

BLAMELESS IGNORANCE? THE LEDBETTER ACT AND LIMITATIONS PERIODS FOR TITLE VII PAY DISCRIMINATION CLAIMS

JEREMY A. WEINBERG*

In Ledbetter v. Goodyear Tire & Rubber Co., the Supreme Court rejected the argument that a new Title VII violation occurred and a new charge-filing period arose each time an employer issued a paycheck to an employee that reflected some past, uncharged discrimination (the so-called “paycheck accrual rule”). This opinion was effectively reversed when President Obama signed his first bill into law: the Lilly Ledbetter Fair Pay Act of 2009. The new law amended Title VII such that an unlawful employment act occurs “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”

Considering issues of fairness to employees and employers, as well as the societal interest in repose, this Note examines the Ledbetter Act and measures it against two alternatives: (1) application of a discovery rule and (2) use of the doctrine of equitable tolling for fraud. The Note contends that the Ledbetter Act is a flawed way of addressing the problem that victims of pay discrimination face in detecting discrimination and bringing suit within the limitations period. Concluding that the discovery rule has been foreclosed by Congress and the courts, this Note argues that equitable tolling for cases of fraudulent concealment is a sensible, viable way of giving blamelessly ignorant plaintiffs access to the courts and avoiding the drawbacks of the Ledbetter Act.

INTRODUCTION

*In Ledbetter v. Goodyear Tire & Rubber Co.,*¹ the Supreme Court rejected the argument that, under Title VII of the Civil Rights Act of

* Copyright © 2009 by Jeremy A. Weinberg. Law Clerk to the Honorable Berle M. Schiller, United States District Court for the Eastern District of Pennsylvania. J.D., 2009, New York University School of Law; B.S., 2003, Cornell University. Many thanks to Professor Sam Estreicher for helping me develop the topic and improve my argument; to Emily Deininger for expert guidance and assistance throughout the submission process; and to Jack Leo and Maiko Nakarai-Kanivas for skilled editing. Also to Drew Johnson-Skinner, Kristen Richer, Julia Hamilton, Chris Terranova, Glen Nager, Larry Gold, and the entire *New York University Law Review* staff. Special thanks to my brother Josh for moral support and to my parents for every other kind of support imaginable. Finally, to my wife Laura, the best writer I know and the best friend I could ever wish for. All opinions and mistakes are my own.

¹ 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

1964 (“Title VII”),² a new act of discrimination occurred and a new charge-filing period³ arose each time the employer issued a paycheck to the employee that reflected some past, uncharged discrimination.⁴ Congress and the president effectively reversed the Court’s opinion in 2009 when President Obama signed his first bill into law: the Lilly Ledbetter Fair Pay Act.⁵ The Ledbetter Act amended Title VII to say that an unlawful employment act occurs “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”⁶ Signed just days into the Obama presidency and amidst the turmoil of economic panic, many heralded the bill as a progressive triumph.⁷

This Note argues that the Ledbetter Act simultaneously did too much and too little to promote equal pay. Considering issues of fairness to employees and employers, as well as the societal interest in repose, this Note examines the Ledbetter Act and measures it against two alternatives: (1) application of a discovery rule and (2) use of the doctrine of equitable tolling for fraud.

Part I profiles the Ledbetter Act, describing the legal and social context from which it developed and the implications of its passage. Part II argues that the Act—though designed to protect victims of

² 42 U.S.C. §§ 2000e to e-17 (2006). Title VII is the federal law that bars discrimination in employment. The primary substantive provision of the law states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin

42 U.S.C. § 2000e-2(a)(1).

³ Charge-filing periods and statutes of limitations are conceptually identical. The latter refers to the period in which a prospective plaintiff must commence a civil suit in order to retain a cause of action. The former refers to the period in which a prospective Title VII plaintiff must file an administrative charge with the Equal Employment Opportunity Commission (“EEOC”) in order to preserve the possibility of a later suit. See § 2000e-5 (establishing requirement that charge be filed with EEOC prior to commencement of Title VII action). I will use the terms “charge-filing period,” “statute of limitations,” and “limitations period” interchangeably to refer to laws that bar claims not brought within a certain period.

⁴ *Ledbetter*, 550 U.S. at 625 (rejecting plaintiff’s argument that each paycheck she received that “‘carried forward’ the effects of prior uncharged discrimination decisions” was new violation with new limitations period).

⁵ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

⁶ *Id.* at 6.

⁷ See, e.g., Gail Collins, *Lilly’s Big Day*, N.Y. TIMES, Jan. 29, 2009, at A27 (criticizing Court’s decision and praising Ledbetter Act).

discrimination—does so at significant cost, fails to protect many of the most aggrieved individuals, and grants an undeserved windfall to certain plaintiffs. Part III introduces two alternatives that avoid some of the pitfalls of the Ledbetter Act, explores the advantages these approaches have over the course Congress has taken, and examines the role these alternative doctrines might play now that the Ledbetter Act is law.

I

THE ORIGINS OF THE LEDBETTER ACT

A. Ledbetter v. Goodyear Tire & Rubber Co.

In *Ledbetter v. Goodyear Tire & Rubber Co.*, Lilly Ledbetter sued her employer alleging sex discrimination in violation of Title VII.⁸ Ledbetter had worked as a supervisor at a Goodyear plant between 1979 and 1998 and was receiving significantly less pay than male supervisors at the same plant.⁹ While the court records reveal little about Ledbetter's initial salary or the raises she received in her first few years of work, it is clear that her pay failed to keep pace with that of her peers through the 1990s, at least in part because she was receiving lower annual pay raises than her male co-workers.¹⁰

Ledbetter filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC) in 1998, a necessary step before filing a suit charging discrimination under Title VII.¹¹ After the requisite EEOC investigation, Ledbetter was permitted to commence suit in federal district court in Alabama, where a jury found in her favor.¹² The district court judge denied defendant's motion for judgment as a matter of law, holding that it was permissible for Ledbetter to challenge pay decisions¹³ that fell outside the charge-filing period.¹⁴

Goodyear appealed, contending that the trial court had erred in allowing Ledbetter to challenge every pay decision to which she was subjected while employed at Goodyear.¹⁵ Goodyear argued that Title VII required prospective plaintiffs to file a charge with the EEOC

⁸ *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1169–70 (11th Cir. 2005).

⁹ *Id.* at 1173–75.

¹⁰ *Id.*

¹¹ 42 U.S.C. § 2000e-5(e)(1) (2006).

¹² *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 99-C-3137-E, 2003 WL 25507253 (N.D. Ala. Sept. 24, 2003).

¹³ I use the term “pay decision” in this context to mean any decision about how much compensation an employee receives from her employer for her work.

¹⁴ 421 F.3d at 1176.

¹⁵ *Id.*

within 180 days of the discrimination¹⁶ and that Ledbetter's discrimination claims were time-barred since the pay decisions on which she based her lawsuit occurred more than 180 days before she filed her charge.¹⁷ Ledbetter countered that a "paycheck accrual rule" applied, meaning that a new statutory violation occurred (and therefore a new limitations period arose) each time she received a paycheck that was lower than it would otherwise have been but for the defendant's previous discrimination.¹⁸ This argument stemmed from language in the Supreme Court's decision in *Bazemore v. Friday*, in which Justice Brennan wrote 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."¹⁹ A significant number of the circuit courts had read this language to mean that the Supreme Court had adopted a paycheck accrual rule, by which every paycheck that was affected by a prior act of discrimination was a new instance of discrimination, giving rise to a new limitations period.²⁰ The Eleventh Circuit disagreed with

¹⁶ 42 U.S.C. § 2000e-5(e)(1). The charge-filing period is 180 days, except where the allegedly aggrieved individual "has initially instituted proceedings with a State or local agency with authority to grant or seek relief" for the discriminatory practice, in which case the charge-filing period is 300 days. *Id.* In Ledbetter's case, the relevant charge-filing period was 180 days.

¹⁷ 421 F.3d at 1177.

¹⁸ *Id.* at 1181.

¹⁹ *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (per curiam) (Brennan, J., concurring in part). The *Bazemore* opinion was per curiam, but all members of the Court joined Justice Brennan's concurrence. *Id.* at 386, 388.

²⁰ *Wedow v. City of Kansas City*, 442 F.3d 661, 671 (8th Cir. 2006) ("[E]ach week's paycheck that delivers less on a discriminatory basis is a separate Title VII violation."); *Forsyth v. Fed'n Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) ("[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act."); *Shea v. Rice*, 409 F.3d 448, 452 (D.C. Cir. 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pay[s] one employee less than another for a discriminatory reason."); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1010 (10th Cir. 2002) ("Under *Bazemore*, then, pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII.").

Other courts of appeals viewed discrimination in pay as part of one continuing violation. *See, e.g., Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 349 (4th Cir. 1994) ("[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages."); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 449 (11th Cir. 1993) ("[R]ace based, discriminatory wage payments constitute a continuing violation of Title VII."); *EEOC v. Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (6th Cir. 1988) (noting that "[t]he Supreme Court . . . recognized the existence of a 'continuing violation' in *Bazemore*, where 'there was a *current* and *continuing* differential between the wages earned by black workers and those earned by white workers"); *Gibbs v. Pierce County Law Enforcement Support Agency*, 785 F.2d 1396, 1399 (9th Cir. 1986) ("The policy of paying lower wages . . . on each payday constitutes a continuing violation." (internal quotation marks omitted)).

Ledbetter's argument, holding that Goodyear was entitled to judgment as a matter of law.²¹

The Supreme Court affirmed the Eleventh Circuit's decision, holding that a paycheck accrual rule did not apply to Title VII.²² Pointing to its decisions in *United Air Lines, Inc. v. Evans*,²³ *Delaware State College v. Ricks*,²⁴ and *Lorance v. AT&T Technologies, Inc.*,²⁵ in which the Court held that the present effects of past discrimination are not actionable if pursued after the charge-filing period for the original discrimination has expired, the Court described Ledbetter's case as simply an "appl[ication of] established precedent in a slightly different context."²⁶ Like the plaintiffs in *Evans*, *Ricks*, and *Lorance*, Ledbetter could not be permitted to point to adverse effects she felt within the limitations period in order to maintain a claim charging the defendant with discriminatory acts that took place outside of that period.²⁷

²¹ 421 F.3d at 1171, 1182–83.

²² *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). The Court distinguished the language in *Bazemore*, stating that in *Bazemore*, the employer was using a facially discriminatory pay structure and that "[a]n employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used." *Id.* at 634. For a criticism of the *Ledbetter* Court's treatment of the facts in *Bazemore*, see Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. (forthcoming 2009) (manuscript at 13), available at <http://ssrn.com/abstract=1418101>, which argues that "[t]he salary discrepancies at issue there did arise from de jure segregation of two branches of the Agricultural Service. However, the Service had been integrated with the passage of Title VII, and it claimed to have eradicated the effects of past segregation on compensation."

²³ 431 U.S. 553 (1977).

²⁴ 449 U.S. 250 (1980).

²⁵ 490 U.S. 900 (1989).

