

IN A DIFFERENT VOICE: LESSONS FROM *LEDBETTER*

PAULA A. MONOPOLI*

INTRODUCTION

One year out of college, women working full time earn only 80 percent as much as their male colleagues earn. Ten years after graduation, women fall farther behind, earning only 69 percent as much as men earn. Controlling for hours, occupation, parenthood, and other factors normally associated with pay, college-educated women still earn less than their male peers earn.¹

Women in academia—among some of the best educated women in America—suffer from similar salary inequities. The most salient fact is that women faculty “earn lower salaries on average *even when they hold the same rank as men*.”² The American Association of University Women (AAUW) has concluded that “women have made remarkable strides in academia” in the last twenty years and that “[d]espite these gains, women remain underrepresented at the highest echelons of higher education. . . . On average, compared to men, women earn less, hold lower-ranking positions, and are less likely to have tenure.”³ The AAUW makes the case that sex discrimination in academia has broad implications, because “[u]niversities and colleges have been powerful cultural institutions in western culture since medieval times.”⁴

* Marbury Research Professor of Law and Founding Director, Women, Leadership & Equality Program, University of Maryland School of Law; B.A. Yale College, 1980; J.D. University of Virginia School of Law, 1983. The author would like to thank Susan G. McCarty for her research assistance and Marin Scordato for his insights. She would also like to acknowledge the allusion to Carol Gilligan’s seminal work on gender difference, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982), in the title of this article. Finally, she would like to dedicate this article to Lilly Ledbetter, whose courage in pursuing her claim has been invaluable to other women in the workplace.

1. JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUC. FOUND., *BEHIND THE PAY GAP 2* (2007), available at <http://www.aauw.org/research/upload/behindPayGap.pdf>.

2. MARTHA S. WEST & JOHN W. CURTIS, AM. ASS’N UNIV. PROFESSORS (AAUP), AAUP FACULTY GENDER EQUITY INDICATORS 12 (2006) (emphasis added), available at <http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf>.

3. AAUW EDUC. FOUND. & AAUW LEGAL ADVOCACY FUND, *TENURE DENIED: CASES OF SEX DISCRIMINATION IN ACADEMIA 1* (2004), available at <http://www.case.edu/president/action/TenureDenied.pdf> [hereinafter AAUW, *TENURE DENIED*].

4. *Id.* at 2.

“Professors help shape the intellect and social conscience of [our] students and, hence, of our society.”⁵ Thus, what happens in academia ripples out to the rest of the nation.⁶ As in the broader workplace, women are now common in academia, but the promise of full equality has yet to be fulfilled, and the AAUW has identified sex discrimination as a major cause of inequality.⁷ The recent *Ledbetter* decision by the United States Supreme Court on pay disparity thus holds a number of important lessons for women in academia.⁸

Disparities in salary have been tied, in part, to factors other than sex discrimination. For example, empirical data suggests reluctance on the part of women to negotiate salaries.⁹ Since women in academia are presumptively better educated than women in other workplaces, one might assume the lessons of *Ledbetter* do not apply to such women. Arguably, they should be more effective at negotiating for comparable salaries than others, enabling them to buck the continuing trend of under-compensation. However, much of the research on women and negotiation shows that women negotiate very well when trained to do so for third parties—with comparable, if not better, outcomes than men—but that women, including women faculty, fare far worse when negotiating for themselves.¹⁰ This is likely due both to socialization and to the very different and negative reaction toward women who attempt to negotiate.¹¹

Any good negotiation relies in large part on information, and women gather information very well. However, in most academic environments, salary information is not public and, even in those state colleges and universities where it is a matter of public record, it is not always easy to obtain.¹² Without reliable data

5. *Id.*

6. *Id.*

7. AAUW, TENURE DENIED, *supra* note 3, at 2.

8. See generally *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

9. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1–2 (2003).

10. *Id.* at 6. The authors write:

A recent study shows that this is true even at institutions with a committed policy against discriminating between men and women. This study describes a man and a woman with equivalent credentials who were offered assistant professorships by the same large university. Shortly after the two were hired, a male administrator noticed that the man's salary was significantly higher than the woman's. Looking into it, he learned that both were offered the same starting salary. The man negotiated for more, but the woman accepted what she was offered. Satisfied, the administrator let the matter drop. He didn't try to adjust the discrepancy or alert the female professor to her mistake. The university was saving money and enjoying the benefits of a talented woman's hard work and expertise. He didn't see the long-term damage to his institution and to society from not correcting such inequities . . . and she didn't know how much she had sacrificed by not negotiating the offer she'd received.

Id.

11. *Id.* at 1–2.

12. See *Ledbetter*, 127 S. Ct. at 2182 n.3 (Ginsburg, J., dissenting) (“One-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy.” (citing Leonard Bierman & Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social*

on where one stands in the faculty array vis-à-vis male colleagues, and with amorphous standards of merit that rule in the academy, women are at a significant disadvantage. The research clearly demonstrates that they, like their sisters in other professions, suffer from clear pay disparities even when doing the same job with the same title.¹³

This article explores the intersection of these observations with the recent U.S. Supreme Court decision, *Ledbetter v. Goodyear Tire & Rubber Company*.¹⁴ It evaluates the soundness of the majority's opinion as it pertains to academia. The position of the Court is inconsistent with the realities of the American workplace and, as Justice Ruth Bader Ginsburg notes in her dissent, in contravention of the federal government's own interpretation of the statute at issue through its agency, the Equal Opportunity Employment Commission (EEOC).¹⁵ The majority opinion, written by Justice Samuel Alito, highlights the profound sea-change in the Court's jurisprudence on issues affecting women since the retirement of Justice Sandra Day O'Connor. This article suggests that this same case may well have had a different result were Justice O'Connor still sitting on the Court.

The article first examines the impact of the *Ledbetter* decision. Second, the article explores the facts of the case and summarizes the analysis of both the majority and the dissent. This section pays particular attention to the revealing choices of language used in the majority opinion, written by one of the Court's

Norms and the Law, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004)).

13. See WEST & CURTIS, *supra* note 2, at 11–12. The authors write:

The final Gender Equity Indicator compares average salaries of men and women by rank and across all academic ranks. In 2005–06, across all ranks and all institutions, the average salary for women faculty was 81 percent of the amount earned by men. This comparison has remained virtually unchanged since the AAUP began collecting separate salary data for women and men faculty in the late 1970s. When men and women faculty at the same rank are compared, women's relative salary is somewhat higher. Among all full professors at all types of institutions in 2005–06, women earned on average 88 percent of what men earned. For associate and assistant professors, the overall national figure for women was 93 percent. However, these numbers are actually slightly lower than they were thirty years previously, down from 90 and 96 percent respectively.

The overall salary disadvantage for women is a combination of two primary factors: women are more likely to have positions at institutions that pay lower salaries, and they are less likely to hold senior faculty rank. [Our research] reflects both of these aspects of salary differences for 2005–06, but also indicates that women earn lower salaries on average even when they hold the same rank as men. . . .

[T]he comparison of average salaries within rank shows that women do not reach parity with men in any of the institutional categories. Women's proportion of men's average salary is significantly lower at doctoral universities for all three ranks, while the proportions at master's, baccalaureate, and associate degree institutions are similar to one another. The differences in average salary . . . may seem small. However, viewed another way, the [data] indicate[] that women earn average salaries that are two to nine percentage points lower than men's salaries, *even when they hold the same rank*.

Id.

14. *Ledbetter*, 127 S. Ct. at 2162.

15. *Id.* at 2185 & n.6 (Ginsburg, J., dissenting).

newest members, Justice Samuel Alito, and the dissent, written by the Court's only remaining woman, Justice Ruth Bader Ginsburg. Third, this article suggests that former Justice O'Connor's approach to cases involving women's issues was different than that of Justice Alito and asks whether his replacement of her may account for the outcome in the *Ledbetter* case. Fourth, the article outlines the current situation in academia both in terms of how women faculty fare in equitable pay and what norms exist for setting salaries, negotiating for increased pay, determining what factors constitute merit, and evaluating how recruiting practices like competing offers and market forces have a disproportionately negative effect on women's pay. Fifth, it explores how academia can effectuate voluntary change in such norms through alternatives to involuntary remedies. Finally, it reviews the pending Congressional legislation that fixes the *Ledbetter* decision and concludes that, with such normative change and legislation, women in academia may fare better in terms of pay equity in the future.

