CLOSING ONE DOOR AND OPENING ANOTHER:  
THE END OF THE PAYCHECK ACCRUAL RULE AND THE NEED FOR A LEGISLATIVE DISCOVERY RULE

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I. INTRODUCTION

In its recent decision of Ledbetter v. Goodyear Tire & Rubber Co., the Supreme Court of the United States imposed a new limitation on plaintiffs seeking recovery for wage discrimination under Title VII of the Civil Rights Act of 1964. In an opinion authored by Justice Alito, the Court reversed established circuit court law in holding that each paycheck received by a plaintiff that is "infected" by a prior discriminatory gender- or race-based decision does not, on its own, constitute an unlawful practice. Prior to this decision, courts operated under the "paycheck accrual rule," which tolled the 180- or 300-day limitations period for filing a complaint with the Equal Employment Opportunity Commission (EEOC) each time a plaintiff received a paycheck that was allegedly tainted by "prior discriminatory conduct . . . no matter how long ago the discrimination occurred." In Ledbetter,

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2 Id. at 645–46; see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).
3 Ledbetter, 550 U.S. at 621.
4 Id. at 633; see also Bazemore v. Friday, 478 U.S. 385, 395 (1986) (per curiam); see also 42 U.S.C. § 2000e-5(e)(1). The statute provides:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief . . . or to institute criminal proceedings . . ., such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred . . . .

the Court chose to limit the application of the paycheck accrual rule to situations in which an employer issued paychecks in accordance with a facially discriminatory pay structure, or when the continuation of the salary disparity stemmed from a current discriminatory intent. The new limitations imposed by the Court placed employees who have unknowingly received paychecks that further past discrimination, but are nevertheless implemented pursuant to a "facially nondiscriminatory and neutrally applied" pay structure, beyond the protection of Title VII after the limitations period has tolled. In her vehement dissent, Justice Ginsburg stated that "any annual pay decision not contested immediately . . . becomes grandfathered, a fait accompli beyond the province of Title VII ever to repair." Justice Ginsburg characterized the Court's decision as a "cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose," and called upon the legislature to correct the Court's ruling. In the wake of the Court's holding, the majority of plaintiffs must have filed their claims with the EEOC within 180 or 300 days of the allegedly discriminatory pay decision or otherwise lose their Title VII claim forever. In response to the Court's ruling, Congress passed the Lilly Ledbetter Fair Pay Act into law to restore the paycheck accrual rule to its previous condition. As drafted, the Act states that "an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision or other practice,

5 Ledbetter, 550 U.S. at 636–37.
6 Id. at 634.
7 Id. at 637 (quoting Lorance v. AT&T Tech., Inc., 490 U.S. 900, 911 (1989)). The new limitations are particularly troublesome when viewed in conjunction with the observation that most employees are not given sufficient access to information to decipher when wage discrimination has taken place and, therefore, would likely miss the opportunity to bring their claim due to a lack of adequate information. See 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, 168 (2004); see also infra note 142 and accompanying text.
8 Id. at 644 (Ginsburg, J., dissenting).
9 Id. at 661; see also Jeffrey M. Fisher, In the Wake of Lorance v. AT&T Technologies, Inc.: Interpreting Title VII’s Statute of Limitations for Facially Neutral Seniority Systems, 1990 U. ILL. L. REV. 711, 712 n.7 (1990) (recognizing the congressional intent to apply Title VII in a broad manner).
10 Ledbetter, 550 U.S. at 661 (Ginsburg, J., dissenting).
11 Id. at 628–29.
12 153 CONG. REC. H8940-02, H8945 (2007) (statement of Rep. Hirono) ("The bill reinstates the paycheck accrual rule, a law widely interpreted by eight Federal circuit courts to mean that the 180 day time limit for filing a charge of discrimination with the [EEOC] begins each time a discriminatory paycheck is received.").
including each time wages, benefits, or other compensation is paid . . . ." The Act allows employees to file timely claims of employment discrimination with the EEOC within 180 or 300 days of the issuance of any paycheck that has been "infected" by a prior discriminatory pay decision. The law's proponents claim that the Court in Ledbetter "ignore[d] the realities of the average employment environment," and that the law restores the "broad, remedial purpose [of Title VII], to make persons whole for injuries suffered on account[] of unlawful employment discrimination." During legislative hearing, its opponents maintained that passage of the bill would "make it impossible for businesses to defend themselves against actions that occurred years in the past," "discourage the prompt investigation and resolution of discrimination," and encourage future discrimination by creating an incentive for businesses to avoid hiring members of protected classes.