²⁶ *Ledbetter*, 550 U.S. at 621; *see also Evans*, 431 U.S. at 558 ("But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists."); *Ricks*, 449 U.S. at 259 ("We conclude that . . . the limitations periods commenced to run when the tenure decision was made and Ricks was notified."); *Lorance*, 490 U.S. at 906 ("Because this diminution in employment status occurred in 1979—well outside the period of limitations for a complaint filed with the EEOC in 1983—the Seventh Circuit was correct to find petitioners' claims time barred."); *infra* notes 82–87 (discussing *Ricks*).

²⁷ As the Court put it:

The instruction provided by *Evans*, *Ricks*, [and] *Lorance* . . . is clear. . . . A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. . . . Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

Ledbetter, 550 U.S. at 628–29.

The Court's ruling angered many, including Justice Ginsburg, who expressed her disapproval with the majority's holding by taking the unusual—and highly publicized—step of reading her dissent from the bench.²⁸ Rejection of the paycheck accrual rule, Justice Ginsburg lamented, would prove disastrous for victims of pay discrimination, who will frequently fail to file a timely charge because they are often unaware of the fact that they have been victimized.²⁹ Pay information, she reasoned, is often kept secret from employees, who will not realize that they have been discriminated against when their pay raises are smaller than others' due to membership in a protected class.³⁰ Commentators quickly echoed Justice Ginsburg's disapproval, arguing that the *Ledbetter* ruling put victims of pay discrimination in the untenable and unrealistic position of having to investigate, uncover, and charge discrimination against their employer in a very short period. Most employees, critics warned, are unaware of such discrimination, unlikely to impute bad motives to their employer, and generally unwilling to rock the boat.³¹

Justice Ginsburg's dissent called upon Congress to take the lead and correct what she described as the majority's "parsimonious

²⁸ Robert Barnes, *Over Ginsburg's Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1; Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice*, N.Y. TIMES, May 31, 2007, at A1.

²⁹ See *Ledbetter*, 550 U.S. at 649–50 (Ginsburg, J., dissenting) (discussing problem of concealed pay discrimination).

³⁰ See *id.* at 650 ("Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity.").

³¹ See, e.g., *Justice Denied? The Implications of the Supreme Court's Ledbetter v. Goodyear Employment Discrimination Decision: Hearing Before the H. Comm. on Education and Labor*, 110th Cong. 26–32 (2007) [hereinafter *Justice Denied?*] (statement of Deborah L. Brake, Professor of Law, Univ. of Pittsburgh) (describing numerous challenges employees face in recognizing and proving pay discrimination under *Ledbetter* standard). Professor Brake also argued in her testimony that *Ledbetter* puts victims of pay discrimination in a Catch-22 situation, since they must complain immediately, but not too soon. *Id.* at 28. That is, *Ledbetter* requires victims of pay discrimination to complain quickly of suspected discrimination, but prior Supreme Court precedent holds that an employee who makes complaints about what she believes to be unlawful discrimination is only protected from retaliation if she had a reasonable belief that the practice violated Title VII. *Id.* (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001)). Therefore, failure to complain quickly of discrimination could lead an employee to lose her Title VII claim under *Ledbetter*, but being too quick to complain leaves an employee vulnerable to retaliation. *Id.* at 28–29. While an employee can protect herself against retaliation by filing a formal charge with the EEOC, Brake notes that this would encourage prospective plaintiffs to file a charge whenever they have the slightest inclination that discrimination might be afoot, leading to a heavy burden on the EEOC and departing from Title VII's goal of encouraging informal conciliation of disputes. *Id.*

reading of Title VII.”³² Democrats in the 110th Congress responded by putting forth a bill that would codify the paycheck accrual rule in Title VII. The House of Representatives passed the bill,³³ but the Senate failed to follow suit.³⁴ However, the 111th Congress, with a bolstered Democratic majority in both Houses and a Democrat in the White House, wasted no time in passing a nearly identical bill³⁵ and sending it to the President in the first month of his new term.³⁶ President Obama promptly signed the measure into law—his first such act as president.³⁷

B. *The Passage of the Ledbetter Act*

The Lilly Ledbetter Fair Pay Act of 2009³⁸ effectively reversed the *Ledbetter* decision and codified the paycheck accrual rule into Title VII. The Act established that an unlawful employment practice occurs “when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”³⁹ Thus, the limitations period for a victim of discrimination begins not only when the discriminatory decision is made but also resets each time the employee receives a paycheck that is “tainted” by the discriminatory decision. The plaintiff’s possible compensatory recovery is still limited to two years of back pay from the time a charge is filed,⁴⁰ but the Ledbetter Act allows many plaintiffs who would have been time-barred under the *Ledbetter* decision to file suit much later, provided that they have received a “tainted” paycheck within the limitations period.

³² 550 U.S. at 661 (Ginsburg, J., dissenting).

³³ Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong.

³⁴ Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

³⁵ See Sullivan, *supra* note 22, at 23 (noting that two bills were identical).

³⁶ Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. TIMES, Jan. 29, 2009, http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html?_r=1.

³⁷ *Id.* (noting that Ledbetter Act was first bill Obama signed into law as president).

³⁸ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

³⁹ *Id.* at 5–6.

⁴⁰ 42 U.S.C. § 2000e-5(g)(1) (2006). Back pay is generally understood to be the compensation that an employee was supposed to receive but did not because of discrimination. An employee is responsible for mitigating her damages once she has been subject to discrimination. For a discussion of these and other procedural elements of Title VII’s remedial scheme, see SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 1055–59 (3d ed. 2008).

II PROBLEMS WITH THE LEDBETTER ACT'S PAYCHECK ACCURAL RULE

In the aftermath of its passage, proponents hailed the Ledbetter Act as a triumph for equal rights and a victory of sensible thinking over stodgy legal technicalities.⁴¹ Many saw it as Congress returning the legal landscape to the status quo as it existed before the *Ledbetter* decision, when the federal courts generally presumed that Title VII was governed by a paycheck accrual rule.⁴² Few commentators stopped to consider whether the paycheck accrual rule was the best means of overcoming the perceived barriers resulting from the *Ledbetter* opinion—namely, the difficulty of discovering and bringing a charge of pay discrimination within the limitations period.

This Part argues that codification of the paycheck accrual rule was a knee-jerk reaction that failed adequately to consider important interests that arise in the context of discrimination suits, such as the societal interest in repose, the difficulty that victims of discrimination outside of the context of pay face in bringing timely claims, and the importance of treating like plaintiffs alike.

A. *The Paycheck Accrual Rule Gives Inadequate Weight to Employer Interests*

By codifying the paycheck accrual rule, Congress made the limitations period for a particular class of discrimination cases dependent on a factor totally divorced from the discriminatory intent that gives rise to a Title VII claim. There is nothing about the act of paying wages to an employee that necessarily suggests an employer is engaging in discrimination, yet under the Ledbetter Act, this is precisely what determines the relevant limitations period.⁴³

The first problem this raises is that it punishes employers for the acts of their predecessors. The law allows plaintiffs to hold today's management liable for the discriminatory intent of those who left the company long ago, even if every employment decision of the existing

⁴¹ See Collins, *supra* note 7, at A27 (describing plight of women denied right to fair pay due to infeasibility of *Ledbetter* rule).

⁴² E.g., 155 CONG. REC. S673, S701 (daily ed. Jan. 21, 2009) (statement of Sen. Mikulski) (“[M]y bill . . . simply restores the law before the Supreme Court decision.”); Collins, *supra* note 7, at A27 (“Until the Supreme Court stepped in, courts generally presumed that the 180-day time limit began the last time an employee got a discriminatory pay check, not the first. In an attempt at bipartisan comity, the Senate decided to simply restore the status quo . . .”). For a discussion of the paycheck accrual rule and its application in Title VII pay discrimination cases in federal courts prior to *Ledbetter*, see *supra* notes 19–20.

⁴³ § 3(A), 123 Stat. at 5–6 (2009).

management was made for nondiscriminatory reasons. The new law states that “an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision.”⁴⁴ This language shifts the focus of the limitations period from the acts of the employer to the effect on the employee. Thus, even if the wrongful conduct was the decision of managers long past, this law allows the employee whose wage was “tainted” to bring suit against the employer today.⁴⁵

An example illustrates the problem. Imagine that an employee receives a poor work evaluation from her supervisor in 2009 and as a result, receives a smaller pay raise than her colleagues. Unbeknownst to all, the supervisor gave the employee this poor work evaluation because she refused the supervisor’s sexual advances. Every year thereafter, her work evaluations and pay raises are comparable to those of her colleagues.⁴⁶ In 2024, after the supervisor has retired and the senior leaders at the employer have been replaced, the employee sues under Title VII for discrimination on the basis of sex. Because the employee’s latest paycheck is lower than it otherwise would have been absent the discrimination fifteen years earlier, the employee has a good claim against the employer under the Ledbetter Act, and a jury is likely to be highly sympathetic to her plea for relief. Yet the employer’s new management acted in a nondiscriminatory way. Each pay decision that it made was free of discrimination. Furthermore, there was nothing about the 2009 pay decision that should have made the employer’s new management aware that discrimination had taken place. Reviewing the employee’s file would have led the new management to conclude that a year of poor performance, not discrimination, led to the employee’s lower salary. This would have raised no red flags.

While there may be cases where it will be beneficial for new management to investigate the pay disparities that it inherited from prior

⁴⁴ *Id.*

⁴⁵ Of course, it is the corporate entity and not the individual managers who will be held accountable for discriminatory pay. The point is merely that, under the Ledbetter Act, new ownership potentially will be on the hook for the sins of their predecessors from decades earlier without notice of the past wrongful conduct.

⁴⁶ Throughout this Note, my general assumption is that, for the most part, an employee’s pay is set annually based on her prior year’s salary plus some percentage increase, often based on an assessment of employee performance. This does not account for promotions or factors like training that can lead to increased pay. Nor does it consider systems of lockstep raises (like that found in the federal government’s General Schedule pay scale or in many large law firms) or employer efforts to “smooth out” pay disparities between workers with similar backgrounds and experience. While the model is rough, I believe it is a helpful one with which to evaluate the effect of discrete acts of pay discrimination.

management in order to ferret out past discrimination, the game might not be worth the candle. New managers will have to mine through years worth of data and reports in order to second guess the motivations of their distant predecessors. Far removed in time from the relevant events, they will be in a poor position to determine which pay decisions were legitimate and which were discriminatory. Arguably, almost no employer “prepare[s] or keep[s] the sort of detailed records that would permit them to explain why Employee A got a 3% increase twelve years earlier but Employee B received a 4% raise.”⁴⁷ Surely it makes more sense for challenges to the rationale of an employment decision to be made more contemporaneously to the decision itself, before the important actors disperse and memories of the surrounding events fade.⁴⁸

Second, the paycheck accrual rule seriously undermines the societal interest in repose embodied in statutes of limitations. Justice Jackson gives perhaps the definitive statement on the purpose of such provisions:

Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.⁴⁹

The paycheck accrual rule gives little credence to this interest in repose because it renews the limitations period for pay claims with each paycheck.⁵⁰ Therefore, so long as a person is still employed by

⁴⁷ Geoff Weirich et al., *Congress Passes Ledbetter Fair Pay Act, but Defers Consideration of Paycheck Fairness Act*, STAY CURRENT (Paul, Hastings, Janofsky & Walker LLP, Los Angeles, Cal.), Jan. 2009, at 3 [hereinafter Paul Hastings Bulletin], available at http://www.paulhastings.com/assets/publications/1172.pdf?wt.mc_ID=1172.pdf.