I. THE IMPACT OF THE *LEDBETTER* DECISION

Colleges and universities are subject to the two major statutory schemes used to ameliorate pay disparities,¹⁶ the Equal Pay Act¹⁷ and Title VII of the Civil Rights Act of 1964.¹⁸ In particular, there are a number of cases involving Title VII in the context of wage differentials among college and university faculty.¹⁹ The history

16. The Education Amendments of 1972, 20 U.S.C. § 1681 (2000) [hereinafter Title IX] also apply to the employment practices of colleges and universities. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (upholding ability of government agency to impose Title IX regulations on the employment practices of higher education institutions). However, Title IX is rarely, if ever, applied in cases of employment in higher education where Title VII remedies are available to plaintiffs. *See, e.g.,* Morris v. Wallace Community Coll. Selma, 125 F. Supp. 2d 1315, 1342–43 (S.D. Ala. 2001) (“At least two courts of appeal have held that an employee of an educational institution subject to both Title VII and Title IX may bring a claim for employment discrimination only under Title VII, reasoning that to rule otherwise would allow a plaintiff to avoid the carefully measured administrative requirements of Title VII.” (citing *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861–62 (7th Cir. 1996) and *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995), *cert. denied*, 519 U.S. 947 (1996) (“We hold that Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”))). Title IX applies only to cases of intentional discrimination rather than the broader disparate impact theory available under Title VII, codified at 42 U.S.C. § 2000e-2(k) (2000). *See* Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993). More recently, the Supreme Court decided *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), which upheld the right of a male coach to sue under Title IX for the retaliatory behavior of his employer in response to his complaints about the school underfunding his girls' basketball team in violation of Title IX—but such a plaintiff would not be afforded Title VII's protections on those facts. *See Jackson*, 544 U.S. at 175, for Justice O'Connor's comparison of the two statutory schemes.

17. 29 U.S.C. § 206(d) (2000).

18. Title VII of the Civil Rights Act of 1964 originally exempted colleges and universities “with respect to the employment of individuals to perform work connected with the educational activities of such institution.” Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255. However, Congress amended the Act in 1972, removing colleges and universities from the exemption. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04.

19. *See, e.g.,* Travis v. Bd. of Regents, 122 F.3d 259 (5th Cir. 1997) (reversing jury verdict

of such cases and efforts to remediate pay differentials indicates that courts are reluctant to intervene in such decisions when it comes to colleges and universities.²⁰

The statistics clearly indicate that women in academia still earn less than their male counterparts at similar ranks.²¹ Given the uniquely fuzzy metrics by which academic salaries are set,²² the inability of many women in academia to find out what their colleagues' salaries are, and the harsh outcomes under the rigid application of the 180-day rule as interpreted by the Court in *Ledbetter*, it is clear that women in academia must be aware of the hazard of waiting too long to bring a claim against their employer for such disparities based on gender discrimination. This rigid interpretation is clearly detached from the realities in many workplaces. In particular, it is disconnected from the realities of the academic workplace and the tenure process when viewed in light of the pre-tenure perils that await any candidate who complains about anything, let alone gender bias in rank and pay.²³

Lilly Ledbetter was a factory supervisor who worked at a Goodyear plant in

in favor of plaintiff professor on the grounds that she “did not prove a violation of Title VII by a preponderance of the evidence”); *Covington v. S. Ill. Univ.*, 816 F.2d 317, 325 (7th Cir. 1987) (holding that the disparity between plaintiff female professor and male professor was “the result of a factor other than sex”); *Soble v. Univ. of Md.*, 778 F.2d 164, 167 (4th Cir. 1985) (noting that a female professor who was paid less than male professors was not discriminated against because she did not “perform work substantially equal in skill, effort, and responsibility”); *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 709 (9th Cir. 1984) (affirming dismissal of Title VII and EPA claims because plaintiffs “failed to prove substantially equal work”); *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984) (finding university had discriminated against women faculty in rank and salary); *Sweeney v. Bd. of Trs.*, 569 F.2d 169 (1st Cir. 1978), *vacated on other grounds*, 439 U.S. 24 (1978) (upholding the district court’s decision that sex discrimination did not affect plaintiff’s pay); *Keyes v. Lenoir Rhyne Coll.*, 552 F.2d 579, 580 (4th Cir. 1977) (affirming decision that college had based its faculty pay on “legitimate, reasonable and non-discriminatory factors”).

20. Barbara A. Lee et al., *Implications of Comparable Worth for Academe*, 58 J. HIGHER EDUC. 609, 618–19 (1987). The authors write:

Recent litigation results make it apparent that courts will not impose upon employers the obligation to implement equal pay for comparable work, nor will they find employers liable for discrimination for the use of market considerations in the setting of salaries. This, however, does not mean that an employer could not, as a matter of policy, adopt the comparable worth philosophy, in total or in part, in setting salary policy. Nor will the lack of legal compulsion necessarily reduce the pressure from employees, especially state employees in institutions of higher education, to have the issue addressed.

Id.

21. See WEST & CURTIS, *supra* note 2, at 11–12.

22. Lee et al., *supra* note 20, at 610.

23. See AAUW, *TENURE DENIED*, *supra* note 3, at 4. The report notes:

Secrecy [in tenure decisions] is needed, some argue, to allow for candid review. The downside, however, is that candidates do not have access to key documents used to make the tenure decision and often learn about deliberations through rumor. Because candidates receive only partial or inaccurate information, they do not know if they have been treated fairly.

Id.

Gadsden, Alabama, for nineteen years.²⁴ Upon her retirement, her wages were lower than any of her male colleagues despite the fact that she received numerous raises along with an award for being “employee of the year.”²⁵ Early in her career, a supervisor told her that “women didn’t belong in the company” and he proceeded to give her lower pay increases, which resulted in a significant disparity in her pay over twenty years later.²⁶

In March 1998, Lilly Ledbetter began the complaint process by filing a questionnaire with the Equal Employment Opportunity Commission (EEOC).²⁷ She filed a formal EEOC charge in July 1998.²⁸ Ledbetter retired from Goodyear in November 1998.²⁹ Upon her retirement, Ledbetter filed suit under Title VII of the Civil Rights Act of 1964, and the Federal District Court allowed the claim to proceed to trial.³⁰ The gravamen of her Title VII claim was that several supervisors had given her poor evaluations over the years due to her gender. Therefore, her pay had not increased as it would have without the discrimination and, upon her retirement, the net effect was that she was earning significantly less than her male colleagues.³¹

The jury in the District Court agreed and awarded Ledbetter back pay and damages.³² On appeal, Goodyear raised its defense that the pay discrimination claim was time-barred with regard to all pay decisions made before September 26, 1997—180 days before Ledbetter filed the EEOC questionnaire.³³

The Eleventh Circuit Court of Appeals reversed the lower court’s decision.³⁴ It concluded that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision during the EEOC charging period. The court found insufficient evidence that Goodyear acted with discriminatory intent in making the only two pay decisions left unaffected by the time-bar—denials of raises in 1997 and 1998.³⁵

When the case reached the United States Supreme Court, the National Partnership for Women and Families was joined by the National Women’s Law Center and others (“Amici”) in filing an amicus brief.³⁶ In asking the Court to

24. Stephanie B. Goldberg, *Women’s Employment Rights, Timing is Key in Wage Discrimination Claims*, PERSPECTIVES, Summer 2007, at 4–5.

25. *Id.* at 5.

26. *Id.*

27. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007).

28. *Id.*

29. *Id.*

30. *Id.* (granting summary judgment to Goodyear on Ledbetter’s Equal Pay Act claim).

31. *Id.* at 2166.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Brief for National Partnership for Women & Families et al., as Amici Curiae Supporting Petitioner at 1, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074), available at <http://www.nwlc.org/pdf/LedbetterAmicusBrief.pdf> [hereinafter Amici Brief] (“*Amici curiae* are twenty-four organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans.”).

reverse the Eleventh Circuit's ruling on appeal, Amici characterized what was at stake as follows:

The Eleventh Circuit's ruling can only aggravate the longstanding gender wage gap. To this day, women earn less than men in virtually every occupation and job category, at every age and stage in the employment lifecycle, and for every hour worked. The wage gap expands over the course of a woman's working life, with serious economic consequences. Pay discrimination is responsible for a significant portion of this gap, and Title VII must be construed broadly and fairly in order to effectively combat it.

The Eleventh Circuit's untethering of discriminatory pay decisions from the subsequent paychecks that implement them is contrary to the way in which typical employers set and review wages. By not permitting employees to challenge pay decisions that continue to affect their paychecks, the court below has created a safe harbor for pay discrimination to persist and grow over time.

The ruling below improperly imposes overwhelming burdens on the victims of pay discrimination. Pay discrimination is rarely accompanied by overt bias, and employee salaries are notoriously cloaked in secrecy. Victims thus have difficulty perceiving pay discrimination and, in any event, are unlikely to promptly complain about it. These difficulties are compounded for employees subjected to discrimination in their starting salaries, when much pay discrimination begins.³⁷

Nonetheless, the Supreme Court agreed with the Eleventh Circuit, holding that Ledbetter's claim was untimely, because the effects of past discrimination do not restart the clock for filing an EEOC charge.³⁸ Justice Alito wrote the majority opinion.³⁹ He was joined by Justices Scalia, Kennedy, Thomas, and Roberts.⁴⁰ Justice Ginsburg wrote the strong dissent, in which she was joined by Justices Stevens, Souter, and Breyer.⁴¹ A comparison of Justice Alito's written analysis and its stark contrast with Justice Ginsburg's analysis of the same statute and precedents illustrates the concern many groups expressed when Justice Alito was elevated to the Court as an Associate Justice.⁴² Both the majority opinion and the

37. *Id.* at 1–2.

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

39. *Id.* at 2165.

40. *Id.* at 2164.