This Comment considers the Ledbetter decision in light of the broad remedial purpose of Title VII and ultimately concludes that, although the Court accurately characterized facially neutral pay structures applied in a discriminatory manner as outside the scope of the continuing violation doctrine, the nature of wage discrimination compels an equitable tolling of the limitations period. Specifically, Congress should write a broad discovery rule into Title VII that would apply to claims involving wage discrimination. Under this discovery rule, the limitations period would toll until the plaintiff knew or should have known (1) of the pay decision and (2) that the decision may have been discriminatory. The plaintiff does not need to infer the intention of his or her employer; however, the plaintiff must have some notice that the pay decision could have been influenced by a discriminatory motive. It would generally suffice under this standard

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18 Id. at H8946 (statement of Rep. Biggert).
19 Id. at H8947 (statement of Rep. Bachmann) ("[W]omen may very well experience real discrimination in that they may find that future employers are reluctant to hire them . . . .").
20 A discovery rule can act to "postpone[] the triggering of a limitations period from the date of the injury to the date a plaintiff should reasonably have discovered the injury." Adams v. CBS Broad., Inc., 61 F. App'x 285, 287 (7th Cir. 2003) (citing Clark v. City of Braidwood, 318 F.3d 764, 767 (7th Cir. 2003)).
for a plaintiff to know that he or she is getting paid less than his or her co-workers. While this standard has been adopted by some of the lower courts, it is far from widely accepted.

Part II of this Comment provides a summary of the Ledbetter decision and other pre-Ledbetter case law. It discusses the emergence of the continuing violation theory, its relation to the paycheck accrual rule, and the Court's prior treatment of wage discrimination. Part III of this Comment demonstrates that the continuing violation doctrine and paycheck accrual rule are not the proper means by which victims of wage discrimination should receive special treatment, although the unique circumstances accompanying such claims do merit some other sort of equitable advantage to plaintiffs. Specifically, Part III discusses the problems inherent in the Ledbetter Fair Pay Act. Part IV examines the application of the discovery rule in employment discrimination cases by the lower courts and proposes a discovery rule amendment to Title VII as a sufficient yet modest response to the problem of latent wage discrimination.

II. LEDBETTER V. GOODYEAR: THE REJECTION OF THE PAYCHECK ACCRUAL RULE

Lilly Ledbetter brought a claim against Goodyear, her employer, claiming that discriminatory evaluations of her job performance, several of which occurred outside the charging period, were affecting her current salary. Ledbetter claimed that her current paychecks "carried forward" the effects of prior, uncharged discrimination decisions. In asserting her claim, Ledbetter relied on the continuing violation doctrine, as well as the paycheck accrual rule. Ledbetter contended that, when read in unison, these doctrines allowed her to assert her claim based upon the discriminatory acts that took place

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21 See infra Part IV. The proposed standard is fact-intensive and must be applied on a case-by-case basis.
22 See, e.g., Adams, 61 F. App'x at 287.
23 It is worth noting that many states have adopted their own statutes dealing with discrimination in the workplace, many of which are strict liability statutes, thus providing plaintiffs with relief in many situations where Title VII may not apply. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2004).
24 In addition to Title VII, the Ledbetter Fair Pay Act amended the Age Discrimination in Employment Act of 1967, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973. The discovery rule advocated by this Comment could apply with equal force to each of these provisions. In light of the nature of Lilly Ledbetter's claim, however, this Comment will only address Title VII.
26 Id. at 625.
27 Id. at 633-37.
outside of the charging period.\textsuperscript{28} The Court, however, held that the paycheck accrual rule did not apply to facially nondiscriminatory and neutrally applied pay structures and affirmed the denial of Ledbetter's claim.\textsuperscript{29} The Court's decision demonstrates how the broad application of these doctrines could lead to future abuses and inequitable decisions. This Comment, however, will illustrate how the application of a robust discovery rule would provide plaintiffs such as Lilly Ledbetter with an adequate remedy while still safeguarding the integrity of Title VII.\textsuperscript{30}

A. The Facts

Lilly Ledbetter was employed by Goodyear Tire and Rubber Company for nearly twenty years, spanning from 1979 to 1998.\textsuperscript{31} In July 1998, Ledbetter filed a charge with the EEOC, claiming sex discrimination under Title VII.\textsuperscript{32} Goodyear's salary structure was based upon supervisor evaluations, and Ledbetter claimed that some of her supervisors had intentionally given her poor reviews because she was a woman.\textsuperscript{33} Ledbetter alleged that she was paid less over the twenty years of her employment because of these early reviews and that her salary at the time of her early retirement was affected by these decisions.\textsuperscript{34} Upon discovering that her supervisors may have discriminated against her when conducting her early reviews, Ledbetter inquired further and learned that she was the lowest paid manager at Goodyear.\textsuperscript{35} After taking an early retirement, Ledbetter filed a charge of discrimination with the EEOC.\textsuperscript{36}

At trial, a jury found that Ledbetter had established a claim under Title VII and awarded her backpay and damages.\textsuperscript{37} On appeal, the U.S. Court of Appeals for the Eleventh Circuit held that the Title

\textsuperscript{28}Id. at 621, 623.

\textsuperscript{29}Id.

\textsuperscript{30}See infra Part IV.

\textsuperscript{31}Ledbetter, 550 U.S. at 621.

\textsuperscript{32}Id.

