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The Ledbetter Act: Sacrificing Justice for "Fair" Pay

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Congressional leaders have said that they will fast-track the Lilly Ledbetter Fair Pay Act, a bill that would allow pay discrimination lawsuits to proceed years or even decades after alleged discrimination took place. Proponents say that the legislation is necessary to overturn a Supreme Court decision that misconstrued the law and impaired statutory protections against discrimination, but the Court's decision reflected both longstanding precedent and Congress's intentions at the time the law was passed.

In addition, eliminating the limitations period on claims would be bad policy. Since ancient Roman times, all Western legal systems have featured statutes of limitations for most legal claims. Indeed, they are so essential to the functioning of justice that U.S. courts will presume that Congress intended a limitations period and borrow one from an analogous law when a statute is silent. While limitations periods inevitably cut off some otherwise meritorious claims, they further justice by blocking suits where defensive evidence is likely to be stale or expired, prevent bad actors from continuing to harm the plaintiff and other potential victims, prevent gaming of the system (such as destroying defensive evidence or running up damages), and promote the resolution of claims. By eliminating the time limit on lawsuits, the Ledbetter Act would sacrifice these benefits to hand a major victory to trial lawyers seeking big damage payoffs in stale suits that cannot be defended.

The Ledbetter Act would also lead to myriad unintended consequences. Foremost, it would push down both wages and employment, as businesses change

Talking Points

- The Supreme Court's *Ledbetter* decision fairly and properly applied Title VII's statute of limitations to block a discrimination claim that the plaintiff had sat on for six years or more.
- The Ledbetter Act, far beyond reversing that decision, would eliminate the limitations period entirely, opening the door to decades-old claims and strategic litigation that games the law.
- In addition to a flood of litigation asserting tenuous claims, the litigation will cause employers to change their hiring practices to reduce the risk of litigation, imposing a hit on employment and wages, as well as consumer prices and the economy. Perversely, women and minorities may suffer disproportionate losses.
- If change is needed, Congress should pursue less risky strategies, such as lengthening the limitations period to match those of similar laws or augmenting the current period with a "discovery rule" that provides additional time to sue when employees were unaware of discrimination.

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their operations to avoid lawsuits. Perversely, it could actually put women, minorities, and workers who are vocal about their rights at a disadvantage if employers attempt to reduce legal risk by hiring fewer individuals likely to file suit against them or terminating those already in their employ.

Rather than effectively eliminate Title VII's limitations period, Congress could take more modest, less risky steps to ease the law's restrictions, if such change is warranted. Most directly, it could lengthen the limitations period to two or three years to match the periods in similar laws. Another option is to augment the current limitations period with a carefully drafted "discovery rule" so that the time limit on suing begins running only when an employee reasonably suspects, or should reasonably suspect, that he or she has been discriminated against. While either of these options would sacrifice some of the benefits of the current limitations period, they are far superior alternatives to throwing the law wide open to stale claims and abuse.

The Ledbetter Suit

For all the rhetoric about the Supreme Court's *Ledbetter* decision—the *New York Times*, for one, called it "a blow for discrimination"[1]—it addresses not the substance of gender discrimination but the procedure that must be followed to assert a pay discrimination claim. Specifically, the case presented only the question of when a plaintiff may file a charge alleging pay discrimination with the Equal Employment Opportunity Commission (EEOC), a prerequisite to suing.

Lilly Ledbetter, who worked for Goodyear Tire and Rubber Co. from 1979 until 1998 as a factory supervisor, filed a formal EEOC charge in July 1998 and then a lawsuit in November, the same month that she retired. Her claim was that after she rebuffed the advances of a department foreman in the early 1980s, he had given her poor performance evaluations, resulting in smaller raises than she otherwise would have earned, and that these pay decisions, acting as a baseline, continued to affect the amount of her pay throughout her employment. She said she had been aware of the pay disparity since at least 1992.

Initially, Ledbetter sued under the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964, a more general anti-discrimination statute.[2] The EPA, unlike Title VII, has been interpreted not to require proof that pay discrimination was intentional but just that an employer paid an employee less for equal work without a good reason for doing so.[3] For such claims, the EPA imposes a two-year statute of limitations, meaning that an employee can collect deficient pay from any discriminatory pay decisions made during that period, whether or not the employer intended to discriminate in any of those decisions. Title VII, while imposing a shorter filing deadline of 180 days[4] and requiring proof of intent to discriminate, allows for punitive damages,[5] which the EPA does not. Perhaps for this reason, Ledbetter abandoned her EPA claim after the trial court granted summary judgment on it in favor of her former employer.

