnote, the court of appeals stated that there was "no documentary record of how *Ledbetter* actually ranked against her colleagues" and that "[s]ome evidence suggests that [*Ledbetter*'s supervisor] recommended such a large increase for *Ledbetter*, not because she was truly a 'top performer,' but simply because he wanted to raise her salary." *Id.* at 1173 n.3. It is, of course, just as likely that negative evaluations were intentionally manipulated in the opposite direction. See Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, N.Y. TIMES, May 30, 2007, at A17 (quoting *Ledbetter*'s statement that "[m]y department manager, when he would evaluate me, he would tell me things like, 'If you meet me at the Ramada Inn, you can be No. 1, and if you don't, you're on the bottom.'").

⁷³ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

⁷⁴ *Ledbetter*, 127 S. Ct. at 2184 (Ginsburg, J., dissenting) (citing 42 U.S.C. § 2000e-5(g)(1) (2000)).

differential is large enough to enable them to mount a winnable case.”⁷⁵

Although *Ledbetter* allowed an employer that a jury found discriminatory to escape all liability, the Court’s holding left some hope for future claimants. The Court declined to address whether section 703 contains a discovery rule, which would start the running of the limitations period when the plaintiff learns or should learn of his or her claim,⁷⁶ allowing future claims to proceed on the basis of prior discrimination that is not discovered until the charging period.⁷⁷ More importantly, as Justice Ginsburg stressed, Congress can address the Court’s holding. In 1991, Congress superseded a series of narrow cases that similarly restricted the rights of Title VII plaintiffs.⁷⁸

The Court’s analysis is far more troublesome than its holding. The Court essentially adopted an employer-based point of view in evaluating the policy underlying the limitations period. For example, the Court noted that “[t]he EEOC filing deadline ‘protect[s] employers from the burden of defending claims arising from employment decisions that are long past’”⁷⁹ and stressed the “policy of repose”⁸⁰ and the employer’s “right to be free of stale claims.”⁸¹ The *Morgan* Court, by contrast, based its distinction between different types of discrimination claims on the claimant’s perspective, applying a stricter limit in cases involving individual, discrete acts because a plaintiff could more easily discover them.⁸² *Ricks* likewise focused on the plaintiff, finding that the cause of action accrued when a discriminatory decision was made

⁷⁵ *Id.* at 2187 n.9.

⁷⁶ *See id.* at 2177 n.10 (majority opinion); *see also* Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 n.7 (2002). *But see id.* at 123–24 (O’Connor, J., concurring in part and dissenting in part) (noting that the Court’s jurisprudence showed that a discovery rule already exists). Indeed, because the harm of a discriminatory pay decision is not that a member of a protected group is paid less than he or she should be, but rather that such a member is paid less than a similarly situated white male, the Court’s reliance on the pay-setting date would be unjust without a discovery rule. Even a plaintiff who knows the details of how her pay was set would not know to bring a claim without knowing that her pay is less than that of her male coworker.

⁷⁷ *See* Peter E. Leckman, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.: Discovery Rule May Limit Impact of Court’s Title VII Decision*, 2007 BENDER’S CAL. LAB. & EMP. BULL. 181, 185–86; *see also* Posting of Jason Harrow to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/06/what_comes_afte_1.html (June 19, 2007, 9:48 AM).

⁷⁸ *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078–79 (codified at 42 U.S.C. § 2000e-5(e) (2000)).

⁷⁹ *Ledbetter*, 127 S. Ct. at 2170 (second alteration in original) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 256–57 (1980)). The *Ricks* Court, however, made clear that protection of employers is a secondary goal. *See Ricks*, 449 U.S. at 256 (stating that “[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending” stale claims). Tellingly, the *Ledbetter* Court left out the first part of this quotation.

⁸⁰ *Ledbetter*, 127 S. Ct. at 2170.

⁸¹ *Id.* at 2170 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

⁸² *See* Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002).

and communicated to him.⁸³ To employ the framework that Professor Martha Nussbaum develops in her *Foreword*, what is most troubling about *Ledbetter* is not that the Court stood on lofty formalism and refused to remove obstacles, but that it removed obstacles from the path of the wrong party.⁸⁴

This focus on protecting employers is misguided in light of several pro-defendant aspects already built into Title VII. First, the employee bears the ultimate burden of proof,⁸⁵ and in many cases, the employer's own burden is exceedingly light.⁸⁶ If proof, particularly proof of intent, is difficult to obtain, the employee bears the consequences.⁸⁷ Second, despite the Court's conclusion that Congress intended to provide a stronger protection than equitable doctrines such as laches,⁸⁸ the Court has consistently held that equitable doctrines are sufficient to protect employers.⁸⁹ Finally, even if these factors fail to provide adequate protection, the statute caps awards. The jury award in *Ledbetter* itself was remitted by approximately ninety percent.⁹⁰

That the Court increased the burden on employees despite these pro-employer factors makes little sense in light of the preventative purpose of Title VII. The statute prevents harm only if plaintiffs can act to correct disparities. An unduly strict application of Title VII's limitations period thus renders the statute a paper tiger. Perhaps just as worrisome, the consequences of this approach are not limited to Ti-

⁸³ See *Ricks*, 449 U.S. at 258.