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

42. See, e.g., Amy Goldstein & Jo Becker, *Critics See Ammunition in Alito's Rights Record*, WASH. POST, Nov. 3, 2005, at A1; Stephen Labaton, *Court Nominee Has Paper Trail Businesses Like*, N.Y. TIMES, Nov. 5, 2005, at A1; Mary Shaw, Editorial, *Alito: Plenty of Reasons to Be Wary*, PHILA. DAILY NEWS, Nov. 11, 2005, at 17; Henry Weinstein, *Alito's Findings for Employers Cited as Evidence*, L.A. TIMES, Nov. 5, 2005, at A12; Press Release, Nat'l Org. for Women, Samuel Alito: Wrong Judge for U.S. Women (Jan. 8, 2006), available at <http://www.now.org/press/01-06/01-08.html>; Press Release, People for the Am. Way, Judge Alito: Closed Mind in Employment Discrimination Cases (Jan. 10, 2006), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=20295>.

dissent are analyzed below; their sharply contrasting views of the realities of pay discrimination and the workplace for women support the conclusion that the Court's jurisprudence turns largely on the political views of the justices and their actual life experience.

II. THE MAJORITY'S OPINION AND A VIGOROUS DISSENT

A. The Facts Through Different Lenses

As one legal scholar notes:

Thinking about judicial opinions is a "rhetorical and literary activity," one that requires close attention to the use of language, the choice of words, and the form of arguments. Legal reasoning is important not only for the set of rules it produces, but also for the *meanings* that are articulated in and through its principles, metaphors, analogies and narratives.⁴³

Ledbetter provides a powerful example of this insight. The different rhetorical styles of Justices Alito and Ginsburg reveal much about the importance of having women on the bench, the power of language, and the elusive nature of equal pay and its theoretical underpinnings.⁴⁴

Justice Alito begins the majority opinion with a rather detached version of the facts surrounding Lily Ledbetter's claims. He writes:

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire and Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963

43. Yasmin Dawood, *Minority Representation, the Supreme Court, and the Politics of Democracy*, 28 *STUD. L. POL. & SOC'Y* 33, 37 (2003) (citing J.B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW*, at x-xi (1985)).

44. See, e.g., *Ledbetter*, 127 S. Ct. at 2175. The Court explained:

While this fundamental misinterpretation of *Morgan* is alone sufficient to show that the dissent's approach must be rejected, it should also be noted that the dissent is coy as to whether it would apply the same rule to all pay discrimination claims or whether it would limit the rule to cases like Ledbetter's, in which multiple discriminatory pay decisions are alleged.

Id. As a simple but profound example, Justice Alito's striking characterization of the dissent as "coy" is particularly surprising, given his use of an odd phrase and one which has uniquely feminine connotations, given that the dissent was authored by the only woman on the nine-member Court.

(EPA).⁴⁵

On the other hand, Justice Ginsburg characterized the facts as follows: “Lily Ledbetter was a supervisor at Goodyear Tire and Rubber’s plant in Gadsden, Alabama, from 1979 until her retirement in 1998.”⁴⁶ While somewhat similar to Justice Alito’s opening sentence, Justice Ginsburg’s is less distant, eschewing the formal terms of petitioner and respondent which tend to put both parties on a neutral plane. She continues:

For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter’s salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, 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, \$5,236.⁴⁷

Note Justice Ginsburg’s use of powerful language like “stark” to illustrate the profound disparity in pay involved in the case. In addition, she includes the actual dollar amounts in her dissent. This makes the disparity far more concrete and the reader is struck by the clear difference in actual paychecks.

B. What Constitutes a “Discriminatory Act” under Title VII and When Does It Occur?

Title VII provides relief for “unlawful employment practices.”⁴⁸ One of the clear differences between Justices Alito and Ginsburg is how each chose to interpret and apply that essential element of the claim for relief. For example, Justice Alito writes:

We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the discriminatory act occurs. We have explained that this rule applies to any “discrete act” of discrimination

45. *Id.* at 2165 (citing 29 U.S.C. § 206(d) (1963)).

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

47. *Id.*

48. *See* 42 U.S.C. § 2000e-2 (2000). Unlawful employment practices for employers include:

- (a) Employer practices. It shall be an unlawful employment practice for an employer—
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

Because a pay-setting decision is a “discrete act,” it follows that the period for filing an EEOC charge begins when the act occurs.⁴⁹

Justice Ginsburg interprets the same statutory phrase “discriminatory act” quite differently. She notes that “Ledbetter’s petition presents a question important to the sound application of Title VII: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation.”⁵⁰ Justice Ginsburg lays out the two competing approaches as follows:

One answer identifies the pay-setting decision, and that decision alone, as the unlawful practice. Under this view, each particular salary-setting decision is discrete from prior and subsequent decisions, and must be challenged within 180 days on pain of forfeiture. Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view, but the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII’s remedial purpose.⁵¹

Justice Ginsburg goes on to defend the latter rule and to clearly outline why it is more faithful to both the Court’s prior decisions and the decisions of a majority of the federal appellate courts below.⁵² Her arguments are persuasive, grounded in her fundamental understanding of the actual nature of such decision-making and its impact on women. One might suggest that this deeper understanding arises from her life experience as a working woman.⁵³

C. Is Each Pay Check a New Discriminatory Act?: Interpreting *Bazemore*

The Justices continue to disagree about the implications of prior precedent as well. For example, Justice Alito reads the Court’s decision in *Bazemore v. Friday*,⁵⁴ a case decided in 1986, as having a significantly different meaning than does Justice Ginsburg. Justice Alito notes that Ledbetter argues that *Bazemore* requires different treatment of her claim than those claims addressed in prior Court decisions in *Evans*,⁵⁵ *Ricks*,⁵⁶ *Lorance*,⁵⁷ and *Morgan*,⁵⁸ because Ledbetter’s claim

49. *Ledbetter*, 127 S. Ct. at 2165 (majority opinion).

50. *Id.* at 2179 (Ginsburg, J., dissenting).

51. *Id.* (internal citation omitted).

52. *Id.* at 2179–88.

53. See, e.g., Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157, 160–62 (detailing Justice Ginsburg’s prejudicial career).

54. 478 U.S. 385 (1986) (per curiam).

55. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

56. *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980).

57. *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989).

relates to pay.⁵⁹ In *Bazemore*, the Court noted 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.”⁶⁰ Justice Alito describes Ledbetter’s position as the Court adopting a “‘paycheck accrual rule’ under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred.”⁶¹ Justice Alito criticizes this interpretation as being “unsound,” noting that under Ledbetter’s reading of *Bazemore*, the case would have “dispensed with the need to prove actual discriminatory intent in pay cases and, without giving any hint that it was doing so, repudiated the very different approach taken previously in *Evans* and *Ricks*.”⁶²

Justice Alito then lays out the facts of *Bazemore*, writing:

[It] concerned a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Service (Service). Service employees were originally segregated into a “white branch” and “a ‘Negro branch’” with the latter receiving less pay, but in 1965 the two branches were merged. After Title VII was extended to public employees in 1972, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted. The Court of Appeals rejected this claim, which it interpreted to be that the “discriminatory difference in salaries should have been affirmatively eliminated.”⁶³

The *Bazemore* Court reversed, with all members joining Justice Brennan’s separate opinion that the Extension Service discriminating with respect to salaries prior to the application of Title VII to public employees “does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII.”⁶⁴ Justice Alito interprets this as being “[f]ar from . . . the approach that Ledbetter advances,” but instead as consistent with prior precedents in ruling 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 when it issues a check to one of these disfavored employees” for as long as the employer continues to use that pay structure.⁶⁵ Justice Alito focuses on Brennan’s invocation of *Evans* in looking at “whether ‘any *present violation* existed.’”⁶⁶

Justice Alito concludes that *Bazemore* stands for the proposition that an

58. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

59. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2172 (2007).

60. Bazemore v. Friday, 478 U.S. 385, 395 (1986).

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

62. *Id.*

63. *Id.* (citing *Bazemore*, 478 U.S. at 395).

64. *Bazemore*, 478 U.S. at 395 (Brennan, J., concurring).

65. *Ledbetter*, 127 S. Ct. at 2173.

66. *Id.* (quoting *Bazemore*, 478 U.S. at 396–97 (Brennan, J., concurring)).

employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.⁶⁷ “But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is ‘facially nondiscriminatory and neutrally applied.’”⁶⁸ Thus, Justice Alito sees a vast difference between an overall pay scheme based on gender discrimination and a case in which—as he acknowledges—Goodyear chose to discriminate against Ledbetter individually based on her gender.⁶⁹ He uses interesting language when describing his view: “[A]ll Ledbetter has alleged is that Goodyear’s agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks.”⁷⁰ Justice Alito concludes that Ledbetter thus “cannot maintain a suit based on [such] past discrimination.”⁷¹ The use of the phrase, “all Ledbetter has alleged” conveys a clear implication of the insignificance of the individual gender bias of which she was a victim. At the least, it diminishes the importance of such bias.

In her dissent, Justice Ginsburg treats that individual discrimination with much more gravitas, thus conferring upon it much greater significance:

[Ledbetter] charged insidious discrimination building up slowly but steadily. Initially in line with the salaries of men performing substantially the same work, Ledbetter’ salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. Over time, she alleged and proved, the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm.⁷²

She cites *Goodwin*,⁷³ a Tenth Circuit case, in asserting that *Bazemore* stands for the proposition that there is “‘a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation Each . . . payment constitutes a fresh violation of Title VII.’”⁷⁴

D. Should Pay Cases Be Treated Differently?: Interpreting *Morgan*

Justice Alito argues that *Morgan* distinguished between “discrete” acts of discrimination and a hostile work environment.⁷⁵ A discrete act is an act that

67. *Id.*

68. *Id.* at 2174 (quoting *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989)).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2181 (Ginsburg, J., dissenting) (citations omitted).