On her Title VII claim, however, Ledbetter prevailed at trial before a jury, which awarded her $223,776 in back pay, $4,662 for mental anguish, and a staggering $3,285,979 in punitive damages. The judge reduced this total award to $360,000, plus attorneys' fees and court costs.

Goodyear appealed, and the Eleventh Circuit Court of Appeals reversed the decision on the grounds that Ledbetter had not provided sufficient evidence to prove that an intentionally discriminatory pay decision had been made within 180 days of her EEOC charge. Ledbetter appealed to the Supreme Court, challenging not that determination

1. Editorial, *Injustice 5, Justice 4,* N.Y. TIMES, May 31, 2007. *See* Jan Crawford Greenburg, "The Sky's Still Up Here," *Legalities*, July 20, 2007 (criticizing the media and law professors for their "tabloid-style, Jerry Springer-esque tone" in response to the decision).
2. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007).
3. 28 U.S.C. § 206 (d).
4. 42 U.S.C. § 2000e-5(f)(1).
5. 42 U.S.C. § 1981a(a)(1).

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but only the Court of Appeals' application of Title VII's limitations period.

In a decision by Justice Samuel Alito, the Supreme Court held that the statute's requirement that an EEOC charge be brought within 180 days of an "alleged unlawful employment practice" precluded Ledbetter's suit, because her recent pay raises were not intentionally discriminatory.[6] Ledbetter argued that the continuing pay disparity had the effect of shifting intent from the initial discriminatory practice to later pay decisions, performed without bias or discriminatory motive. The Court, however, had rejected this reasoning in a string of prior decisions standing for the principle that a "new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[7] For those familiar with the law, this appeared to be a rehash of a 1977 case that reached the same conclusion on identical grounds.[8]

Thus, the Court affirmed the lower decision against Ledbetter.

The Purposes of Limitations Periods

That result did not speak to the merits of Ledbetter's case—that is, whether she had suffered unlawful discrimination years before—but only to the application of the statute's limitations period. Although it seems intrinsically unfair to many that a legal technicality should close the courthouse doors, statutes of limitations, as the majority of the Court observed, do serve several essential functions in the operation of law that justify their cost in terms of barred meritorious claims. In general, limitations periods serve five broad purposes.

Justice Story best articulated the most common rationale for the statute of limitations: "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."[9]

Indeed, *Ledbetter* itself illustrates this function. Different treatment, such as pay disparities, may be easy to prove even after much time has lapsed, because the kinds of facts at issue are often documented and, indeed, are rarely in dispute. More contentious, however, is the defendant's discriminatory intent, which Title VII requires in addition to proof of disparate treatment. The evidence proving intent can be subtle—for example, "whether a long-past performance evaluation … was so far off the mark that a sufficient inference of discriminatory intent can be drawn."[10] With the passage of time, witnesses' memories may fade, stripping their accounts of the details necessary to resolve the claim. Evidence may be lost or discarded. Indeed, witnesses may disappear or perish—the supervisor whom Ledbetter accused of misconduct had died by the time of trial. Sorting out the subtleties of human relationships a decade or more in the past may be an impossible task for parties and the courts, one at which the defendant, who did not instigate the suit, will be at a particular disadvantage. This seems to have been the case in *Ledbetter.*

Statutes of limitations, in contrast, require a plaintiff to bring his or her claim earlier, when evidence is still fresh and the defendant has a fair chance of mustering it to mount a defense. In this way, statutes of limitations also serve to prevent fraudulent claims whose veracity cannot be checked due to passage of time.

Second, statutes of limitations also help to effectuate the purposes of law. They encourage plaintiffs to diligently prosecute their claims, thereby achieving the law's remedial purpose. This is particularly

6. *Ledbetter* 127 S. Ct. at 2187.
7. *Id.* at 2167–70 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989); and *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002)).
8. *Evans*, 431 U.S. 553 (Stevens, J.).
9. *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828).
10. *Ledbetter*, 127 S. Ct. at 2171.

the case for statutes such as those forbidding discrimination in employment practices, where Congress has created causes of action to supplement government enforcement actions. Litigation under such statutes is, in part, a public good, because the plaintiff in a meritorious suit secures justice not just for himself but for similarly situated victims, as well as the public at large, which has expressed its values through the law. Anti-discrimination law is the archetypical example of an area where private suits can promote far broader good. Other victims and the public are best served when workers who believe they have been subject to discrimination have the incentive to investigate the possible unlawful conduct, document it, and then challenge it in a timely fashion.[11] This was an explicit goal of the Civil Rights Act of 1964, whose drafters reasoned that the short limitations period and mandatory EEOC administrative process would lead most discrimination complaints to be resolved quickly, through cooperation and voluntary compliance.[12]