⁴⁸ See *Justice Denied?*, *supra* note 31, at 21 (statement of Neal D. Mollen, on behalf of the U.S. Chamber of Commerce) (“When [discrimination claims are] raised promptly . . . most or all of the decisionmakers, witnesses, and human resources representatives [involved] are likely to still be working for the defendantemployer [sic] The employer’s ability to muster a defense dwindles, however, as the challenged decision recedes into the past.”).

⁴⁹ *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944); see also *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (quoting *Order of R.R. Telegraphers*).

⁵⁰ 155 CONG. REC. S673, S696 (daily ed. Jan. 21, 2009) (statement of Sen. Voinovich) (“[T]he Ledbetter legislation could allow for the filing of lawsuits long after someone knew they were subject to a discriminatory act, effectively eliminating the statue [sic] of limitations from [T]itle VII in many cases.”). See generally ANDREW M. GROSSMAN, HERITAGE FOUNDATION, *THE LEDBETTER ACT: SACRIFICING JUSTICE FOR “FAIR” PAY* (2009),

his or her alleged discriminator, he or she need not worry about the limitations period for a pay discrimination claim since a fresh 180 or 300 days to file arrives with each paycheck.

B. The Paycheck Accrual Rule Protects Only a Limited Class of Discrimination Victims

An additional problem with the Ledbetter Act's paycheck accrual rule is that it targets a select number of victims of discrimination—a group that prima facie is no more deserving of protection from harsh limitations periods than other victims of discrimination.⁵¹ While Justice Ginsburg, dissenting in *Ledbetter*, rightly pointed out that wage discrimination is often secret,⁵² it is not the only form of discrimination that is difficult to detect. The Ledbetter Act's paycheck accrual rule does nothing to help plaintiffs who want to bring claims alleging discrimination in employer decisions about, for example, bonuses. Imagine that Omega Inc. pays a one-time bonus to employees in 2009 ostensibly based on each employee's performance in the previous year. X, a woman, receives a bonus of \$500 while Y, a similarly situated man, receives \$1000. Unless X's subsequent wages are somehow tied to the amount of her bonus, she will only have 180 (or 300) days to charge her employer with discrimination. Her limitations period will not renew with each paycheck because these paychecks are not "tainted" by this one-time bonus payment. Thus, though X would have as much difficulty detecting discrimination in her bonus as she would in detecting discrimination in pay raise decisions, she receives more time to file charges in the latter than in the former.

The same is true for firings. Because the paycheck accrual rule ties the limitations period to a factor wholly unrelated to the discriminatory decision itself—the receipt of subsequent wages—only the fortuitous plaintiff still on the payroll benefits from the Ledbetter Act. The employee terminated for discriminatory reasons still has only 180

available at <http://www.heritage.org/Research/LegalIssues/lm34.cfm> (discussing purposes of statutes of limitation and arguing Ledbetter Act went too far in removal of limitations periods).

⁵¹ See Kathryn A. Eidmann, Comment, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 973 (2008) ("Future courts, reading the Fair Pay Act to repudiate the principles of *Ledbetter* only with respect to pay discrimination, likely will continue to bar relief to similarly situated Title VII plaintiffs with non-wage-related claims.").

⁵² *Ledbetter*, 550 U.S. at 649–50 (Ginsburg, J., dissenting) (discussing problem of concealed pay discrimination).

or 300 days from the firing to file a charge of discrimination, though she is in no better position to discover the discrimination.⁵³

Even the person who received discriminatorily low pay raises who has since voluntarily left the company will not be able to take advantage of the Act's more generous limitations period. Imagine three women—A, B, and C—all of whom work for Zelda Industries under the supervision of Q, a man. Each is a good employee, at least equal in every respect to Zelda's male employees. Q, however, is a sexist and treats his three female employees worse than he treats male employees. In 2009, he decides to give A and B lower pay raises than the men and fires C, saying simply that she is not a good fit for the organization. Shortly thereafter, B decides to leave Zelda Industries to work for its competitor. A stays on as a Zelda employee. Five years later, A, B, and C each are made aware that Q gave A and B lower pay raises than comparable men and that he fired C purely because of sexism. Under this hypothetical, B and C are time-barred from bringing a charge of discrimination, while A can still make a claim because she presently happens to be on Zelda's payroll. That is, only A has been subject to an "unlawful employment practice" within the last 180 or 300 days because only she has received a paycheck affected by past discrimination in that time period. Despite all being subject to discrimination, only the employee who still happens to be working for the discriminator has a live claim. It is unclear why the timeliness of these three women's claims should depend on the fortuity of whether the plaintiff remains under the employ of the defendant when she discovers the discrimination. It would thus seem that the Ledbetter Act's paycheck accrual rule fails to provide protection for many of the people it is designed to help.⁵⁴

⁵³ Of course, the plaintiff who is fired is in a much better position to discover the fact that she has been *injured* than is the plaintiff who has been given a smaller bonus because of her sex. For a discussion of the important difference between discovery of *injury* (a factual determination) and discovery of *discrimination* (a legal determination), see *infra* notes 69–71 and accompanying text.

⁵⁴ It may be true that Congress felt that it was worth sacrificing some parity between employees in order to promote greater certainty in the law. That is, while employees like A and B in the example above may both suffer a similar type of harm and be unaware of its nefarious source, Congress may have felt that A, who feels the effect of the discrimination more than B, was more deserving of protection and that extending protection to employees like B would make the rule harder to administer. For example, applying an injury discovery rule, as discussed in Part III.A *infra*, might reduce some of the disparity between employees but be costly in terms of judicial resources. There is some evidence that Congress was concerned with establishing a "bright-line" rule for determining when the limitations period for Title VII claims begins to run. See 155 CONG. REC. S673, S707 (daily ed. Jan. 21, 2009) (statement of Sen. Klobuchar) (advocating bright-line rule); *id.* at S708 (statement of Sen. Mikulski) (same). However, Congress could have taken many paths to create a bright-line rule while still achieving parity between employees. For

C. *The Paycheck Accrual Rule Gives a Strategic Advantage to Many Undeserving Individuals*

While Subpart II.B noted the many deserving plaintiffs who receive no protection from the Ledbetter Act, many undeserving plaintiffs also receive a windfall from the new law. The reason that the *Ledbetter* decision generated such uproar was the perception that it created unfairness for plaintiffs who were unaware of the fact that they had been victimized. However, the Ledbetter Act does not make the more generous limitations period subject to a plaintiff's ignorance of the discrimination against her. Even those who are fully aware that they have been the subject of discrimination receive the benefit of the law and receive a new limitations period each time they are paid.

This raises the concern that plaintiffs will unfairly use the more generous limitations period to their advantage, long after learning of the discrimination. Plaintiffs might, for example, strategically hold their suits in abeyance until "evidence has been lost, memories have faded, and witnesses have disappeared,"⁵⁵ making the cases difficult for employers to defend.⁵⁶ Certainly, there are safeguards against this kind of strategic gamesmanship: First, Title VII's two-year limit on back pay applies regardless of how long the discrimination has been ongoing;⁵⁷ second, an employer can invoke the defense of laches if prejudiced by the employee's unreasonable delay in filing suit.⁵⁸ Yet plaintiffs might find it to their strategic advantage to delay bringing

example, it might have simply lengthened the charge-filing period under Title VII or explicitly repudiated the Supreme Court's statutory interpretation that the present effects of past discrimination are not actionable if pursued after the charge-filing period for the original discrimination has expired. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (concluding that, notwithstanding present effects of past discrimination, limitations period commenced at time of original discriminatory act); *infra* notes 82–87 (discussing *Ricks*). I am grateful to Chris Terranova for bringing this issue to my attention.

⁵⁵ *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944).

⁵⁶ *See* Paul Hastings Bulletin, *supra* note 47, at 2 ("The Act thus allows an individual to file a charge of discrimination a decade—or longer—after originally being informed about the allegedly discriminatory pay decision . . .").

⁵⁷ 42 U.S.C. § 2000e-5(g)(1) (2006); 155 CONG. REC. S673, S707 (daily ed. Jan. 21, 2009) (statement of Sen. Klobuchar) (noting that current two-year limit on back pay addresses concern that employees might consciously hide cases to collect additional back pay).

⁵⁸ *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 657 (2007) (Ginsburg, J., dissenting) (arguing that laches would prevent abuse of paycheck accrual rule), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.), 123 Stat. 5; *see also Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (defining laches).

suit if deteriorating evidence and fallible memories make the employer's defense harder to mount at some later date.⁵⁹

Additionally, the paycheck accrual rule reduces employees' incentives to seek out and discover pay discrimination—an objective of statutes of limitations. Generally, we rely on plaintiffs to be reasonably diligent in investigating and vindicating their rights⁶⁰ because this serves several important societal goals. First, plaintiffs' affirmative steps to uncover wrongdoing help reduce discrimination overall.⁶¹ Second, plaintiffs diligent about asserting their rights simplify litigation: It is easier and less expensive to try cases involving recent occurrences than those involving events from the distant past.⁶² Therefore, there is a societal interest in encouraging parties to take reasonable steps to determine whether discrimination has occurred. The threat of a time-bar, though occasionally harsh, encourages such affirmative steps; the Ledbetter Act, on the other hand, rewards idle plaintiffs by allowing them to file charges even if they unreasonably failed to take steps to unearth discrimination against them.

The Ledbetter Act thus overshoots its objective by allowing some undeserving plaintiffs additional time to file a claim. If the argument for a legislative response to *Ledbetter* was that pay discrimination is different because of its secretive nature,⁶³ it seems odd that the legislative solution does not limit itself to those for whom pay discrimination was, in fact, a secret.⁶⁴

⁵⁹ In Lilly Ledbetter's case, for example, a key witness (Ledbetter's former supervisor) died between the alleged discrimination and the time Ledbetter brought suit. *Ledbetter*, 550 U.S. at 632 n.4.

⁶⁰ See *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868) ("The policy of these statutes [of limitations] is to encourage promptitude in the prosecution of remedies.").

⁶¹ See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 78 (2005) ("Requiring plaintiff diligence may also have the collateral effect of deterring defendant misconduct.").

⁶² See *Riddlesbarger*, 74 U.S. at 390 (arguing that statutes of limitation protect "parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth"); Malveaux, *supra* note 61, at 79–81 (setting forth efficiency argument for limitations periods).

⁶³ See *supra* notes 29–30 (detailing argument for different treatment of pay discrimination because of its secrecy).