73. *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005 (10th Cir. 2002).

74. *Ledbetter*, 127 S. Ct. at 2184 (Ginsburg, J., dissenting) (quoting *Goodwin*, 275 F.3d at 1009–10 (alteration in original)).

75. *Id.* at 2169 (majority opinion).

“itself ‘constitutes a separate actionable ‘unlawful employment practice’” and that is temporally distinct.”⁷⁶ Justice Alito notes that the Court gave as examples “termination, failure to promote, denial of transfer, or refusal to hire.”⁷⁷ These were distinguished from a hostile work environment which “typically comprises a succession of harassing acts, each of which ‘may not be actionable on its own.’”⁷⁸ Such a hostile work environment does not occur on a particular day and thus it is not the hostile acts but rather the environment created thereby that is the gravamen of the claim.⁷⁹

Justice Alito notes that the dissent argues that pay claims are different from such discrete acts and much more like a hostile work environment claim because both are “‘based on the cumulative effect of individual acts.’”⁸⁰ Justice Alito argues that this analogy “overlooks the critical conceptual distinction” between the two and that it is a “fundamental misinterpretation of *Morgan*.”⁸¹

Such a conceptual distinction does not seem significant in the face of the realities of workplace pay discrimination—why is a supervisor’s continuing choice to pay Ledbetter less each time not a series of cumulative acts? How can the plaintiff prove that each time she receives a paycheck, her supervisor remembered (or not) that the reason he is paying her less is because of her gender? Such conscious decisions likely did not happen in the *Bazemore* pay structure, but that initial discriminatory choice of overall pay structures is somehow distinct from an initial choice to make an individual discriminatory pay decision? And how much of this behavior in both cases is conscious?⁸² What constitutes a “decision” in the first place?⁸³

Justice Ginsburg rejects this spurious distinction, and, in doing so, makes a much more persuasive argument. With regard to the *Morgan* decision she notes:

Subsequently, in *Morgan*, we set apart, for purposes of Title VII’s timely filing requirement, unlawful employment actions of two kinds: “discrete acts” that are “easy to identify” as discriminatory, and acts that recur and are cumulative in impact . . . [versus] “claims . . . based on the cumulative effect of individual acts.” The *Morgan* decision placed hostile work environment in that category. . . . The persistence of the discriminatory conduct both indicates the management should have known of its existence and produces a cognizable harm. . . .

76. *Id.* at 2175 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (internal quotations omitted)).

77. *Id.*

78. *Id.* (quoting *Morgan*, 536 U.S. at 115–16).

79. *Id.*

80. *Id.* (quoting the dissenting opinion, at 2180).

81. *Id.*

82. See Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 *BROOK. L. REV.* 1037, 1045 (1999) (“The main answer to the question of why there are not more women at the top is that our gender schemas skew our perceptions and evaluations of men and women, causing us to overrate men and underrate women.”); see also Virginia Valian, *Beyond Gender Schemas: Improving the Advancement of Women in Academia*, 20 *HYPATIA* 198 (2005).

83. See *Ledbetter*, 127 S. Ct. at 2187 (Ginsburg, J., dissenting) (noting that Title VII requires intentional behavior).

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. Ledbetter's claim, resembling Morgan's, rested not on one particular paycheck, but on "the cumulative effect of individual acts."⁸⁴

E. EEOC Deference?

Justices Alito and Ginsburg also have remarkably different views of how much deference to give a governmental agency in answering all these questions. Justice Alito notes that the interpretation by the EEOC, which would treat the 180-day period running anew with each paycheck, is found in its *Compliance Manual*.⁸⁵ The Court, he argues, has refused to extend deference to the *Compliance Manual* and to EEOC's adjudicatory positions.⁸⁶ Much like Justice Alito suggests the dissent misunderstands *Bazemore*, he accuses the EEOC of "misreading" the *Bazemore* decision.⁸⁷

Justice Ginsburg, on the other hand, makes a powerful argument in favor of deference to the very agency charged with implementing Title VII in such cases. Justice Ginsburg explicitly describes the workplace realities that the EEOC's interpretation better reflects, i.e., the significant difficulty of discovering salary information.⁸⁸ She concludes, "The Court dismisses the EEOC's considerable 'experience and informed judgment' as unworthy of any deference in this case. But the EEOC's interpretations mirror workplace realities and merit at least respectful attention."⁸⁹

F. Justice Ginsburg's Clarion Call

A number of commentators have been struck by the power of Justice Ginsburg's dissents since Justices Roberts and Alito have ascended to the bench and Justice O'Connor has retired. For example, Linda Greenhouse wrote a column immediately after the decision in *Ledbetter*, noting that "[w]hatever else may be said about the Supreme Court's current term . . . it will be remembered as the time

84. *Id.* at 2180–81 (citations omitted).

85. *Id.* at 2177 n.11 (majority opinion).

86. *Id.*

87. *Id.* Justice Alito explains his refusal to apply *Chevron* deference in a footnote of his opinion. *Id.* He points out that the EEOC decision is based on the agency's interpretation of a prior Supreme Court case, *Bazemore*, rather than a *Chevron*-type interpretation of an ambiguous statute where the EEOC has expertise greater than the Court's. *Id.* Such an agency interpretation has "no special claim to deference . . ." *Id.* Justice Alito also states that there is no "reasonable ambiguity in the statute itself," offering an argument in the alternative for the Court's failure to defer to the EEOC. *Id.*

88. *Id.* at 2178–79 (Ginsburg, J., dissenting).

89. *Id.* at 2185 n.6 (quoting *Firefighters v. Cleveland*, 478 U.S. 501 (1986)) (internal citation omitted); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to [the Department of Education] the task of prescribing standards for athletic programs under Title IX.").

when Justice Ruth Bader Ginsburg found her voice, and used it.”⁹⁰

Greenhouse notes that the oral dissent “is an act of theater” that is used to communicate that “the majority is not only mistaken, but profoundly wrong.”⁹¹ It is a rarely used device that Justice Ginsburg has used sparingly and has never used twice in one term.⁹² In fact, Greenhouse and other scholars suggest that Justice Ginsburg is using this rhetorical device to assert that the majority’s opinions in both *Gonzalez v. Carhart*,⁹³ the so-called partial-birth abortion case, and in *Ledbetter*, are long on politics and short on legal analysis and precedent.⁹⁴ Justice Ginsburg is becoming increasingly frustrated, according to these commentators, about the unwillingness of the new justices to be persuaded on those issues of great importance to her. For example, in the past, Justice Ginsburg persuaded Chief Justice Rehnquist, a noted conservative, to vote with her in the decision that struck down the Virginia Military Institute’s men-only admissions policy in 1996.⁹⁵ Justices Alito and Roberts are proving less open to compromise and conciliation.

Justice Ginsburg concludes her dissent in *Ledbetter* with an explicit call to Congress to correct the majority’s ruling: “This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose. Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”⁹⁶ And Congress, as discussed below, has answered that call.⁹⁷

G. A Discovery Rule?

An initial reaction to the *Ledbetter* majority opinion is that, at the very least, it seems unfair to begin running the 180-day period before the plaintiff has or should have discovered the pay disparity. Given the difficult nature of finding out pay scales in most workplaces, it would seem that a more appropriate rule would begin running the clock from the date the plaintiff discovered, or should have discovered with some reasonable diligence, the gender-based pay disparity.⁹⁸ Justice Alito

90. Linda Greenhouse, *Supreme Court Memo: Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1.

91. *Id.*

92. *Id.*; see also Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1 (noting that reading from the bench “is a usually rare practice that [Justice Ginsburg] has now employed twice in the past six weeks to criticize the majority”).

93. 127 S. Ct. 1610 (2007).

94. Greenhouse, *supra* note 90, at A1 (quoting legal commentators’ opinions of Ginsburg).

95. *United States v. Virginia*, 518 U.S. 515, 558 (1996) (Rehnquist, C.J., concurring in the judgment).

96. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2188 (Ginsburg, J., dissenting) (internal citations omitted).

97. See *infra* notes 148–60 and accompanying text.

98. See Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 683–84 (2007). The author writes:

[T]he Supreme Court has been content to leave the existence of a discovery rule in Title VII cases an open question, an indication that it views *justifiable* delays in perceiving discrimination to be the exception, rather than the norm. . . . More

refused to consider the issue of whether the 180-day rule began to run on the date the pay disparity started or the date of the plaintiffs' discovery of the disparity.⁹⁹ He reasoned that the issue was not before the Court in *Ledbetter*, since there was no suggestion that Lily Ledbetter had not discovered the pay inequity until just before she filed her EEOC complaint.¹⁰⁰ Justice Alito notes that “[w]e have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.”¹⁰¹

As the Amici in *Ledbetter* argue, however:

A discovery rule, although appropriate for Title VII claims generally, would do little to alleviate these concerns and would turn virtually every pay discrimination case into a messy factual dispute over what the plaintiff knew and when. Employees governed by the lower court's ruling will face undue pressure to file first and ask questions later in order to preserve their Title VII rights.