Third, time limits on filing lawsuits prevent strategic behavior by plaintiffs. In some cases, plaintiffs may wait for evidence favorable to the defense to disappear or be discarded, for memories to fade and witnesses to move on, before bringing claims. Particularly under laws that allow damages continuing violations or punitive damages, plaintiffs may face the incentive to keep quiet about violations as the potential pool of damages grows. Concerns that plaintiffs will game the system in this way are so prevalent that an entire doctrine of judge-created law, known as "laches," exists to combat certain of these abuses.[13] Laches, however, is applied inconsistently, and courts often decline its exercise in enforcing statutory rights. A limitations period puts a limit on the extent to which plaintiffs can game the law by delaying suit.

Fourth, time-limiting the right to sue furthers efficiency. Valuable claims are likely to be investigated and prosecuted promptly, while most of dubious merit or value are "allowed to remain neglected."[14] Thus, "the lapse of years without any attempt to enforce a demand, creates, therefore, a presumption against its original validity, or that it has ceased to subsist."[15] Statutes of limitations, then, are one way that our justice system focuses its limited resources on the most valuable cases, maximizing its contribution to the public good.

Finally, there is an intrinsic value to repose. It promotes certainty and stability. Putting a deadline on claims protects a business's or individual's settled expectations, such as accounting statements or income. At some point, surprises from the past, in the form of lawsuits, cease to be possible. As with adverse possession of land, the law recognizes that, though a wrong may have been done, over time certainty of rights gains value.

For these important reasons, statutes of limitation are ubiquitous in the law and have been since ancient Roman times.[16] Limitations periods necessarily close the courthouse doors to some potentially worthwhile claims—an outcome so harsh that it would be "pure evil," observed Oliver Wendell Holmes, if it were not so essential to the operation of law.[17] That a single good claim has been barred, then, proves not that the deadline for suit is unfair or unwise but only that justice cannot provide a remedy in every case.

11. *See* Rotella v. Wood, 528 U.S. 549, 557-58 (2000). *See generally*, Suzette Malveaux, *Statutes Of Limitations: A Policy Analysis In The Context Of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 77 n.48 (2005).
12. *See* 42 U.S.C. § 2000e-5(b) (requiring the EEOC to attempt to eliminate discriminatory practices "by informal methods of conference, conciliation, and persuasion"); Occidental Life Ins. Co. of Cal. v. EECO, 432 U.S. 355, 367–68 (1977).
13. Laches is "unreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought." BLACK'S LAW DICTIONARY (8th ed. 2004).
14. *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 70 (1873).
15. *Id.*
16. Lindsey Powell, *Unraveling Criminal Statutes Of Limitations*, 45 AM. CRIM. L. REV. 115, 121 (2008) (citing FRANCIS WHARTON, 1 A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 444*a*. n.*b* (7th ed. 1874)).
17. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), *available at* http://www.gutenberg.org/etext/2373.

The Ledbetter Act

Nonetheless, editorial reaction to *Ledbetter* was swift and almost entirely negative, with most writers drawing from Justice Ginsburg's bombastic dissent (which she read in part from the bench) calling the majority's reasoning "cramped" and "incompatible with the statute's broad purpose."[18] Ginsburg's logic, repeated on the opinion pages, and often news pages, of countless newspapers, was that Ledbetter was a member of a protected class (women), performed work equal to that of the dominant class (men), and was compensated less for that work due to gender-based discrimination. End of story. Pay discrimination, Ginsburg argued, is different than other forms of discrimination and is more akin to a "hostile work environment" claim, which by its nature involves repeated, ongoing conduct.[19] But this is creative reimagining of the statute: Nowhere in it is there any room for the limitations period present in the statute or indeed any of the other requirements that Congress crafted.