⁶⁴ The Ledbetter Act has also been criticized for unnecessary vagueness and encouraging excessive litigation. The Act establishes that a new limitations period commences with respect to discrimination in compensation under Title VII whenever "an individual is affected by application of a discriminatory compensation decision or other practice . . ." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3(A), 123 Stat. 5, 5–6 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). Senator Arlen Specter of Pennsylvania, for one, argued that the lack of a definition for the term "other practices" would lead to much litigation over congressional intent. 155 CONG. REC. S673, S697 (daily

III ALTERNATIVE APPROACHES TO THE PAYCHECK ACCURAL RULE

In light of the shortcomings of the Ledbetter Act's paycheck accrual rule presented in Part II, it is worth considering alternatives that could address the problem of time-barring plaintiffs who were unaware, through no fault of their own, that they had been victimized. This Part discusses two such alternatives: (1) a so-called "injury discovery rule," in which the limitations period begins only when the plaintiff becomes aware that she has been injured, and (2) the doctrine of equitable tolling for cases in which an employer's fraud disguised the presence of pay discrimination. Each option addresses some of the shortcomings of the paycheck accrual rule and each arguably would have been available to courts even absent legislation. This Part analyzes the advantages these approaches have over the paycheck accrual rule and examines the role these alternative doctrines might play now that the Ledbetter Act is law.

A. *The Injury Discovery Rule*

In response to the perceived shortcomings of the Ledbetter bill's paycheck accrual rule, Senator Kay Bailey Hutchison of Texas introduced alternative legislation that would have started the limitations period only "when the person aggrieved has, or should be expected to have, enough information to support a reasonable suspicion of such discrimination."⁶⁵ This proposal was essentially a call to codify into Title VII a legal concept commonly known as a "discovery rule."⁶⁶ A discovery rule gives extra filing time to the plaintiff who, because of "blameless ignorance"⁶⁷ of facts vital to her case, does not bring her claim until long after the complained-of conduct has occurred.⁶⁸

ed. Jan. 21, 2009) (internal quotations omitted) (statement of Sen. Specter). This criticism is beyond the scope of this Note.

⁶⁵ 155 CONG. REC. S401, S588 (daily ed. Jan. 15, 2009). Senator Hutchinson's proposed amendment, dubbed the "Title VII Fairness Act," would have required the aggrieved individual to make a showing that he or she "did not have, and should not have been expected to have, enough information to support a reasonable suspicion" of discrimination in order to invoke the more generous limitations period. *Id.*

⁶⁶ See Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 496 (2004) (describing discovery rule).

⁶⁷ See *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (noting legislation not intended to limit claims because of "blameless ignorance").

⁶⁸ See Nancy Zisk, *In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule To Determine the Start of the Limitations Period for Pay Discrimination Claims*, 16 DUKE J. GENDER L. & POL'Y 137, 151-53 (2009) (arguing that realities of workplace demand application of injury discovery rule in pay discrimination claims).

A discovery rule addresses many of the concerns expressed by critics of the *Ledbetter* decision while avoiding some of the pitfalls of the paycheck accrual rule, such as failing to treat similar victims of discrimination equally and extending limitations periods indefinitely. It is important to note that there are several kinds of discovery rules, each of which sets the limitations period running based on the plaintiff's "discovery" of different facts. One possible form of discovery rule sets the limitations period running only when the plaintiff has or should have knowledge that she has an actionable complaint against the defendant.⁶⁹ This tolls the limitations period until the plaintiff has sufficient knowledge of particular conduct, the source of the conduct, that the conduct has caused her harm, and that the conduct is potentially actionable.⁷⁰

A more basic form of a discovery rule—the "injury discovery rule"—triggers the limitations period when the plaintiff discovers or should reasonably have discovered that she has been injured, without regard to her knowledge of who injured her or whether she has a cause of action for her injury.⁷¹ Courts could invoke an injury discovery rule in the context of pay discrimination when an employee discovers that she has received a lower pay raise than other similarly situated employees, not when she learns that the differential treatment was the product of sex discrimination. Even the less plaintiff-friendly injury discovery rule protects deserving plaintiffs and better addresses the concerns Justice Ginsburg raised in her *Ledbetter* dissent, without the drawbacks of the paycheck accrual rule.

An injury discovery rule protects employees from having their suits time-barred when they do not know they have been victimized. While the paycheck accrual rule also protects the viability of many unknowing victims' claims, it encompasses fewer potential claims than

⁶⁹ Cf. *Rotella v. Wood*, 528 U.S. 549, 555–58 (2000) (rejecting argument that limitations period for Racketeer Influenced and Corrupt Organizations Act (RICO) claim does not begin until plaintiff discovers pattern of racketeering activity sufficient to support plaintiff's claim and leaving open possibility of injury discovery rule); *United States v. Kubrick*, 444 U.S. 111, 123 (1979) (rejecting argument that limitations period for medical malpractice claim under Federal Tort Claims Act does not begin until plaintiff discovers his injuries resulted from his doctor's negligence).

⁷⁰ In the pay discrimination context, such a rule would mean that the limitations period was tolled "until the plaintiff knew or had reason to know not only that an adverse action was taken against him but that it was taken for discriminatory reasons." Sullivan, *supra* note 22, at 17 n.105.

⁷¹ See Amy Franklin et al., *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871, 916 & nn.321–22 (2008) (discussing injury recovery rule generally and with respect to RICO).

the discovery rule.⁷² Recall the hypothetical case of the discriminatory bonuses paid by Omega Inc.⁷³ Employees X and Y received bonuses, but X received less than Y because of her sex. As noted above, X would not be helped by the Ledbetter Act's paycheck accrual rule since no subsequent payment was "tainted" by the discriminatory bonus. However, if discrimination claims were instead subject to an injury discovery rule, the limitations period for X's claim would not begin until she knew (or should reasonably have known) that her bonus was smaller than those paid to comparable men.

An injury discovery rule would also prevent differential treatment of the victim who continues working for the discriminatory employer and the victim who resigns. Recall A and B from the Zelda Industries hypothetical above.⁷⁴ Both women received low pay raises because of discrimination, but A remained on Zelda's payroll, while B had long since moved on by the time she discovered that comparable men received larger raises. While a paycheck accrual rule does not help B because she is no longer receiving paychecks from Zelda,⁷⁵ the victims receive equal treatment under an injury discovery rule. Since neither employee was aware that her pay raise was less than that received by comparably situated men, their respective limitations periods would not begin to run until they discovered or should reasonably have discovered the disparity.⁷⁶

Furthermore, unlike the paycheck accrual rule, a discovery rule bars knowing plaintiffs from sleeping on their rights and bringing claims years later, at a time when the deterioration of evidence has disadvantaged the defendant's ability to defend a case.⁷⁷ An injury discovery rule encourages plaintiffs to take reasonable steps to unearth and challenge discrimination; if they fail to do so and a rea-

⁷² See *supra* Part II.B (arguing paycheck accrual rule neglects to protect many of those it is designed to help).

⁷³ See *supra* Part II.B.

⁷⁴ See *supra* Part II.B.

⁷⁵ See *supra* text accompanying note 54 (noting reasons paycheck accrual rule does not assist former employees).

⁷⁶ The situation would probably be different for the hypothetical worker C who was fired but did not know it was for discriminatory purposes. Unlike A and B who were not even aware that they were harmed (namely, that they were paid less than men), C was aware that she was fired. Thus, she had knowledge of her injury and would not be helped by an injury discovery rule. She might, however, be helped by a more expansive discovery rule in which the limitations period did not begin to run until she was aware of facts that would suggest that the reason for the firing was discriminatory. Senator Hutchinson's proposed amendment to the Ledbetter bill was arguably such a discovery rule. See *supra* note 65 and accompanying text (discussing Sen. Hutchinson's amendment). For a discussion of different types of discovery rules, see *supra* notes 69–71 and accompanying text.

⁷⁷ See *supra* Part II.C (noting that deterioration of evidence over time may disadvantage defendant's ability to mount case).

sonable investigation would have uncovered the injury, a court could find that the case is time-barred. This yields societal benefits by potentially reducing discrimination and bringing claims into court while they are still fresh.⁷⁸

1. *Could Courts Read an Implicit Discovery Rule into Title VII to Fill the Gaps Left by the Ledbetter Act?*

While Senator Hutchison's amendment failed,⁷⁹ a discovery rule may still apply to Title VII. Arguably, a discovery rule has always been implicit in Title VII and is now available to fill in the gaps left by the Ledbetter Act. The question of whether a discovery rule can be implicitly read into Title VII was clearly on the Supreme Court's radar before the Ledbetter Act passed. The Court has raised the question—without answering it—on three separate occasions in the past decade.⁸⁰ It is now possible that the question will reemerge as courts are left with the seeming injustice the Ledbetter Act creates.⁸¹ This subpart explores whether judges may read an implicit discovery rule into Title VII to avoid the Act's apparent inequity.

Judge Richard Posner, relying on the United States Supreme Court's decision in *Delaware State College v. Ricks*,⁸² was an early proponent of the argument that a discovery rule was implicit in Title VII.⁸³ In *Ricks*, Delaware State College denied tenure to a Liberian college professor, instead offering him a one-year "terminal contract."⁸⁴ The professor, Ricks, believed the college made its decision based on his national origin in violation of Title VII.⁸⁵ The Supreme Court held that "the only alleged discrimination occurred—and the filing limitations period therefore commenced—at the time the tenure decision was made and communicated to Ricks."⁸⁶ Since Ricks had

⁷⁸ See *supra* Part II.C (noting societal benefits of efficiently brought claims).

⁷⁹ 155 CONG. REC. S733, S744–45 (daily ed. Jan. 22, 2009).

⁸⁰ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.10 (2007) (declining to resolve question of whether charge-filing period for Title VII begins when injury occurs or when injury reasonably should have been discovered), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7 (2002) (same); *TRW, Inc. v. Andrews*, 534 U.S. 19, 27 (2001) ("We have also observed that lower federal courts generally apply a discovery accrual rule when a statute is silent on the issue. But we have not adopted that position as our own." (internal quotation marks and citations omitted)).

⁸¹ See *supra* Part II (discussing various problems created by Ledbetter Act).

⁸² 449 U.S. 250 (1980).

⁸³ See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (quoting *Ricks*).

⁸⁴ *Ricks*, 449 U.S. at 252–53.

⁸⁵ *Id.* at 254.

⁸⁶ *Id.* at 258.

not filed a complaint within the requisite time after that event occurred, the Court held that his claim was time-barred.⁸⁷ Judge Posner, interpreting the Court's holding ten years later in *Cada v. Baxter*, relied heavily on the *Ricks* Court's language stating that the limitations period began to run when the tenure decision was "made and communicated to Ricks."⁸⁸ According to Judge Posner, that the Court mentioned the fact that the college notified Ricks of its decision demonstrates that the limitations period does not begin to run until the plaintiff discovers his injury.⁸⁹

Justice Sandra Day O'Connor also registered her support for an implicit discovery rule in Title VII: "I see no need to resolve fully the application of the discovery rule to [Title VII] claims based on discrete discriminatory acts. I believe, however, that some version of the discovery rule applies to discrete-act claims."⁹⁰ She cited a treatise which contends that *Ricks* and other Court precedent "establish a relatively simple 'notice' rule as to when discrimination 'occurs' (so as to start the running of the charge-filing period)."⁹¹

For years, the lower federal courts, on the whole, took this one step further, saying that an injury discovery rule is implicit in federal statutes of limitations unless Congress has expressed otherwise.⁹²

⁸⁷ *Id.* at 261–62.

⁸⁸ *Cada*, 920 F.2d at 450 (quoting *Ricks*, 449 U.S. at 258).

⁸⁹ *Id.* Also making this argument is Nancy Zisk, *supra* note 68, at 153.