At the same time, the decision below undermines the incentives for employers to prevent and correct pay discrimination. Because this ruling grandfathered in pre-existing pay discrimination, it creates little incentive for employers to find and correct pay disparities between male and female workers. Instead, it encourages employers to conduct periodic *pro forma* salary reviews so as to insulate prior discriminatory decisions from challenge.¹⁰²

Thus, the retention of a bright-line rule by which the Title VII claim may be brought within 180 days of each new paycheck would best ensure that female faculty will be able to preserve their ability to enforce their right to equal pay under Title VII.

importantly, perhaps, even those lower courts that have adopted a discovery rule in Title VII cases have failed to grapple with the complexity of perceiving discrimination. These courts have applied the discovery rule to set the moment in time when the plaintiff should have known of the alleged discrimination at the point when the plaintiff first learned of the adverse job decision (or in the case of pay, that a male comparator earns more), rather than the moment when the plaintiff actually perceived the discrimination.

Id. (footnote omitted).

99. *Ledbetter*, 127 S. Ct. at 2177.

100. *Id.*

101. *Id.* at 2177 n.10.

102. See Amici Brief, *supra* note 36, at 2.

III. O'CONNOR'S GHOST

Justice O'Connor resigned from the Court in January 2006.¹⁰³ She and Justice Ginsburg had "formed a deep emotional bond, although they differed on a variety of issues."¹⁰⁴ Her replacement on the Court was Justice Alito.¹⁰⁵ Would O'Connor's presence on the Court have made a difference in the outcome of the *Ledbetter* case?¹⁰⁶

The National Women's Law Center (NWLC) predicted that then-Judge Alito would have a negative impact on women's rights. The NWLC sounded this alarm as soon as would-be Justice Alito was nominated:

For women in this country, the stakes could not be higher, nor the implications more profound. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins over vigorous dissents, often by votes of 5 to 4. Justice Sandra Day O'Connor, the first woman on the Supreme Court, has often cast the decisive vote in these cases. In a number of key cases, Justice O'Connor has parted company with the Court's most doctrinaire, conservative Justices, and if she is replaced by a Justice in their mold, critical women's rights are likely to be seriously weakened if not lost altogether. Judge Alito's record makes clear that his approach to the law is dramatically different from that of Justice O'Connor.¹⁰⁷

The NWLC went on to describe Justice Alito's rulings on prior cases involving gender discrimination in the employment context.¹⁰⁸ Like *Ledbetter*, the focus of many of these cases was on the application of Title VII. According to the NWLC, Justice Alito's decisions effectively put more of a burden on plaintiffs in proving that discrimination occurred.¹⁰⁹ Among the cases he cited, he included his dissent in *Sheridan v. E.I. DuPont de Nemours & Co.*, a sex discrimination case in which *all ten of the other members of the Third Circuit* joined in reversing the trial court's rejection of a jury verdict for the plaintiff.¹¹⁰ The NWLC argues that then-Judge Alito ignored applicable legal standards to urge overturning the jury verdict,

103. Linda Greenhouse, *With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change*, N.Y. TIMES, Jan. 28, 2006, at A10.

104. Greenhouse, *supra* note 90, at A1.

105. Joan Biskupic, *Contrast Obvious Between O'Connor, Would-be Successor*, USA TODAY, Nov. 2, 2005, at 5A.

106. See Ellis Cose, *The Supremes' Technical Failure*, NEWSWEEK, June 11, 2007, at 34 (noting that "O'Connor did not seem to have a problem with a strict interpretation of Title VII's deadlines" but also that "she clearly had a world view that accepted the reality of inequality—and the need to do something about it").

107. NAT'L WOMEN'S LAW CTR., THE NOMINATION OF SAMUEL ALITO: A WATERSHED MOMENT FOR WOMEN 1 (2005), [hereinafter NWLC, NOMINATION OF SAMUEL ALITO].

108. *Id.* at 28–31 (discussing Alito's employment discrimination opinions).

109. *Id.* at 30 ("Several other opinions authored by Judge Alito betray a disturbing tendency to . . . heighten the evidentiary burden on an individual trying to prove discrimination.").

110. *Id.* at 28–29 (discussing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996)).

inappropriately credited the employer's explanations for its actions, and, standing in for the jury, downplayed the plaintiff's evidence.¹¹¹

The NWLC highlighted "an independent review of all 311 of Judge Alito's published Third Circuit opinions, [in which] Knight Ridder concluded that 'Alito has been particularly rigid in employment discrimination cases.'"¹¹² The NWLC concluded:

Judge Alito has found ways to make it harder for a plaintiff to prevail, or even to allow a jury to decide on his or her claims. These opinions resolve issues of fact that should be left to the jury; inappropriately discredit the plaintiff's evidence of discrimination and construe the evidence in a light favorable to the employer; fail to examine the totality of the plaintiff's evidence; and even bar the plaintiff from presenting relevant evidence at all out of concern that it would create "unfair prejudice" against the employer. In one case in which Judge Alito dissented . . . , the majority went so far as to say that had Judge Alito's position prevailed, "Title VII . . . would be eviscerated."¹¹³

What effect does Justice Alito's approach to employment discrimination cases, which, according to the NWLC analysis cited above, makes it more difficult for "plaintiffs to win, or even to get to a jury,"¹¹⁴ have on women in academia?

111. NAT'L WOMEN'S LAW CTR., FACT SHEET: THE ALITO NOMINATION PLACES WOMEN'S RIGHTS AT RISK 2 (2005), available at http://www.nwlc.org/pdf/12-1505_AlitoAndWomensIssuesFactsheet.pdf [hereinafter NWLC, FACT SHEET]; see also NWLC, NOMINATION OF SAMUEL ALITO, *supra* note 107, at 29–30. The report notes:

Similarly, in *Bray v. Marriott Hotels*, Judge Alito dissented from a panel decision that allowed Beryl Bray, who alleged race discrimination in her employer's failure to promote her, to present her case to a jury. Again disregarding the legal requirement that the court give Bray "the benefit of all reasonable inferences" in deciding whether a jury should hear her case, Judge Alito ignored numerous inconsistencies in the employer's evidence of the reason for its actions; dismissively characterized the employer's clearly false statement that Bray was not qualified for the job as merely "loose language" insufficient to raise even a question of pretext; and decided for himself that the employer honestly believed that Bray was less qualified than the white applicant. . . . The majority went so far as to declare that "Title VII would be eviscerated if our analysis were to halt where [Judge Alito's] dissent suggests"—i.e., at the employer's assertion that it honestly believed it had selected the best candidate for the job.

Id. (discussing *Bray v. Marriott Hotels*, 110 F.3d 986, 1000–02 (3d Cir. 1997) (internal citations omitted)).

112. NWLC, NOMINATION OF SAMUEL ALITO, *supra* note 107, at 28.

113. *Id.* (quoting *Bray*, 110 F.3d at 993).

114. *Id.* at 32.

IV. ACADEMIC SALARY SETTING: AN ART NOT A SCIENCE

Many female faculty in academia face large, if not insurmountable, obstacles when it comes to discovering salary information. Many private colleges and universities do not make salary information available.¹¹⁵ Of those that do, including public colleges and universities, it is often difficult to find the information.¹¹⁶ There may be a stigma or cultural pushback against those who do find the information and discuss it with their department chair or dean. Often, the salary information that is published does not include “soft money” or stipends that may also flow to certain faculty members for additional work as administrators, directors of programs, or other similar functions.

Compounding the accessibility issue, the vague benchmarks used to set salaries in academia in terms of what constitutes merit, coupled with the decentralized nature of this process, all contribute to the differences in pay between male and female faculty of the same rank.¹¹⁷ The criteria for tenure at most institutions include teaching, scholarship, and service, with teaching and service being dominated by women, and research being dominated by men.¹¹⁸ Research is by far the most salient factor in tenure, promotion and pay decisions.¹¹⁹ Even when

115. See, e.g., Aliya Sternstein, *Schools Weigh Merits of Disclosing Pay Online*, NAT'L J. TECH. DAILY, Mar. 16, 2007, <http://nationaljournal.com/pubs/techdaily/pmedition/tp070316.htm#5> (discussing the public college and university's problem of “balancing the public's right to know and the university's need to retain its own faculty”).

116. *Id.*

117. Lee et al., *supra* note 20, at 610–11. The authors write:

That colleges and universities have been the target of comparable worth litigation is not surprising when one considers the context in which faculty salary decisions occur. At four-year colleges and universities in particular, hiring, promotion, and salary decisions are often decentralized to the department or school level, and unless the institution adheres to a published salary schedule tied to rank or years of service, salaries may vary widely between departments, and among faculty within the same department. Criteria for making salary decisions may be vague or unwritten, and faculty who are visible and mobile have an advantage in negotiating starting salaries or raises. Salary compression may become a problem as departments must meet demands for starting salaries which are not far below the salaries of mid-career professors.

Id. See also THE COLLABORATIVE ON ACAD. CAREERS IN HIGHER EDUC. (COACHE), TENURE TRACK FACULTY JOB SATISFACTION SURVEY: HIGHLIGHTS REPORT (2007), available at http://gseacademic.harvard.edu/~coache/downloads/COACHE_ReportHighlights_20070801.pdf [hereinafter COACHE, HIGHLIGHTS] (describing the statistical evidence showing that female tenure-track faculty find the tenure process more unclear than male faculty).