Unfortunately, though, it was Ginsburg's dissent, and her unseemly urging that "once again, the ball is in Congress' court,"[20] that spurred the drafters of the Lilly Ledbetter Fair Pay Act, which was introduced soon after the Court issued its decision and passed the House in short order. The bill would adopt Ginsburg's view, amending a variety of anti-discrimination laws to the effect that a violation occurs "each time wages, benefits, or other compensation is paid" that is affected by any discriminatory practice. In this way, the law would simply eliminate the limitations period as applied to many cases.[21]

Under the Ledbetter Act, employees could sue at any time after alleged discrimination occurred, so long as they have received any compensation affected by it in the preceding 180 days. While this would certainly reverse *Ledbetter*, it goes much further by removing any time limitation on suing in pay-related cases, even limitations relating to the employee's learning of the discrimination—an approach that is known in other contexts, such as fraud, as a "discovery rule."[22] This new rule is also broader in that it would apply to any (alleged) discrimination that has had an (alleged) effect on pay, such as an adverse promotion decision. In addition, retirees could bring suits alleging pay-related discrimination that occurred decades ago if they are presently receiving benefits, such as pensions or health care, arguably effected by the long-ago discrimination.

In these ways, the Ledbetter Act would allow cases asserting extremely tenuous links between alleged discrimination and differences in pay, which may result from any number of non-discriminatory factors, such as experience.[23] Employers would be forced to defend cases where plaintiffs present evidence of a present wage gap, allegations of long-ago discrimination, and a story connecting the two. As wage differences between employees performing similar functions are rampant—consider how many factors may be relevant to making a wage determination—a flood of cases alleging past discrimination resulting in present disparity would likely follow passage. In addition to investigatory and legal expenses, employers will face the risk of punitive damages and the difficulty of rebutting assertions of discriminatory acts from years or decades ago.

The flood of lawsuits would not be endless, however, because, as Eric Posner observes, employers can be expected to change their hiring, firing, and

18. *Ledbetter*, 127 S. Ct. at 2188.

19. *Id.* at 2181

20. *Id*. at 2188. *See* Ed Whelan, "Justice Ginsburg's Political Activism," National Review Bench Memos, May 30, 2007, at http://bench.nationalreview.com/post/?q=NzIxNGIxNTI2Y2EzNDE2ZTNmMGI1MTcxY2UyNmY5MTI= (noting that the *Washington Post* reported that Ginsburg "called for Congress to correct what she sees as the court's mistake" and that the *New York Times* reported she "invited Congress to overturn the decision").

21. This discussion relies on the act as introduced in the 110th Congress. H.R. 2831, 110th Cong. § 3 (2007).

22. For discussion, *see infra*.

23. *See, e.g.,* June O'Neill, *The Gender Gap in Wages, circa 2000*, 93 AM. ECON. REV. 313 (2003).

wage practices to reduce the risk of lawsuits. To the extent that disparities in treatment are the result of discrimination, this may undercut its effects. But if, as Posner puts it, businesses "start paying workers the same amount even though their productivity differs because they fear that judges and juries will not be able to understand how productivity is determined," the law would impose significant costs on businesses and, by extension, consumers and the economy.[24] The result would be a hit to employment and wages, combined with higher prices for many goods and services.

Perversely, the Ledbetter Act may actually harm those it is intended to protect. In making employment decisions, businesses would consider the potential legal risks of hiring women, minorities, and others who might later bring lawsuits against them and, as a result, hire fewer of these individuals. Even though this discrimination would violate the law, it would be difficult for rejected applicants to prove. Other employers might simply fire employees protected by Title VII—and especially those who are vocal about their rights under the law—to put a cap on their legal liabilities. Again, this would be illegal, but difficult to prove.

These kind of unintended consequences have been a chief effect of the Americans with Disabilities Act, which prohibits discrimination against individuals with disabilities and enforces that prohibition through civil lawsuits. Today, the disabled earn less and work far less than they did prior to enactment of the ADA,[25] and a number of economists, including MIT's Daron Acemoglu, blame the ADA for reducing the number of employment opportunities available to the disabled.[26] In this way, by dramatically increasing employers' exposure to potential liability when they hire members of protected classes, the Ledbetter Act would put members of those classes at a disadvantage in the labor marketplace.

Big Payoffs for the Trial Bar

It is difficult to explain the hue and cry from parts of the bar that accompanied *Ledbetter*, given that the plaintiff clearly could have proceeded under the Equal Pay Act without running into a limitations period problem. One explanation is that Title VII, unlike the EPA, allows for punitive damages in addition to several years' worth of deficient pay. Had she proceeded under the EPA and prevailed, Ledbetter would have received deficient pay going back two or three years prior to filing a charge with the EEOC—about $60,000 according to the trial court. But under Title VII, the case was worth six times that amount, due to a large punitive award.