⁹⁰ *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 123 (2002) (O'Connor, J., concurring in part and dissenting in part) (citation omitted). On this point Justice O'Connor was writing for Chief Justice Rehnquist and Justice Breyer. *Id.* The issue in *Morgan* was the charge-filing period for allegations of a "hostile work environment" under Title VII. *Id.* at 104–05.

⁹¹ *Id.* at 123–24 (citing 2 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1349 (3d ed. 1996)).

⁹² See, e.g., *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 343 (D.C. Cir. 1991) (Ginsburg, Ruth B., J.) (applying injury discovery rule); *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991) ("The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984))); *Cada*, 920 F.2d at 450 (Posner, J.) ("[T]he 'discovery rule' of federal common law . . . is read into statutes of limitations in federal-question cases . . . in the absence of a contrary directive from Congress."); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990) ("A federal claim is generally considered to accrue when the plaintiff knows or has reason to know of the injury which is the basis of the action."); *Alcorn v. Burlington N. R.R. Co.*, 878 F.2d 1105, 1108 (8th Cir. 1989) ("A limitations period accrues when a claimant knows, or should know through an exercise of reasonable diligence, of the acts constituting the alleged violation."); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1127 (3d Cir. 1988) ("It is generally the case that a claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of injury . . ."); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) ("Under federal law, the limitations period commences when the aggrieved party has either knowledge of the violation or

Judge Posner went so far as to describe the injury discovery as a part of “federal common law,” meaning that such a rule will be read into federal statutes unless disclaimed by Congress.⁹³ Even the Supreme Court has acknowledged that lower courts generally presume, as a baseline, that an injury discovery rule applies to federal statutes.⁹⁴ The Supreme Court, however, has never adopted that position as its own, instead reserving judgment on the question.⁹⁵

Several factors suggest the Court might be hostile to the argument that an implicit discovery rule should be read into Title VII. First, the Court has stated that the “standard rule [is] that the limitations period commences when the plaintiff has ‘a complete and present cause of action.’”⁹⁶ A cause of action is “complete and present” (that is, a plaintiff could rightfully walk into court to sue) when the injurious act has occurred; it does not depend on her knowledge of the injury.⁹⁷

Next, there is the language of Title VII itself. Title VII requires that prospective plaintiffs file a charge with the EEOC within a certain period⁹⁸ “after the alleged unlawful employment practice occurred.”⁹⁹ Following the canon of statutory construction that “[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning,’”¹⁰⁰ the Court has applied a plain-sense interpretation of the word “occurred,” reasoning that an unlawful employment prac-

notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof.” (internal quotation marks omitted)); *Alexopoulos v. S.F. Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987) (“Under federal law a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action.”); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980) (“[F]ederal law . . . establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.” (internal quotation marks omitted)).

⁹³ *Cada*, 920 F.2d at 450.

⁹⁴ *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (“Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue . . .”).

⁹⁵ See *supra* note 80 and accompanying text (noting Supreme Court has raised issue of, but not decided, whether injury discovery rule can be read into Title VII).

⁹⁶ *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

⁹⁷ *Id.* (citing *Reiter v. Cooper*, 507 U.S. 258, 267 (1993)).

⁹⁸ This period is either 180 or 300 days, depending on whether a state or local investigatory body exists in the plaintiff’s state. See *supra* note 16 (discussing charge-filing period under Title VII).

⁹⁹ 42 U.S.C. § 2000e-5(e)(1) (2006).

¹⁰⁰ *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993)).

tice “occurred” on the day that it “happened.”¹⁰¹ The plain language of the statute suggests that the limitations period begins to run once the unlawful employment practice has been completed, regardless of whether the plaintiff knows or should know about it. Under the “ordinary meaning” analysis, then, it seems unlikely that an unlawful employment practice has not “occurred” until the plaintiff has been made aware of it.¹⁰²

Additionally, because the word “occurred” in Title VII’s limitations provision is a nontechnical term, it makes sense that courts should apply its common meaning. This is in contrast to the word “accrued,” which is the operative word in many limitations provisions.¹⁰³ Lower courts that have suggested that an injury discovery rule is inherent in federal statutes have latched on to the vagueness of the word “accrue” to suggest that it embodies not just the occurrence of an unlawful act but also the awareness of the prospective plaintiff that he has been injured.¹⁰⁴ That Title VII’s limitations provision uses the word “occurred” instead of “accrued”¹⁰⁵ may suggest that Congress did not intend for an injury discovery rule to apply to Title VII claims.

In addition to the language of the Title VII charge-filing provision, the existence of explicit statutory injury discovery rules elsewhere in the United States Code argues against reading an implicit discovery rule into Title VII.¹⁰⁶ Many federal statutes contain explicit instructions from Congress that the limitations period is not to commence until the plaintiff has discovered, or should reasonably have

¹⁰¹ Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 & n.5, 110 (2002). *Morgan* held that employees can recover on a hostile work environment theory of discrimination for acts occurring outside of the charge-filing period so long as the acts were part of the hostile work environment and at least one occurred within the charge-filing period. *Id.* at 104–05.

¹⁰² This was exactly the point that the Fourth Circuit made in rejecting an injury discovery rule in the Age Discrimination in Employment Act (ADEA) context. *See* Hamilton v. 1st Source Bank, 928 F.2d 86, 87–88 (4th Cir. 1990) (en banc) (“The ‘discovery’ rule that [plaintiff] would have us adopt completely abandons the statute. . . . [W]e decline to append to [the ADEA] what Congress did not place there.”). Like Title VII, ADEA’s charge-filing provision begins to run “after the alleged unlawful practice occurred.” 29 U.S.C. § 626(d) (2006).

¹⁰³ *See, e.g.*, 28 U.S.C. § 2401(b) (2006) (establishing that under Federal Tort Claims Act, limitations period begins when “such claim accrues”).

¹⁰⁴ *See, e.g.*, Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 (D.C. Cir. 1991) (describing injury discovery rule as “the general accrual rule in federal courts”).

¹⁰⁵ 42 U.S.C. § 2000e-5(e)(1) (2006).

¹⁰⁶ *See* Hamilton, 928 F.2d at 88 (noting that “when Congress has intended a discovery rule, it has proven capable of writing one” and listing examples of explicit statutory injury discovery rules in United States Code).

discovered, the fact of his injury.¹⁰⁷ The inference from this fact is that Congress knows how to prescribe a discovery rule when it wants one and that if the statute does not explicitly call for a discovery rule then courts should not infer that one applies.¹⁰⁸

Furthermore, the Court tends to interpret limitations periods literally and reject attempts to construe the language of limitations provisions liberally in order to give plaintiffs more time to bring their claims. In *Mohasco Corp. v. Silver*,¹⁰⁹ for example, the Court held that a plaintiff's Title VII suit was time-barred despite the fact that he had sent a letter to the EEOC complaining of discrimination within the limitations period.¹¹⁰ Because the plaintiff did not file his charge with the appropriate state agency in a timely way as prescribed by the law, his claim was time-barred, despite the fact that the plaintiff alerted the EEOC of his charge within 300 days of being fired.¹¹¹ This, the Court stated, was Congress's design: "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination."¹¹² The Court responded to the argument that it should interpret flexibly the literal language of the statute in the interest of fairness by concluding that "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."¹¹³ The same thing might be said in response to exhortations for the Court to interpret Title VII to include an injury discovery rule: Any inequity in Title VII's procedural requirement (before or after the Ledbetter Act) is Congress's doing and fairness can only be maintained if courts follow the language of Congress's procedural requirements rather than allowing some courts to apply them flexibly and others more strictly.

¹⁰⁷ See, e.g., 15 U.S.C. § 77m (2006) (specifying discovery rule in statute's limitations provision); 18 U.S.C. § 1030(g) (2006) (same); 22 U.S.C. § 4134(a) (2006) (same); 41 U.S.C. § 55(b) (2006) (same); 15 U.S.C. § 1681p (2006) (same); 42 U.S.C. § 9612(d)(2) (2006) (same).

¹⁰⁸ See *TRW, Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring) (noting that Congress has spoken clearly about when it wants courts to apply discovery rule); *Hamilton*, 928 F.2d at 87–88 (noting that Congress clearly stated in ADEA that statute of limitations starts running after "occurrence" of alleged violation and declining to adopt discovery rule).

¹⁰⁹ 447 U.S. 807 (1980).

¹¹⁰ *Id.* at 812–15.

¹¹¹ *Id.* at 816–17.

¹¹² *Id.* at 825.

¹¹³ *Id.* at 826.

The Court's holding in *TRW, Inc. v. Andrews*¹¹⁴ gives further reason to be skeptical of the application of the injury discovery rule in this context. The issue in *TRW* was whether a discovery rule governed section 1681p of the Fair Credit Reporting Act (FCRA).¹¹⁵ The case raised, but ultimately did not answer, the larger question of whether "all federal statutes of limitations, regardless of context, incorporate a general discovery rule unless Congress has expressly legislated otherwise."¹¹⁶ The Court did not reach the larger question because it believed that the case was resolved by the language and structure of the statute.¹¹⁷ Since the limitations provision in the statute specifically stated that a discovery rule applied in cases involving willful misrepresentation of material information but said nothing about a discovery rule in other cases,¹¹⁸ the Court invoked the canon of *expressio unius est exclusio alterius*¹¹⁹ to say that Congress meant for the discovery rule to apply only to cases involving willful misrepresentation of material information.¹²⁰

Despite the narrow grounds of the holding, the Court, in emphatic language, clearly distanced itself from the Ninth Circuit's holding that discovery rules are implicit unless Congress disclaims them: "[B]eyond doubt, we have never endorsed the Ninth Circuit's view that Congress can convey its refusal to adopt a discovery rule only by explicit command"¹²¹

In his concurrence, Justice Scalia, joined by Justice Thomas, was more explicit in his views, writing that he had very little doubt that the notion that federal statutes presumptively carry a discovery rule is

¹¹⁴ 534 U.S. 19 (2001).

¹¹⁵ 15 U.S.C. § 1681p (2006); *TRW*, 534 U.S. at 26 (noting that Court granted certiorari to resolve conflict over whether FCRA incorporates "a general discovery rule").

¹¹⁶ *TRW*, 534 U.S. at 27 (internal quotation marks omitted).

¹¹⁷ *Id.* at 27–28 (describing question of whether presumptive discovery rule applies as "a matter this case does not oblige us to decide").

¹¹⁸ At the time of the case, FCRA had a two-year statute of limitations, except in those cases where a defendant materially and willfully misrepresented any material information required under the Act, in which case, an action could be brought "within two years after [the plaintiff's] discovery . . . of the misrepresentation." *Id.* at 22 (alterations in original). Congress has since amended the FCRA to provide that the statute of limitations is the earlier of two years after the discovery of a violation or five years from the occurrence of the violation. Fair and Accurate Credit Transaction Act of 2003, Pub. L. 108-159, § 156, 117 Stat. 1952 (codified at 15 U.S.C. § 1681p (2006)).

¹¹⁹ Under this canon of statutory interpretation, which means "the [expression] of one thing suggests the exclusion of all others," the specific application of a discovery rule in one part of a statute suggests that a discovery rule was not intended for conduct other than that covered in that specific part of the statute. WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 263 (2d ed. 2006) (discussing *expressio unius*).