118. See generally Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 51 (1996).

In treating teaching and service as undifferentiated activities, the argument for prioritizing research utilizes a technique commonly used to devalue women's work and, thus, rationalize the unpaid or underpaid status of that work. It assumes that there is no difference between good and bad teaching (and service) or, that if there is, this difference is unaccounted for by levels of skill, because these are activities that are *instinctual* or *natural* for those who perform them.

Id.

119. See generally *id.* at 50.

teaching is given some weight in assessing compensation, the use of student evaluations has serious flaws, as noted in a wide body of literature on gender bias in student evaluations.¹²⁰ Utilizing such evaluations can have negative effects on compensation in direct and indirect ways, including time taken from scholarship by the need for women to work harder than men to receive comparable student evaluations.¹²¹

There is a psychological reluctance to accept the fact that one is being treated in a different and less favorable way than one's peers. And there are practical difficulties in developing such an awareness as well. For example, scholars have found that that:

[A]ggregate data is extremely important in enabling people to recognize individual instances of discrimination. Without data showing across-the-board disparities, people are more likely to hypothesize nondiscriminatory reasons for individual disparities and less likely to perceive discrimination. With respect to pay disparities, for example, slight variations in any of the criteria used for setting pay are likely to be perceived as excusing gender gaps in pay, while data documenting organization-wide disparities greatly increases the likelihood of perceiving pay discrimination.

Why should research be the primary criterion for tenure and promotion? One line of argument, which focuses on research as an indicator of faculty merit, goes something like this: "Research separates the men from the boys (or the women from the girls). Teaching and service won't serve this function because everyone teaches and does committee work." A variation on this theme argues that "[t]eaching and service won't serve this function because there is no satisfactory way of evaluating teaching and service." According to the first line of reasoning, research performance is the only factor that *differentiates* faculty presumed to be equal in other respects. According to the second line of reasoning, research performance is the only factor by which faculty members can be *objectively* evaluated, even if they are unequal in other respects.

Id.

120. See Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 *SEX ROLES* 779 (2005).

121. *Id.* at 791. The authors write:

Note that students' memories of their worst-ever teachers appear to be more emotionally charged than their memories of their best-ever teachers and that the most hostile words are saved for women teachers. The worst women teachers are sometimes explicitly indicted for being bad women through the use of words like bitch and witch. Students may not like their arrogant, boring and disengaged men teachers, but they may hate their mean, unfair, rigid, cold, and "psychotic" women teachers. These findings are substantiated by the observations of other feminist researchers who have reported incidents of student hostility toward women instructors who are perceived as not properly enacting their gender role or who present material that challenges gender inequality. . . . That is, women teachers may be called on to do more of what sociologists call emotional labor, labor that is frequently invisible and uncounted. Thus, if teachers are being held accountable to, and are attempting to meet, gendered standards, then women and men may be putting out very different levels of effort to achieve comparable results. If it takes more for a woman to get a 5 and she nearly kills herself to do it, that difference in effort will not be measurable on student rating scales.

Id. (internal citations omitted).

Not only the information itself but also how it is presented and formatted strongly influences peoples' ability to perceive discrimination. Presenting information on disparities in an aggregate, across-the-board format makes it much more likely that people will perceive discrimination than showing them the same information in case-by-case format. Apparently, the case-by-case formatting leads people to hypothesize neutral, nondiscriminatory justifications, while the all-at-once, aggregate format make such speculation less likely.¹²²

Such aggregate data is rarely available in the workplace, and the culture surrounding discussions of pay, especially in academia, suggests that systematic studies of pay disparities among individuals within departments and among departments are not likely to become widespread in the near future. Without such a systematic study, women in academia are likely to remain the victim of sex discrimination in pay—without even knowing it.¹²³

122. Debra L. Brake & Joanna Grossman, *The Failure of Title VII as a Rights-Claiming System* 25 (U. Pittsburgh School of Law, Working Paper No. 67, 2007), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1068&context=pittlwps>; see also Faye Crosby, *The Denial of Personal Discrimination*, 27 AM. BEHAV. SCI. 371, 377–78 (1984); Faye Crosby et al., *Cognitive Biases in the Perception of Discrimination: The Importance of Format*, 14 SEX ROLES 637, 644–46 (1986); Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 293, 332 (1994) (“It is easier to see discrimination on the collective level than on an individual level.”); Brenda Major et al., *Prejudice and Self-Esteem: A Transactional Model*, 14 EUR. REV. SOC. PSYCHOL. 77, 81 (2003).

123. This is especially true in traditionally male academic departments like science, medicine, and engineering. See, e.g., Christine Laine & Barbara J. Turner, Editorial, *Unequal Pay for Equal Work: The Gender Gap in Academic Medicine*, 141 ANNALS OF INTERNAL MED. 238 (2004); Andrew Lawler, *Tenured Women Battle to Make It Less Lonely at the Top*, 286 SCI. 1272 (1999); Lee et al., *supra* note 20, at 610.

Institutions of higher education have not escaped the debate about comparable worth. Nationally, women faculty's earnings were approximately 81 percent of the earnings of male faculty in 1983; when adjusted for rank, the disparity ranged from 85 percent for full professors to 93 percent for assistant professors. Reasons offered to explain the segregation of women faculty into lower-paying disciplines such as nursing, education, and the arts and humanities echo those attributed to occupational segregation in general: socialization, choice, and erratic labor force behavior resulting from homemaking and child-rearing obligations versus discrimination. There is a similar lack of consensus about the remedy for the salary gap in academe: advocates of academic comparable worth reject the notion that the market should set academic salaries, whereas opponents argue that ignoring the market will decimate the ranks of highly paid disciplines or lower the quality of education.

Id. But see MASS. INST. OF TECH., A STUDY ON THE STATUS OF WOMEN FACULTY IN SCIENCE AT MIT (1999), available at <http://web.mit.edu/fnl/women/women.pdf> (detailing a model that could increase the participation of women and minorities on faculties).

V. ALTERNATIVES TO TITLE VII

Given the unwillingness of judges and courts to venture into the realm of salary setting for academics generally, one is forced to look to alternative remedies.¹²⁴ Even if courts were more hospitable, the emotional and financial cost of pursuing legal remedies would militate in favor of institutional reform as a preferred avenue to eradicate pay inequities in academia.¹²⁵ For example, the authors of *Tenure Denied*, a major study of sex discrimination cases in academia, note that both the personal and professional costs of bringing a Title VII action can be extraordinary.¹²⁶ There are of course, the litigation fees, which can run into the hundreds of thousands of dollars.¹²⁷ In addition, plaintiffs suffer untold emotional costs including depression and suicidal thoughts in some cases.¹²⁸ They lose marriages and time with their spouses and children.¹²⁹ Their relationships with those in their departments suffer permanent damage and many plaintiffs are struck by how little support they received from colleagues.¹³⁰ Such emotional abandonment by other women in particular seems to take a large toll.¹³¹

In much of academia, salaries are now set in large part based on “market forces.”¹³² There is significant research that documents how this approach disadvantages women.¹³³ In a world where visiting at another academic institution has become almost a requirement for a lateral offer to join that institution, it is clear women cannot compete.¹³⁴ They are far less likely to have husbands who are mobile and willing to relocate for a year to join them on a visit.¹³⁵ Academic merit, too, has been based on norms that are historically male. Publishing has great weight in salary setting in academia, and there is substantial research

124. See Lee et al., *supra* note 20, at 618–19. The authors write:

Recent litigation results make it apparent that courts will not impose upon employers the obligation to implement equal pay for comparable work, nor will they find employers liable for discrimination for the use of market considerations in the setting of salaries. This, however, does not mean that an employer could not, as a matter of policy, adopt the comparable worth philosophy, in total or in part, in setting salary policy. Nor will the lack of legal compulsion necessarily reduce the pressure from employees, especially state employees in institutions of higher education, to have the issue addressed.

Id.

125. AAUW, *TENURE DENIED*, *supra* note 3, at 63.

126. *Id.*

127. *Id.* at 65.

128. *Id.* at 71.

129. *Id.* at 70.

130. *Id.* at 68–69.

131. *Id.* at 69.

132. Scott Jaschik, *Real Pay Increases for Professors*, INSIDE HIGHER ED, Apr. 12, 2007, <http://www.insidehighered.com/news/2007/04/12/salaries>.

133. See, e.g., Joan Williams, *What Stymies Women's Academic Careers? It's Personal*, CHRON. HIGHER EDUC. (WASH., D.C.), Dec. 15, 2000, at B10.