⁸⁴ See Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 82 (2007). Here, Goodyear is the "wrong party" because Congress enacted Title VII to remove barriers preventing employees from developing their capabilities. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (noting that Congress passed Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s]"). Although an employer-based, pro-defendant approach is arguably more appropriate when dealing with most limitations periods, *Ledbetter* advanced the approach further than had previous Courts. In *Morgan*, for example, the Court did not catalogue the trouble that a Title VII defendant might face, but merely noted that its holding would "not leave employers defenseless." *Morgan*, 536 U.S. at 121.

⁸⁵ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981).

⁸⁶ See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1185 (11th Cir. 2005) (noting that the employer's burden to show nondiscriminatory reasons for a pay disparity involves "merely proffer[ing] non-gender based reasons, not prov[ing] them").

⁸⁷ This is particularly troublesome because the employer has the built-in advantage of greater access to the factors behind an employment decision.

⁸⁸ See *Ledbetter*, 127 S. Ct. at 2171.

⁸⁹ See, e.g., *Morgan*, 536 U.S. at 121–22; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Laches provides an affirmative defense in cases where a court concludes that the plaintiff has slept on his or her rights. See FED. R. CIV. P. 8(c).

⁹⁰ See *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507253, at *2 (N.D. Ala. Sept. 24, 2003) (citing 42 U.S.C. § 1981a(b)(3) (2000)).

tle VII.⁹¹ The Court has essentially imported wholesale an analysis of statutes of limitations better suited to classic suits between similarly situated private parties than to claims involving large power differences between the plaintiff and defendant⁹² and implicating an “integrated, multistep enforcement procedure.”⁹³ Moreover, the Court has done this in applying a broad, remedial statute aimed squarely at the type of behavior in which Goodyear engaged.⁹⁴

Ledbetter is not irreversible. In the wake of the decision, congressional leaders moved to supersede the Court’s unduly restrictive reading by enacting a legislative fix, similar to the 1991 amendments to the Act.⁹⁵ But such a fix may not counter the message that the Court has sent, and a future Court may read it as narrowly as *Ledbetter* read the 1991 Act. The central question in this case remains open: if five of the most intelligent, most accomplished jurists can seemingly turn a deaf ear to a policy that Congress has repeatedly stressed, what hope is there that thousands of employers nationwide will not do the same?

D. *Individuals with Disabilities Education Act*

Parental Rights. — School districts and parents have been battling over enforcement of the Individuals with Disabilities Education Act¹ (IDEA) since its passage in 1975. In 2005, the Supreme Court handed a victory to school districts by placing the burden of persuasion on the student in IDEA administrative hearings.² Circuit courts have also sided with schools on another important issue: whether money damages are available under the IDEA.³ Last Term, after this string of IDEA decisions in favor of school districts, the Court in *Winkelman v. Parma City School District*⁴ held that parents are entitled to pursue IDEA claims pro se.⁵ When examined alongside other judicially created IDEA enforcement schemes, *Winkelman* arrives at the proper

⁹¹ One can speculate that the Court might employ a similar approach in cases brought, for example, by consumers against corporations.

⁹² Title VII plaintiffs are often reluctant to challenge supervisors in the first place. Cf. Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 847 (2005) (noting that most sexual harassment victims do not report the conduct).

⁹³ *Ledbetter*, 127 S. Ct. at 2170 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (internal quotation marks omitted).

⁹⁴ See, e.g., Brief for the Plaintiff-Appellee, *supra* note 15, at 18 (noting that Goodyear’s plant manager had previously asked Ledbetter’s supervisor, “When are you going to get rid of the drunk and the damn woman?”).

⁹⁵ See Press Release, House Speaker Nancy Pelosi, Pelosi Statement on Passage of Ledbetter Fair Pay Act (July 31, 2007), <http://www.speaker.gov/newsroom/pressreleases?id=0268>.

¹ 20 U.S.C. §§ 1400–1482 (2000 & Supp. IV 2004).

² See *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

³ See *infra* note 55.

⁴ 127 S. Ct. 1994 (2007).

⁵ See *id.* at 2006.