¹²⁰ *TRW*, 534 U.S. at 28–29.

¹²¹ *Id.* at 27.

wrong.¹²² “The injury-discovery rule,” Scalia proclaimed, “is bad wine of recent vintage.”¹²³ He argued that the presumptive rule is that the limitations period begins to run when the plaintiff has “a complete and present cause of action.”¹²⁴ When Congress wanted a discovery rule, he noted, it explicitly called for one in the statute.¹²⁵

2. *Could Courts Read an Implicit Discovery Rule into Title VII Pay Discrimination Claims To Fill in the Gaps Left by the Ledbetter Act?*

Part III.A.1 suggests that the Supreme Court would be hostile to arguments that judges should read a discovery rule into Title VII to help deserving plaintiffs who are not protected by the Ledbetter Act’s paycheck accrual rule. However, an argument could be made that, even if there is no presumptive discovery rule for federal statutes generally or Title VII specifically, the courts should apply a discovery rule to cases of pay discrimination in particular. This argument draws upon the one context in which the Supreme Court has recognized the existence of a discovery rule despite a lack of explicit statutory language calling for one: tort claims for latent diseases.¹²⁶

In *Urie v. Thompson*,¹²⁷ the Court applied an injury discovery rule to the federal tort claims of a railroad worker who developed a

¹²² *Id.* at 35–36 (Scalia, J., concurring).

¹²³ *Id.* at 37.

¹²⁴ *Id.* at 36 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)).

¹²⁵ *Id.* at 38.

¹²⁶ The Court arguably has also implicitly recognized a discovery rule for medical malpractice claims under the Federal Tort Claims Act. 28 U.S.C. § 1346(b) (2006) (providing district courts with jurisdiction over claims against United States for harms caused by federal government workers within scope of their employment). In *United States v. Kubrick*, 444 U.S. 111 (1979), the Court presented the issue as “whether [a Federal Tort Claims Act] claim ‘accrues’ within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.” *Id.* at 113. The Third Circuit had held that the limitations period does not begin to run until the plaintiff discovers that his doctor’s actions constituted malpractice. *Id.* at 121. The Supreme Court rejected this, stating “[w]e thus cannot hold that Congress intended that ‘accrual’ of a claim must await awareness by the plaintiff that his injury was negligently inflicted.” *Id.* at 123. Although the *Kubrick* Court gave no affirmative endorsement of the injury discovery rule in the medical malpractice context, in later cases the Court has presumed that injury discovery sets the clock running in medical malpractice cases and lower courts have acted accordingly. *See TRW*, 534 U.S. at 27 (citing *Kubrick* for proposition that Court has applied injury discovery rule in medical malpractice cases); *see also* *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008) (applying *Kubrick*’s injury discovery rule); *Rakes v. United States*, 442 F.3d 7, 19 (1st Cir. 2006) (same); *Massey v. United States*, 312 F.3d 272, 276 (7th Cir. 2002) (same); *RESTATEMENT (SECOND) OF TORTS* § 899 cmt. e (1979) (describing use of discovery rule by lower courts in medical malpractice context).

¹²⁷ 337 U.S. 163 (1949).

debilitating disease from breathing in dangerous particles at work. In *Urie*, petitioner sued the trustee of the Missouri Pacific Railroad under the Federal Employers' Liability Act (FELA),¹²⁸ alleging that in his thirty years of employment on the railroad line, he breathed in air from the trains which, because of his employer's negligence, contained high levels of silicon, causing him slowly over time to develop silicosis, a debilitating lung disease.¹²⁹

The Court rejected the defendant's argument that Urie's claim was barred by FELA's three-year statute of limitations.¹³⁰ The Court wrote, "We do not think the humane legislative plan intended such consequences to attach to blameless ignorance."¹³¹ Injuries such as Urie's, according to the Court, "are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves."¹³² Thus, the Court seemed to say that the limitations period does not begin to run against a plaintiff who was injured by incremental exposure to harm until that harm accumulates to the point that the plaintiff knows he has been injured.

Understanding that the Supreme Court has recognized an implicit injury discovery rule in the context of latent disease in *Urie*,¹³³ pay discrimination plaintiffs who do not receive the benefit of the Ledbetter Act's paycheck accrual rule might try to draw comparisons between pay discrimination and latent disease in urging that an injury discovery rule should apply to their cases as well.

Assume that one group of workers is hired at a slightly lower starting salary or given a lower annual pay adjustment than another group of workers based on race, color, religion, sex, or national origin.¹³⁴ Though this difference in pay is not large, over time, as each group of workers receives percentage pay raises over their former

¹²⁸ 45 U.S.C. § 51 (2006).

¹²⁹ *Urie*, 337 U.S. at 165–66.

¹³⁰ The defendant's theory was that Urie's slow-developing injury was the result of inhalations long in the past and hence was time-barred. *Id.* at 169. An alternative argument was that Urie could only sue for the aggravation to his injuries caused by the "dusty breath[s]" he took within the three years prior to his suit. *Id.* at 170.

¹³¹ *Id.*

¹³² *Id.* (quoting *Associated Indem. Corp. v. State Indus. Accident Comm'n*, 12 P.2d 1075, 1076 (Cal. Dist. Ct. App. 1932)).

¹³³ See *supra* notes 127–32 and accompanying text (discussing *Urie*).

¹³⁴ Cf. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) (noting that pay disparities often occur in small increments), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* 1–5 (2003) (citing one study in which men earned starting salaries 7.6% higher than women with equal credentials).

salary, the initial disparity rises in absolute terms.¹³⁵ With the passage of time, what was once a minimal difference in pay grows into a large wage gap.

Plaintiffs might argue that this is analogous to the latent disease in *Urie* and therefore should be treated similarly, with the limitations period beginning only after the plaintiff discovers the harm. Just as the inhalation of dangerous particles might initially only cause irritation of the lungs but can, over time, grow to become a debilitating disease,¹³⁶ the effect of discriminatory pay might start out as de minimis but develop into a more expansive wage gap. Just as we would not expect people to file suit every time they are exposed to irritants in the air, the argument goes, we would not expect plaintiffs to run to court because they received a fractionally smaller pay raise compared to people outside of their protected class.

The argument, however, likely fails for two reasons: Unlike *Urie*, the pay discrimination plaintiff (1) suffers a discrete harm and (2) arguably has adequate notice of the fact that she has been injured.

The harm recognized in *Urie* was the lung disease itself, not the individual instances of exposure to unhealthy particles.¹³⁷ Individually, “each intake of dusty breath” was not an actionable harm¹³⁸—only when combined together to form a debilitating disease did they add up to a claim for relief.¹³⁹ Pay discrimination, in contrast, is a “complete and present cause of action”:¹⁴⁰ Once an employer has decided to pay an employee less than other employees because of race, color, religion, sex, or national origin, that employee has a cogni-

¹³⁵ See *BABCOCK & LASCHEVER*, *supra* note 134, at 1–5 (illustrating how small initial disparities in pay compound over time); *VIRGINIA VALIAN*, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN 3* (1999) (“Very small differences in treatment can, as they pile up, result in large disparities in salary, promotion, and prestige.”).

¹³⁶ *Cf. Urie*, 337 U.S. at 165–66 (discussing how plaintiff developed silicosis after inhaling silica dust over thirty-year period).

¹³⁷ See *id.* at 170 (rejecting idea that each breath of harmful air constituted new legally cognizable harm).

¹³⁸ *Id.*

¹³⁹ In this way, *Urie*’s tort claim was akin to a “hostile work environment” claim, which is composed of “a series of separate acts that collectively constitute one unlawful employment practice.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (internal quotation marks and citations omitted). Like a hostile work environment action, *Urie*’s claim was “based on the cumulative effect of individual acts.” *Id.* at 115. Since the harm is the ongoing exposure to the harm rather than individual instances, it does not matter in those cases for the purpose of the limitations period if some of those acts fall outside of the limitations period so long as “an act contributing to the claim occurs within the filing period.” *Id.* at 117.

¹⁴⁰ *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997).

zable Title VII claim. Regardless of how minimal the harm, the plaintiff can sue under Title VII.¹⁴¹

The victim of pay discrimination in the hypothetical example above suffers a discrete harm at one moment, rather than a gradual exposure to harm that over time manifests itself in injury. This hypothetical employee's injury certainly worsens with time, but the tortious behavior occurred at only one point, meaning that the limitations period should begin to run at that time.¹⁴² For purposes of limitations periods, it does not matter that the impact of the past discrimination is felt (or even magnified) in the present. Absent a statute like the Ledbetter Act,¹⁴³ the limitations period begins to run when the discriminatory act occurs and is not renewed by nondiscriminatory acts that make the plaintiff feel the effects of the past discrimination.¹⁴⁴ Therefore, individuals who receive no benefit from the Ledbetter Act (for example, those victimized by an employer's discrimination in the past but who have long since left that employer) are unlikely to be able to analogize to *Urie* and get the benefit of an injury discovery rule.

Furthermore, there is a significant difference between *Urie* and the hypothetical employee discussed above when one considers each

¹⁴¹ No matter how small the harm, a plaintiff can recover punitive damages against an employer who engaged in intentional discrimination "with malice or with reckless indifference" to the employee's Title VII rights. 42 U.S.C. § 1981a(b) (2006).

¹⁴² One commentator makes the argument that pay discrimination claims are analogous to hostile work environment claims and should be treated similarly. Zisk, *supra* note 68, at 149–50. However, this comparison ignores that each instance of pay discrimination is itself an actionable harm.

¹⁴³ As one commentator has noted, the Ledbetter Act will likely be interpreted by courts as a limitations rule for pay claims rather than an admonition by Congress to the courts to reframe the judicial approach towards limitations periods generally. Eidmann, *supra* note 51, at 979.

¹⁴⁴ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007) ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); see also *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 906 (1989) (holding that present effects of past discrimination are not actionable if pursued after charge-filing period for original discrimination has expired); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (same); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (same).

Were this employee subjected, year after year, to discriminatorily low pay raises because of sex, she might be able to argue that her employer's treatment of her was "a series of separate acts that collectively constitute one unlawful employment practice," *Morgan*, 536 U.S. at 117 (internal quotation marks and citations omitted), and that the charge-filing period for the entire pay pattern should therefore reset each time the employer gives her a pay increase according to this practice. However, this rationale is unlikely to assist plaintiffs like Lilly Ledbetter who claim isolated and targeted instances of pay discrimination.

plaintiff's ability to determine that he or she has suffered harm. In cases where plaintiffs have alleged that their failure to file a charge within the limitations period was due to a lack of notice that their rights had been violated, the Supreme Court has tended to disagree, saying that despite no *actual* notice of harm, the plaintiffs were on *constructive*¹⁴⁵ or *inquiry*¹⁴⁶ notice sufficient to set the limitations clock running.¹⁴⁷ Presumably, Urie was not on constructive notice—nothing about breathing at work alerts a person to investigate whether he has come down with a rare but potentially harmful disease. Even if the circumstances of Urie's employment would lead a reasonable person to get tested for silicosis, unless he was constantly testing himself, it is unlikely that he would discover the slow-developing disease until years later.¹⁴⁸ In contrast, a pay increase or decrease is a discrete decision—one which the Court would likely consider sufficient to prompt a reasonable employee to talk with colleagues to determine whether her raise was comparable to that of her co-workers or instead based on unlawful considerations.