134. *Id.*

135. *Id.*

demonstrating that women publish less than men for a number of reasons, including more time with students, family obligations and other external limits on their time.¹³⁶ Finally, much salary setting in academia is based on perception of status, and such perception-based behavior is discretionary and subject to unconscious gender schemas and bias.¹³⁷ Women are rarely described as “brilliant” or standouts, and brilliance is the coin of the realm in academia.¹³⁸ Women self-promote less frequently and are promoted by their institutions on websites and in marketing brochures far less.¹³⁹ Society teaches women not to self-promote or negotiate for salary and this behavior leads to lower salaries in a milieu where perception is a central ingredient for raises and promotions.¹⁴⁰ In general, there is a norm among academics that to be concerned about monetary compensation is not in keeping with the intellectual life that eschews money for knowledge.¹⁴¹ All of these factors create an environment where women are far

136. See Park, *supra* note 118, at 47. The author writes:

Current working assumptions regarding (1) what constitutes good research, teaching, and service and (2) the relative importance of each of these endeavors reflect and perpetuate masculine values and practices, thus preventing the professional advancement of female faculty both individually and collectively. A gendered division of labor exists within (as outside) the contemporary academy wherein research is implicitly deemed ‘men’s work’ and is explicitly valued, whereas teaching and service are characterized as ‘women’s work’ and explicitly devalued.

Id. See also CHARMAINE YOEST, PARENTAL LEAVE IN ACADEMIA 2 (2004), available at <http://faculty.virginia.edu/familyandtenure/institutional%20report.pdf> (noting that even when an institution officially attempts to accommodate family obligations, “anecdotal responses provide some evidence that stigma is still a factor” to parental leave policy use).

137. See Linda A. Krefting, *Intertwined Discourses of Merit and Gender: Evidence from Academic Employment in the USA*, 10 GENDER, WORK & ORG. 260 (2003) (discussing “the gendered basis for academic merit”); see also U.S. GOV. ACCOUNTABILITY OFF., GENDER ISSUES: WOMEN’S PARTICIPATION IN THE SCIENCES HAS INCREASED, BUT AGENCIES NEED TO DO MORE TO ENSURE COMPLIANCE WITH TITLE IX 3–4 (2004), available at <http://www.gao.gov/new.items/d04639.pdf>. The GAO found:

[T]he proportion of faculty in the sciences who are women has also increased since the early 1970s. However, female faculty members still lag behind their male counterparts in terms of salary and rank, and much of their gain in numbers has been in the life sciences, as opposed to mathematics and engineering. A variety of studies indicate that experience, work patterns, and education levels can largely explain differences in salaries and rank A few studies also suggest that discrimination may still affect women’s choices and professional progress, assertions we also heard during many of our site visits to selected campuses.

Id.

138. See, e.g., Valian, *Beyond Gender Schemas*, *supra* note 82 (describing study where writers of letters of recommendation for women used quantitatively fewer “stand-out adjectives” than in letters for men).

139. SHEILA WELLINGTON, BE YOUR OWN MENTOR, STRATEGIES FROM TOP WOMEN ON THE SECRETS OF SUCCESS 51 (2001).

140. BABCOCK & LASCHEVER, *supra* note 9.

141. See Piper Fogg, *Young Ph.D.s Say Collegiality Matters More Than Salary*, CHRON. HIGHER EDUC. (Wash, D.C.), Sept. 29, 2006, at A1; Scott Jaschik, *The Clarity Gap*, INSIDE HIGHER ED, Sept. 26, 2006, <http://www.insidehighered.com/news/2006/09/26/coache> (quoting Kenyon College President Georgia Newton: “If faculty were people who really cared primarily about money,” she said, “they wouldn’t be in this business.”).

less likely to be properly compensated for their contributions to the institution and to have their value recognized.

Some have noted that “this fundamental imbalance in academic labor economics is precisely the sticking point for judges facing comparable worth arguments. They are highly reluctant to interfere in the market, other than to reinforce and enhance the free operation of competition.”¹⁴² Legal academia is one of the fields regularly used as an example of an academic discipline driven by competing market forces.¹⁴³ In fact, the maxim that all law professors could be making far more money if they returned to law practice is really true only of the very top candidates. By definition, there is a limited supply of such faculty candidates and fewer women in that pool, since the apex of credentialing is now a year spent as a United States Supreme Court clerk.¹⁴⁴ If one looks beyond these few top candidates, there is actually an excess supply of candidates very willing to work for a fraction of law firm associate pay.

As an alternative to Title VII and other statutory remedies, some scholars have outlined proposals for moving toward a model of salary setting in academia that reflects a theory of comparable worth:

There are several ways in which comparable worth problems might be addressed, and these methods, for both legal and policy reasons, would be superior to Title VII lawsuits for resolving bona fide inequities. The most obvious route is the voluntary adjustment of salary, wage, benefit, and classification systems. This approach could be taken at the individual, job group, department or division, or institutional level. . . .

142. Lee et al., *supra* note 20, at 620.

143. *Id.*

But the key point is that, even where job content may be measurably similar, as in the case of deans, salary differences are responsive to very substantial market factors acting to differentiate salary structures among fields. One would expect to find that a typical full professor in one field, such as law, would receive a salary at great variance with a typical professor in another, such as education, at the same university. These market driven differences might exist in spite of direct similarities in objective job content and in objective measures of job performance. The market factors are so powerful that deans in some fields—dentistry, law, and medicine—receive average salaries higher than the average salaries for university presidents. Arguably, presidents' jobs are more demanding than deans' jobs; and, arguably, presidents have superior qualifications and experience to those of deans. Yet to find a dean, one might have to accept market forces that de-couple salary from an objective analysis of job and qualifications. To some extent, these variations depend on the viability of external employment alternatives. Both law and engineering, for example, are cited as fields in which private or corporate practice at high competitive salaries may be hurting universities' ability to recruit faculty. In other fields, such as the humanities, there are fewer external opportunities for employment and therefore for market competition.

Id.

144. See David H. Kaye & Joseph L. Gastwirth, Where Have All the Women Gone? “Random Variation” in the Supreme Court Clerkship Lottery 1 (Nov. 10, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=944058> (describing the fifty-percent drop in the number of women clerks in 2006).

The second means is to establish a policy on comparable worth. The policy could be framed to deal with the conceptual problem or with its constituent elements. It could also be substantive or procedural in its content. . . .

A third means of dealing with a comparable worth problem is what might be analogized to the “consent decree” approach. Under a collective bargaining agreement or some other authoritative document of concord, the particulars of a settlement concerning comparable worth might be specified.¹⁴⁵

In fact, women faculty as a group might do much better if faculty unions took hold throughout academia.¹⁴⁶ A lockstep compensation system, rather than one based on gendered definitions of merit, would likely inure to the benefit of the largest group of women faculty. A few women might suffer, but, in the aggregate, by limiting the discretion of administrators across the board and tying pay to objective criteria such as years out of graduate school, most women would do better. Gender disparities in pay would likely be more effectively minimized than a system in which individual negotiations can create large disparities in pay.

What is the likelihood that such collective action through unions might become more prevalent? Some have suggested that the strikes of student teaching assistants may offer some insight into this question:

Although the Yale strike did not involve faculty salaries, the implications for unionized institutions of higher education are clear. Just under 25 percent of the public colleges and universities in the U.S. have faculty unions . . . and comparable worth could serve as an organizing issue for unions, particularly at public research and comprehensive institutions where salary differences among disciplines may be more visible (and more widely known) than at private liberal arts colleges. It is too early to gauge the potential for collective bargaining to advance the comparable worth doctrine for women faculty (or for comparable worth to promote the spread of faculty unionization), but policy makers should be aware of developments in the nonfaculty sector of academe.¹⁴⁷

While such remedies offer future hope of resolving pay inequities, a more immediate response to the *Ledbetter* case is pending in Congress.

145. Lee et al., *supra* note 20, at 625–26.

146. See JUDITH WAGNER DECEW, *UNIONIZATION IN THE ACADEMY: VISIONS AND REALITIES* 85 (2003).

147. Lee et al., *supra* note 20, at 618.

VI. REMEDIAL LEGISLATION INTRODUCED

A number of women's groups reacted quickly to the *Ledbetter* decision.¹⁴⁸ They worked with Congress to introduce legislation that would adopt the EEOC's interpretation of the 180-day rule.

The National Women's Law Center explains why it supports such legislation:

More than four decades after Congress outlawed wage discrimination based on sex, women continue to be paid, on average, only 77 cents for every dollar paid to men. This persistent wage gap can be addressed only if women are armed with the tools necessary to challenge sex discrimination against them. But the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.* severely limits workers' ability to vindicate their rights and distorts Congress' intent to eliminate sex and other forms of discrimination in the workplace. In July 2007 the House of Representatives passed legislation to reverse the Supreme Court decision; a parallel bill, the Fair Pay Restoration Act, is currently pending in the Senate. Restoring adequate protection against pay discrimination is critical to assuring that all workers have fair workplace opportunities. As a result, Congress should act expeditiously to enact the Fair Pay Restoration Act.¹⁴⁹

The NWLC describes the impact of the Fair Pay Restoration Act.¹⁵⁰ The Act

148. Press Release, Nat'l Women's Law Ctr., Supreme Court Decision Severely Weakens Remedies for Workplace Discrimination (May 29, 2007). The Press Release stated:

The U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.* severely weakens remedies for employees who have faced wage discrimination and represents a flawed interpretation of our nation's civil rights laws, the National Women's Law Center (NWLC) said today. "The Court's decision is a setback for women and a setback for civil rights," said Marcia Greenberger, Co-President of NWLC. . . . "Not only does the ruling ignore the reality of pay discrimination, it also cripples the law's intent to address it, and undermines the incentive for employers to prevent and correct it. Victims of pay discrimination who did not initially know of pay disparities or were afraid to file a complaint now will have no effective remedy against discrimination, even when it continues," Greenberger added. . . .