That result becomes all the more alluring to the plaintiff's bar when one considers the possibility of follow-on lawsuits and, in limited instances, class actions. A single legal victory against an employer could provide the fodder for scores of lawsuits by similarly situated employees and former employees receiving benefits, each alleging a pattern of discrimination affecting pay, as evidenced by the previous lawsuits. In this way, each lawsuit becomes easier and cheaper to bring than the last. Employers, then, would face the choice of fighting every suit with all their might—because any loss could lead to scores more—or agreeing to generous settlements, even in marginal cases, to avoid the risk of high-stakes litigation.

This may account for the trial bar's keen interest in the Ledbetter Act—it is among the top priorities of the American Association for Justice (formerly the American Trial Lawyer's Association)[27]—despite the existence of other, less attractive statu-

24. Eric Posner, Pay Equity and the Ledbetter Act, Slate Convictions, April 27, 2008, at http://www.slate.com/blogs/blogs/convictions/archive/2008/04/27/pay-equity-and-the-ledbetter-act.aspx.

25. Richard Burkhauser & David Stapleton, *Introduction*, in THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES 3-4 (2003).

26. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 957 (2001).

27. Mark Tapscott and Cheryl Chumley, *Lawyers Use Campaign Cash to Buy Friends in High Places*, WASH. EXAMINER, Sept. 21, 2007, *available at* http://www.examiner.com/a-947316~Lawyers_use_campaign_cash_to_buy_friends_in_high_places.html.

tory remedies for those who are the victims of recent or continuing discrimination or unjustified pay disparities.

Safer Solutions

It is true, as proponents of the Ledbetter Act have noted, that the statute of limitations for Title VII is shorter than most others. There are good reasons for this, though, considering the context in which it was drafted. Chief among them, many Members of Congress, when they considered the Civil Rights Act of 1964, feared that businesses would be overwhelmed with litigation. Others favored voluntary conciliation over litigation. Some might have been concerned that evidence of discriminatory intent would fade away if the limitations period were too long. A relatively brief limitations period certainly satisfies these concerns.

But if Congress believes that it is too short, it has far less drastic and disruptive options at its disposal than effectively eliminating the limitations period altogether. It could, quite simply, extend the period to two or three years to match the EPA. This would give employees more time to uncover possible discrimination and seek remedies, without allowing a flood of lawsuits premised on aged grievances. There is also more logic to matching the more specific statute's limitations periods than leapfrogging it so dramatically.

Another option was proposed in the last Congress as the "Title VII Fairness Act" (S. 3209, 110th Cong.). This legislation would maintain the current limitations period but augment it with a "discovery rule" so that the period begins running only when the employee reasonably suspects, or should reasonably suspect, that he or she has been discriminated against.[28] This approach has the benefit of encouraging employees to investigate and take action on worthwhile claims, while keeping many stale claims out of court. Some courts, however, might twist this looser rule to allow stale claims brought by sympathetic plaintiffs, such as Lilly Ledbetter, who learned about the possible discrimination fully six years before filing a charge. It would also undermine, somewhat, the clear bright-line rule that a hard statute of limitations provides. Nonetheless, this approach would provide far more certainty, and prove far less disruptive, than eliminating the limitations period.

A Perfect Storm

It was a surprise to many legal observers a year and a half ago that the *Ledbetter* case—an unremarkable application of a rule settled 20 years prior—would attract any interest at all. But on closer examination, the course of events leading up to the Supreme Court's decision, and the reaction since, have not been by chance but by design, part of a "perfect storm" orchestrated by trial lawyers, wrongheaded civil rights organizations, and labor groups to achieve a radical shift in employment law.[29] These special interests have an extensive agenda planned for the current Congress. Yet Members should consider each plank of it on the merits.

Far beyond reversing the result of a single Supreme Court decision—one that, viewed fairly, was consistent with precedent and fairly represented Congress's intentions—the Lilly Ledbetter Fair Pay Act would open the door to a flood of lawsuits, some frivolous, that employers would find difficult or impossible to defend against, no matter their ultimate merit. Rather than help employees, the bill could end up hurting them by reducing wages and job opportunities—at a time when unemployment is rising and many are nervous about their job prospects. Instead, Congress should recognize that statutes of limitations serve many important and legitimate purposes and reject proposals that would allow litigants to evade them.

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28. S. 3209, 110th Cong. § 3 (2008).

29. *See, e.g.*, AAUW, The Paycheck Fairness Act's Perfect Storm, Aug. 5, 2008, at http://www.aauw.org/advocacy/issue_advocacy/paycheckFairness.cfm.