All of this leads to the conclusion that courts are unlikely to find that a discovery rule is implicit in Title VII for pay discrimination cases and that Congress has failed to explicitly provide for a discovery rule in such contexts. Therefore, despite its advantages—providing blamelessly ignorant plaintiffs adequate time to file their claims, treating undiscoverable discrimination the same regardless of whether the victim is still employed by the once discriminating employer, and not allowing plaintiffs the chance strategically to delay filing—a discovery rule does not appear to be, at present, a viable substitute to the flawed paycheck accrual rule codified in the Ledbetter Act, nor an option to remedy the gaps left by the new statute.

¹⁴⁵ Constructive notice is “[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of” BLACK’S LAW DICTIONARY 1090 (8th ed. 2004).

¹⁴⁶ Inquiry notice is “[n]otice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further” *Id.* at 1091.

¹⁴⁷ For example, in *United States v. Kubrick*, the Court held that although plaintiff did not know whether his doctor's treatment constituted malpractice, he knew that he had been injured by his doctor and this should have prompted him to seek out medical and legal advice to determine if he was in fact the victim of malpractice. 444 U.S. 111, 122 (1979). In *Rotella v. Wood*, the Court was satisfied that when a plaintiff is injured by an organization, he is on notice to investigate whether the organization has engaged in a pattern of racketeering sufficient to support a RICO claim. 528 U.S. 549, 555–57 (2000).

¹⁴⁸ See *supra* note 129 and accompanying text (discussing silicosis).

B. Equitable Tolling/Fraudulent Concealment

Another option for giving deserving pay discrimination plaintiffs sufficient time to file while avoiding the unfairness to employers inherent in the paycheck accrual rule is the use of the concept of equitable tolling, a familiar principle in the common law¹⁴⁹ and in Supreme Court jurisprudence.¹⁵⁰ This doctrine halts the running of the limitations period when, through an act of fraud, the defendant prevents the plaintiff from filing a claim in a timely manner.¹⁵¹ If an employer, through “fraud or concealment of the existence of a claim,” prevents an employee from discovering pay discrimination, the doctrine of equitable tolling allows for suspension of the limitations period “until the fraud or concealment is, or should have been, discov-

¹⁴⁹ See *Sherwood v. Sutton*, 21 F. Cas. 1303, 1304–05 (C.C.D.N.H. 1828) (No. 12,782) (examining application of equitable tolling in English courts of equity). As Lord Redesdale of the High Court of Chancery stated over two centuries ago: “[A]s fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate; because until discovery, the title to avoid it does not completely arise.” 2 JOHN SCHOALES & THOMAS LEFROY, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY IN IRELAND, DURING THE TIME OF LORD REDESDALE 634 (1811).

¹⁵⁰ The U.S. Supreme Court first recognized the doctrine in *Bailey v. Glover*, where the Court noted that “in suits in equity,” the prevailing rule is:

[W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

88 U.S. (21 Wall.) 342, 348 (1874); see also *Exploration Co. v. United States*, 247 U.S. 435, 446 (1918) (affirming *Bailey* rule). More than seventy years later, Justice Frankfurter reaffirmed the *Bailey* Court’s holding, stating that “[t]his equitable doctrine is read into every federal statute of limitation” and calling the matter “settled.” *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). More than forty years thereafter, Justice Blackmun described this as a “venerable principle.” *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

¹⁵¹ See *Bain & Colella*, *supra* note 66, at 504–07 (defining fraudulent concealment). Equitable tolling was initially a doctrine only invoked when the underlying offense charged was fraud. SCHOALES & LEFROY, *supra* note 149, at 634. However, courts soon learned that even when the underlying offense was not fraud, a defendant could cover up its conduct via acts of fraud, thereby calling upon the same policy reasons that inspired the equitable tolling rule for cases of underlying fraud. See *Bain & Colella*, *supra* note 66, at 515 n.91 (noting that some courts have extended equitable tolling to cases where concealment of wrongdoing is fraudulent); John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 879–80 (1933) (noting that courts emphasize defendant’s affirmative misconduct in obstructing discovery under fraudulent concealment doctrine); Note, *Developments in the Law: Statutes of Limitation*, 63 HARV. L. REV. 1177, 1220 (1950) (“When the defendant fraudulently conceals from the plaintiff the existence of a cause of action, postponement of the limitations period is as equitable as in the fraud exception, for the only difference is that the wrong in this case, although concealed, exists independently of the fraud.”).

ered”¹⁵² This doctrine, I argue, is superior to the paycheck accrual rule in addressing Justice Ginsburg’s concern that rigid limitations periods keep deserving but blamelessly ignorant plaintiffs out of court. Thus, while I recognize that the paycheck accrual rule is now the law, courts should complement it by drawing upon their common law authority to apply equitable tolling where the paycheck accrual rule falls short.

The doctrine of equitable tolling protects deserving plaintiffs who are diligent about their rights but face obstacles to bringing suit without, as the paycheck accrual rule does, rewarding plaintiffs who sit on their rights. This provides the right incentives to plaintiffs by encouraging them to be mindful of investigating and protecting their rights, since a failure to do so could lead a court to find their claim time-barred, even if they were unaware that they had been injured. At the same time, it does not subject employers to endless limitations periods. An equitable tolling regime, unlike a paycheck accrual system, allows an employer who does not engage in fraud to achieve repose as to events falling outside the limitations period.

In the context of pay discrimination,¹⁵³ plaintiffs might assert that employers have committed fraud by covering up the fact that an employee or group of employees is being paid less because of race, color, religion, sex, or national origin.¹⁵⁴ Application of equitable tolling would be appropriate where an employee had discovered a pay disparity, confronted her employer about it, and been told (falsely) that the disparity resulted from a nondiscriminatory rationale.¹⁵⁵

¹⁵² *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000). The concept of equitable tolling is often confused with equitable estoppel, in which a court will find a defendant estopped from asserting a defense of untimeliness when the defendant took actions that prevented the plaintiff from complying with the statute of limitations. Bain & Colella, *supra* note 66, at 505–06; Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797, 809 (2000). It “ultimately serve[s] little purpose” to attempt to differentiate the two doctrines. *Id.* at 810. The important point is that in both cases, conduct by the defendant prevents application of the limitations period to defeat the claim of a plaintiff who could not have been expected reasonably to uncover the claim.

¹⁵³ The Supreme Court has made clear that equitable doctrines can be applied to the Title VII charge-filing period. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (“We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”).

¹⁵⁴ See Eric Posner, *Pay Equity and the Ledbetter Act*, SLATE, Apr. 27, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/27/pay-equity-and-the-ledbetter-act.aspx> (comparing pay discrimination to fraud); see also 155 CONG. REC. S673, S698 (daily ed. Jan. 21, 2009) (statement of Sen. Durbin) (recognizing exception to stringent application of limitations law in cases of fraud and concealment).

¹⁵⁵ See, e.g., *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). In *Reeb*, the plaintiff was told that her monthly employment contract would not be renewed

Equitable tolling would also be appropriate in cases where the plaintiff was entirely unaware of the existence of the pay disparity because of an employer's efforts to conceal it. As Justice Ginsburg pointed out in her dissent in *Ledbetter*, such disparities "are often hidden from sight."¹⁵⁶ In addition to the reluctance of American workers to discuss their compensation,¹⁵⁷ employers are increasingly adopting policies that bar employees from discussing their pay with co-workers.¹⁵⁸ Though the National Labor Relations Board¹⁵⁹ and courts¹⁶⁰ have struck down workplace pay secrecy rules as violations of employees' right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection"¹⁶¹ under section 7 of the National Labor Relations Act, these rules persist.¹⁶²

because of financial considerations. Only later did she find out that the position was filled by an allegedly less qualified male, whereupon she immediately filed charges of sex discrimination under Title VII. *Id.* at 925–26. Judge Wisdom, writing for the Fifth Circuit panel, articulated the rule that the Act's charge-filing requirement should be subject to "the familiar equitable modification to statutes of limitation: the statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* at 930. While the facts of *Reeb* suggest that the court was simply applying the equitable tolling doctrine, the language of its holding suggests the court may have been articulating a discovery rule. See ESTREICHER & HARPER, *supra* note 40, at 1088 (noting confusion over *Reeb*). Regardless, *Reeb* proved to be enormously influential in the federal circuit courts. See, e.g., *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1389 (3d Cir. 1994) (adopting *Reeb* rule); *Wolfolk v. Rivera*, 729 F.2d 1114, 1117 (7th Cir. 1984) (same); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 677 n.3 (11th Cir. 1983) (following *Reeb* rule); *Wilkerson v. Siegfried Ins. Agency, Inc.*, 683 F.2d 344, 345–46 (10th Cir. 1982) (applying *Reeb* rule); *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981) (implementing equitable tolling in ADEA suit).

¹⁵⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

¹⁵⁷ See *id.* at 649–50 ("It is not unusual . . . for employees to keep private their own salaries."); Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 175–81 (2004) (noting employee reluctance to discuss pay and analyzing reasons therefor).

¹⁵⁸ See Bierman & Gely, *supra* note 157, at 168 (noting that one-third of private sector employers have adopted such pay secrecy rules); Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. MGMT. REV. 55, 57 (2007) (same).

¹⁵⁹ See, e.g., *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165, 165 (1997) (finding workplace rule that barred discussion of earnings with co-workers unlawful).

¹⁶⁰ See, e.g., *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) ("A rule prohibiting employees from communicating with one another regarding wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees' right to engage in protected concerted activity."); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919–20 (3d Cir. 1976) (upholding NLRB determination that prohibiting employees from discussing wages violated National Labor Relations Act).

¹⁶¹ 29 U.S.C. § 157 (2006).

¹⁶² See Bierman & Gely, *supra* note 157, at 173 (noting persistence of pay secrecy and confidentiality rules despite illegality); Colella et al., *supra* note 158, at 56 ("[S]ome form of pay secrecy is prevalent in many organizations, despite its potential illegality.").

Such workplace rules, I argue, should be considered fraud, as they effectively prevent employees from discovering that they have been the victims of pay discrimination. As such, the Title VII charge-filing period for employees subjected to pay discrimination in workplaces with such pay secrecy rules should be tolled until they discover (or reasonably should discover) that they have been victimized. Unlike the Ledbetter Act's paycheck accrual rule, this doctrine could reach any employee who was discriminated against and whose employer took steps to block her from discovering that fact. Therefore, courts could use equitable tolling to assist employees who, because of an employer's attempt to conceal the discriminatory acts, were discriminated against in a one-time bonus payment and those who only discovered the fact that they were paid less because of their membership in a protected class long after switching jobs or retiring.