"This 5-4 decision authored by Justice Alito shows just how important one vote can be," Greenberger said. "By a one-vote margin, this Court has put at risk women's ability to combat the wage discrimination to which they are far too frequently subject."

Id.

149. NWLC, *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.: THE SUPREME COURT LIMITATION ON PAY DISCRIMINATION CLAIMS AND THE LEGISLATIVE FIX 1 (2007)*, available at <http://www.nwlc.org/pdf/Broad%20Ledbetter%20Fact%20Sheet-Letterhead.pdf> [hereinafter NWLC, *LEDBETTER*].

150. *Id.* at 3 (describing S. 1843, 110th Cong. (2007)). The House of Representatives passed a nearly identical legislative remedy, The Lily Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (2007), on July 31, 2007. See also Brake & Grossman, *supra* note 122, at 3 n.1 (noting "[s]oon after *Ledbetter* was decided, a bill to undo the ruling was introduced in Congress). The bill was passed by the House of Representatives, 110 Bill Tracking H.R. 2831, and is currently pending in the Senate. President Bush, however, issued a formal statement of opposition to the Act. Executive Office of the President, *Statement of Administration Policy: H.R. 2831—Lilly*

itself would supersede the Court's decision in *Ledbetter* and make it clear that Congress intended Title VII to be applied by Courts using the "paycheck accrual rule."¹⁵¹ This approach ensures that a Title VII claim exists "whenever a discriminatory pay decision or practice is adopted, when a person becomes subject to the decision or practice, or when a person is affected by the decision or practice, including whenever s/he receives a discriminatory paycheck."¹⁵²

As a policy matter, enactment of the Act will provide an incentive for employers to assess whether they engage in gender discrimination on a continuing basis. The NWLC argues that the legislation encourages "voluntary compliance" by employers because they will clearly be exposed to continuing liability each time they issue a paycheck to an employee.¹⁵³ The 180-day period for filing a complaint with the EEOC will be triggered with the issuance of each paycheck and the discrimination that occurred at the time the employer originally decided on what that employee should be paid.¹⁵⁴

As noted above, the actual reality at most workplaces, including academia, is that many people are completely unaware of or unable to determine whether they are being paid less than their colleagues.¹⁵⁵ A major benefit of the paycheck accrual approach, according to the NWLC, is that it will allow a Title VII claim to survive until a woman either later discovers she is being paid less than her male counterparts or is in a position to make an official complaint, without fear of retaliation.¹⁵⁶ This is best illustrated in academia by the untenured female professor who rightly fears the very real impact an EEOC complaint may have on her tenure vote. And, given the closed nature of the tenure process, she might never be able to establish that her speaking up was the cause of a denial of tenure. In the small world of academia, such an official complaint may well cause her to be blackballed as well.

As the NWLC notes, these initial pay disparities are compounded over time by raises, pensions and similar benefits tied to pay level.¹⁵⁷ The adoption of the paycheck accrual rule will ensure that women preserve their right to challenge these decisions well into the future. In the case of academia, a female professor may well want to wait until she obtains tenure and her job is secure before filing an EEOC complaint. While such a complaint may still trigger retaliation on the part of the administration in terms of merit raises, research grants, and other compensatory decisions, at least she will have her job and will not face the issue of

Ledbetter Fair Pay Act of 2007 (July 27, 2007). Brake and Grossman were also Amici on the brief in support of Lily Ledbetter. See Amici Brief, *supra* note 36.

151. NWLC, *LEDBETTER*, *supra* note 149, at 3.

152. *Id.*

153. *Id.*

154. *Id.*

155. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2182 n.3 (2007) (citing Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 *BERKELEY J. EMP. & LAB. L.* 167, 168, 171 (2004) (noting one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy)).

156. NWLC, *LEDBETTER*, *supra* note 149, at 3.

157. *Id.*

having to look within academia for another position, with the taint of having been labeled a “troublemaker” by filing an EEOC complaint. As many have noted, “[b]ecause academic disciplines are often tightly knit communities, rejected faculty can find it difficult to get a new job elsewhere in academia.”¹⁵⁸

The pending legislation gives plaintiffs time to carefully gather evidence of discrimination and to decide whether the significant costs of bringing a complaint are worth it. Plaintiffs bear the burden of proof under Title VII, and if they bring their claim too early, they risk having it summarily dismissed.¹⁵⁹ As the NWLC notes, “The Fair Pay Restoration Act simply restores prior law, which had been applied by nine of the twelve federal courts of appeals and the EEOC before the *Ledbetter* decision.”¹⁶⁰ The two-year statute of limitations for back pay under Title VII should ensure that employers are not held liable for stale claims and passage of this remedial legislation in Congress simply clarifies what the practice has already been.

CONCLUSION

Justice Alito’s impact on the outcome in *Ledbetter* is striking. Given the views of his earlier decisions, the result in *Ledbetter* may have been predicted. However, his reasoning and choice of language clearly demonstrate his failure to recognize the difficulty in perceiving that one is being paid less than one’s colleagues simply because of one’s gender. One is tempted to suggest to Justice Alito that he, as an Italian-American and a Catholic, may have been the victim of discrimination in his life because of his ethnic and religious background.¹⁶¹ However, perhaps Justice Alito’s profound belief in the egalitarian ideal of American society blinded him to such discrimination. Or perhaps such disparate treatment remained hidden behind secret pay decisions, and Justice Alito never suspected that his ethnicity or religion might have been used to peg him as less deserving of a comparable salary.

The realities of the academic workplace exacerbate this problem. The nature of the powerlessness of pre-tenure track faculty is legendary.¹⁶² Even if one perceives discrimination, it is hard to prove. The cost of trying to seek a remedy may mean being denied tenure in a process that is opaque at best and that facilitates discriminatory decision-making at worst. Sadly, reporting a suspicion of discriminatory pay may cost the faculty member her job. A female faculty member in this position may find it impossible to continue in a profession that is reluctant to hire a “troublemaker” and in which there are few alternative paths of employment once denied tenure.

Thus, *Ledbetter* offers those in academia a number of lessons. First, the gender

158. AAUW, TENURE DENIED, *supra* note 3, at 3, 68.

159. NWLC, *LEDBETTER*, *supra* note 149, at 3.

160. *Id.*

161. There is no doubt that such ethnic stereotyping still exists. *See, e.g.*, Evan Thomas & Suzanne Smalley, *Growing Up Giuliani*, NEWSWEEK, Dec. 3, 2007, at 30 (including a subhead about then-presidential candidate Rudy Giuliani that includes a reference to “hoods” in his family).

162. *See generally* COACHE, HIGHLIGHTS, *supra* note 117.

of our judges matters. Women judges often view the same evidence through a different lens, reflecting their different life experiences.¹⁶³ For example, Justice Ginsburg gives great weight to the actual evidence presented to the *Ledbetter* jury below—and the way she recounts that evidence makes it clear that she sees it as tremendously damning to the defendant.¹⁶⁴ Justice Alito, on the other hand, uses dismissive language that illustrates his failure to understand the profound impact such discrimination had on Lilly Ledbetter and the centrality of her claim to her life.¹⁶⁵

Under the reasoning of *Ledbetter*, women in academia must choose between speaking up immediately upon any suspicion that their male colleagues are receiving greater pay or risk losing the opportunity to ever do so. That puts such women faculty at risk of moving too early under Title VII, where they have the burden of proof. It puts younger, untenured women in the position of choosing between lower pay on the one hand, and tenure and job security on the other. Given the nature of the tenure process, they may never know if a colleague or administrator improperly held their complaint about pay disparity against them in the tenure decision.¹⁶⁶ Putting women faculty between Scylla and Charybdis is untenable in a world where we seek equality in our academic institutions and

163. See, e.g., Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice?*, 6 MICH. J. GENDER & L. 113 (2005); Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 131–32 (1993); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 208 (1983); Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 742 (1997); Gerald S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 153 (1986); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971); Elaine Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990); Lynn Hecht Schafran, *Not From Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953 (2005); Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 433 (1994); Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 178 (1990); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 48 J. POL. 596 (1985); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Susan Moloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179 (1994); Sarah Westergren, Note, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 690 (2004).

164. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2187 (2007) (Ginsburg, J., dissenting).

165. See *supra* note 70 and accompanying text.

166. See AAUW, *TENURE DENIED*, *supra* note 3, at 4. The AAUW found:

Secrecy [in tenure decisions] is needed, some argue, to allow for candid review. The downside, however, is that candidates do not have access to key documents used to make the tenure decision and often learn about deliberations through rumor. Because, candidates receive only partial or inaccurate information, they do not know if they have been treated fairly.

Id.

where women have yet to come close to such equality.¹⁶⁷ Those of us who are full professors with tenure are in the best position to move our institutions toward gender equality, and we have an obligation to use our positions to do so.

167. *See id.* at 2; *see also* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANO-LATINA L. REV. 169 (2006); Park, *supra* note 118, at 46. “Despite myths concerning the efficacy of affirmative action programs, there are still relatively few women in academia. Moreover, the female professors one does encounter in the academy are apt to be found in lower-paying, less prestigious, and less secure positions.” *Id.* (internal citations omitted).