Though the doctrine of fraudulent concealment generally applies to the sale of goods or securities, it is equally applicable in the context of workplace pay discrimination. According to the Second Circuit, "[u]nder the doctrine of fraudulent concealment, the statute of limitations will be tolled if [plaintiffs] prove three elements: (1) wrongful concealment by [defendants], (2) which prevented [plaintiff's] discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing the discovery of the claim."¹⁶³

Similarly, section 550 of the Restatement (Second) of Torts recognizes a claim for fraudulent concealment: "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the non-existence of the matter that the other was thus prevented from discovering."¹⁶⁴ As comment (b) of section 550 notes, one of the common ways in which fraudulent concealment is effectuated is "when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or when the defendant frustrates an investigation."¹⁶⁵

When an employer tells an employee that she cannot discuss her salary nor inquire about how much others earn, on pain of reprimand or discharge,¹⁶⁶ it prevents the employee from making an inquiry and

¹⁶³ *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998).

¹⁶⁴ RESTATEMENT (SECOND) OF TORTS § 550 (1977).

¹⁶⁵ *Id.* § 550 cmt. b.

¹⁶⁶ See *Fredericksburg Glass & Mirror, Inc.*, 323 N.L.R.B. 165, 168 (1997) (quoting employer-issued handbook stating that discussion of earnings with fellow co-workers "will result in dismissal and/or disciplinary action at the supervisor's discretion").

keeps her from discovering that she earns less than her male counterparts. This is undoubtedly material information for an individual trying to determine if her rights have been violated by discriminatory pay decisions.

Critics of this argument might contend that equitable tolling requires “*active misleading* by the defendant”¹⁶⁷ and that absent some affirmative misleading statement by an employer (for example, “We are terminating your employment because of financial considerations, not because of your race”),¹⁶⁸ there is no fraud. While this argument rightly recognizes that the employer has no duty to disclose to an employee information about what others earn,¹⁶⁹ it misunderstands the nature of the employer’s wrongful conduct in threatening to punish employees who discuss pay with their co-workers. The reason courts maintain that equitable tolling requires active misleading or affirmative conduct is to demonstrate that an employer does not commit fraud when it merely stays silent about its allegedly discriminatory practices or denies the allegations.¹⁷⁰ The wrongful conduct addressed here is not the employer’s failure to disclose this information, but rather its obstruction of an employee’s inquiry into whether she is a victim of pay discrimination. Thus, this analysis does not suggest that an employer commits fraud—and that the limitations period is therefore tolled—every time it engages in pay discrimination and fails to inform the employee thereof. Rather, the employer perpetrates fraud when it “frustrates [the employee’s] investigation”¹⁷¹ by placing roadblocks in the way of her efforts to uncover pay discrimination.

This proposed claim raises a question about intent: For a fraudulent concealment claim to prevail, must the employer have adopted the pay secrecy rule with the *intent* of obstructing an employee’s

¹⁶⁷ *Forbes v. Eagleson*, 228 F.3d 471, 487 (3d Cir. 2000); *see also* *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) (“[T]he plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief.”); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 875 (2008) (“Courts generally refuse to toll the limitations period based on the employee’s lack of information unless the employer actively concealed relevant facts or actively misled the employee into believing she did not have a claim.”).

¹⁶⁸ *See, e.g., supra* note 155 and accompanying text (discussing affirmative, untruthful statements that mislead plaintiffs into believing they have no pay discrimination claim).

¹⁶⁹ The employer-employee relationship is not one that normally creates a duty to disclose. *See* RESTATEMENT (SECOND) OF TORTS § 551 (1977) (listing situations in which parties have disclosure obligations).

¹⁷⁰ *See, e.g., Rutledge*, 576 F.2d at 250 (contrasting “affirmative conduct” designed to mislead with “a simple denial of wrongdoing”).

¹⁷¹ RESTATEMENT (SECOND) OF TORTS § 550 cmt. b (1977).

inquiry into potential pay discrimination, or is the mere fact that the rule interferes with such an inquiry sufficient to toll the running of the limitations period? I would argue that specific intent to obstruct an investigation of pay discrimination is not necessary so long as the employer adopted the rule with a general intent to discourage discussions about pay. According to the Restatement (Second) of Torts, for fraud to be actionable, the fraud must be “for the purpose of inducing another to act or to refrain from action in reliance upon it.”¹⁷² Where employers impose pay secrecy rules, they clearly intend to induce employees to refrain from discussing pay. A benign motive (that is, not wanting employees who earn less to feel inferior to higher earners) is insufficient for a pay secrecy rule to survive scrutiny under the National Labor Relations Act,¹⁷³ nor should it be enough to allow such a rule to effectively block a plaintiff from uncovering material information regarding her possible Title VII pay discrimination claim.

Once one appreciates the extent to which employer rules prevent an individual from determining that she has been the victim of unlawful pay discrimination, it becomes clear that equitable tolling of the Title VII charge-filing period is appropriate. It is insufficient to respond that an employee is on inquiry notice of the fact that she has been discriminated against.¹⁷⁴ Even if some event in the workplace spurs an employee to investigate whether she had been the victim of unlawful pay discrimination,¹⁷⁵ workplace pay secrecy rules will effectively block her from uncovering the illegal conduct. The case law demonstrates that plaintiffs frequently do not discover that they have been victimized until years later, and then often only by chance or anonymous tip.¹⁷⁶ Therefore, a judicial rule that victims of pay discrimination are on inquiry notice that their rights have been violated

¹⁷² *Id.* § 525.

¹⁷³ *See supra* notes 159–60 and accompanying text (noting that workplace restrictions on pay discussions violate National Labor Relations Act).

¹⁷⁴ *See supra* note 146 (discussing inquiry notice).

¹⁷⁵ It will often be the case that an employee will suffer from pay discrimination without ever having reason to believe that she was victimized. Imagine, for example, a discretionary pay raise given only to men, or only to whites, or only to Christians. If no one mentions the pay raise to others, those denied the benefit would have no reason to know that their rights had been violated. *Cf. Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsburg, J., dissenting) (“The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises.”), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

¹⁷⁶ *See, e.g., Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1008–09 (10th Cir. 2002) (noting that African-American plaintiff was unaware that her starting salary had been set lower than her co-workers’ salaries until she received anonymous listing of salaries seven years later); *McMillan v. Mass. Soc. for the Prevention of Cruelty to Animals*, 140 F.3d 288,

stretches a legal fiction past its breaking point. Instead, courts (at least in cases where the Ledbetter Act's paycheck accrual rule does not apply)¹⁷⁷ should use the doctrine of equitable tolling when an employee uses due diligence to discover the existence of a pay discrimination claim and is obstructed in her inquiry by a workplace rule that punishes discussions of pay. In those cases, the limitations period should be tolled until the employee discovers (or reasonably should discover) that she received less pay than similarly situated men.

This inquiry will not always be easy. Courts applying the doctrine of equitable tolling in this context will always have to address many difficult questions: What constitutes due diligence in discovering one's claim? Need one actually have talked with others about pay and been subjected to or warned of discipline from the employer? Alternatively, would an affidavit from the employee stating that she would have inquired about co-worker wages but for her fear of employer discipline be adequate? And of course, the question of when a reasonable person should have discovered the existence of a claim is always difficult to answer.¹⁷⁸ But these are questions that courts have tackled for a long time in the context of the many discovery rules in the United States Code¹⁷⁹ and are perfectly capable of addressing. As cases are decided, the relevant standards of conduct will become clearer for litigants.

The equitable tolling doctrine protects the most worthy plaintiffs, those who are diligent about their rights, against the stringency of Title VII's short limitations period, without creating the problems of the paycheck accrual rule—overprotecting certain plaintiffs who do not deserve such protection¹⁸⁰ and underprotecting others who do.¹⁸¹ While equitable tolling on its own does not cover all victims of pay discrimination—applying only to those whose employer engaged in fraud that blocked them from discovering the fact that they had been subject to discrimination—it helps those most in need without incen-

296 (1st Cir. 1998) (noting that plaintiff for years had been unaware that her salary was lower than that of her male peers until peers' salaries were printed in newspaper).

¹⁷⁷ See *supra* Part II.B. (arguing that paycheck accrual rule fails to protect some victims of pay discrimination).

¹⁷⁸ See 155 CONG. REC. S673, S708 (daily ed. Jan. 21, 2009) (statement of Sen. Mikulski) (criticizing amendment to bill that would have required courts to look to when plaintiff should reasonably have discovered cause of action as judicially burdensome).

¹⁷⁹ See *supra* note 107 (listing statutory discovery rules).

¹⁸⁰ See *supra* Part II.C (discussing how paycheck accrual rule could encourage strategic behavior by undeserving individuals or incentivize inattention to discrimination).

¹⁸¹ See *supra* Part II.B (discussing how paycheck accrual rule only protects limited class of discrimination victims).

tivizing the stale suits that will likely accompany the Ledbetter Act's paycheck accrual rule.

Critics of this proposal might contend that it does not do enough to help those who are afraid of "rocking the boat" by challenging an employer's pay practice. However, a balance must be struck between giving employees an opportunity to seek redress and allowing employers to achieve repose for events in the distant past. I argue that equitable tolling does a far better job balancing all relevant interests—protecting against discrimination, encouraging repose, and ensuring that parties are diligent about protecting their rights—than the Ledbetter Act does. It sends a message that employees have an obligation to be diligent about protecting their rights, both to discourage discrimination and to promote societal repose. At the same time, it assures employees that they will not be denied access to judicial redress when they have done everything right, but have been stymied by their employer's efforts to keep them from discovering how their pay compares to that of their colleagues. While Congress has seemingly chosen its desired remedy for the problem created by the *Ledbetter* opinion, equitable tolling can be utilized to prevent substantial injustice to those left behind by the paycheck accrual rule.

CONCLUSION

This Note discusses the Ledbetter Act and highlights the implications of its paycheck accrual rule, which resets the limitations period for pay discrimination claims with each paycheck an employee receives, provided the paycheck reflects some past discriminatory decision. It has argued that this rule is a poor solution to the problem highlighted by the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber*: the difficulty that victims of pay discrimination face in detecting discrimination and bringing suit within 180 or 300 days of the discriminatory act. Specifically, this Note demonstrates that the Ledbetter Act gives inadequate weight to the societal interest in repose and protects select victims of pay discrimination without offering anything to other victims who are equally, if not more, deserving of extended filing time. The Note then proposed two alternative rules that would better address the problem of pay discrimination: a discovery rule wherein the limitations period would only begin to run once a plaintiff discovered or should reasonably have discovered that her pay raise was lower than that given to others; and a fraudulent concealment rule wherein individuals whose employers prevented them from discussing pay with their co-workers have their limitations period tolled until they discovered, or reasonably should

have discovered, the fact that they were subject to discrimination. Concluding that the discovery rule has been foreclosed by Congress and the courts, this Note argues that the fraudulent concealment rule is a sensible, viable option for giving people who are blamelessly ignorant of the fact that they have been discriminated against access to the courts, which better preserves the principle of repose embodied in Title VII's limitations period than does the Ledbetter Act. Although Congress is unlikely to reverse course quickly and revoke the Ledbetter Act in favor of a pure system of equitable tolling (whether codified or based in common law), this Note argues that equitable tolling does a better job balancing all the interests involved than does the paycheck accrual rule. For the time being, courts should apply equitable tolling to plaintiffs who fall outside of the Ledbetter Act's scope. Though this might create a patchwork of procedural protections for pay discrimination plaintiffs, it takes a needed step toward increased fairness for deserving plaintiffs.