\textsuperscript{33}Id. at 621–22.

\textsuperscript{34}Id. at 622.


\textsuperscript{36}Ledbetter, 550 U.S. at 621.

\textsuperscript{37}Id.
VII claim was time-barred because Ledbetter could not point to any discriminatory act within the limitations period of 180 days from when she brought her claim. While a jury had paired the pay decisions that took place prior to the charging period but were still affecting Ledbetter's pay to a discriminatory intent, the circuit court found that there was no discriminatory intent attached to the only two pay decisions that took place during the limitations period. Ledbetter filed a petition for a writ of certiorari, seeking review of the following question: "Whether a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." 

B. Title VII

Title VII of the Civil Rights Act of 1964 has been described as "one of the most effective federal antidiscrimination statutes in employment discrimination law..." The statute prohibits an employer from discriminating "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." Title VII also prohibits discrimination against employees because of their association with another who is a member of a protected class or as retaliation against employees who oppose unlawful discrimination. In order to invoke Title VII, an employee must file a claim with the EEOC within 180 or 300 days of the allegedly unlawful act, depending on whether the state has its own State Fair Employment Practices Agency (FEPA) authorized to contest the challenged practice.

58 Id. at 622-23.
59 Id. at 623.
60 Id.
43 Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."). (emphasis in original).
44 42 U.S.C. § 2000e-3(a); see also Twisdale v. Snow, 325 F.3d 950, 952 (7th Cir. 2003).
Our courts have recognized two modes of discrimination that are reprehensible under the Act: disparate treatment and disparate impact.\textsuperscript{46} Disparate treatment claims consist of an employment practice coupled with a discriminatory intent.\textsuperscript{47} Disparate impact claims encompass employment practices that are not coupled with a discriminatory intent but nevertheless have a disparate effect "on one group more than another and which cannot be justified by business necessity."\textsuperscript{48} The majority of claims filed under Title VII are disparate treatment claims.\textsuperscript{49} Regardless of the type of claim, Title VII permits a successful plaintiff to recover back pay for a period of up to two years before the charge of discrimination was filed with the EEOC.\textsuperscript{50}

As originally enacted, Title VII was targeted at the implementation of systematic practices of employment discrimination.\textsuperscript{51} As the case law has developed, courts have generally interpreted Title VII as encompassing a broad remedial purpose and have operated under the presupposition that "[i]t is . . . the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."\textsuperscript{52} To adhere to this broader purpose, the courts have developed common law doctrines allowing plaintiffs to toll the limitations period and assert their claims in situations in which the alleged discriminatory act may be hard to ascertain, is part of a continuing policy, or requires a cumulative analysis.\textsuperscript{53}

\textsuperscript{46} Debra H. Goldstein, \textit{Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both}, 56 ALA. LAW. 294, 297 (1995).
\textsuperscript{48} Goldstein, \textit{supra} note 46, at 297; \textit{see also} Int'l Bd. of Teamsters v. U.S., 431 U.S. 324, 336 n.15 (1977) (explaining that disparate impact cases are based on "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity").
\textsuperscript{49} Goldstein, \textit{supra} note 46, at 298.
\textsuperscript{51} Cheng, \textit{supra} note 41, at 1419 n.1.
\textsuperscript{52} Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); \textit{see also} Ledbetter, 550 U.S. at 661.
\textsuperscript{53} \textit{See generally} Lex K. Larson, \textit{Part XX Title VII: Administrative Prerequisites to Court Suit}, 4-72 EMPLOYMENT DISCRIMINATION § 72.08 (2007). Larson explains the nature of the continuing violation theory as follows:

The idea . . . is that the employer action, though outside of the time period, is a part of a continuing policy or practice that continues to the present . . . . Courts in recent times have endorsed the use of "continuing violation" when there is an overt and continuing employer policy or when there exists a hostile work environment of sexual or racial harassment. Some courts also recognized the applicability of continuing violation theory when the plaintiff is subjected to a series of discrete
C. The Majority Opinion

In an opinion authored by Justice Alito, the Court affirmed the appellate court's denial of Ledbetter's claim. The Court focused specifically on the fact that Ledbetter's claim was one of disparate treatment, which requires that the practice in question be coupled with a discriminatory intent. The Court emphasized that Ledbetter did not allege that the conduct that took place within the EEOC charging period was coupled with discriminatory intent. Rather, Ledbetter argued that the conduct that took place within the EEOC charging period "carried forward" the discriminatory intent of conduct which was itself time-barred. Relying on precedent, the Court held that "a pay-setting decision is a discrete act that occurs at a particular point in time." The Court emphasized that discriminatory intent associated with past discrete pay decisions could not carry forward to timely discrete acts, unless those timely acts were themselves discriminatory. Because Ledbetter could not point to an actionable offense within the limitations period, the Court denied her claim.

but related employer violations, some but not all of which occur within the filing deadline period.

Id.

54 Ledbetter, 550 U.S. at 621.
55 Id. at 624.
56 Id.
57 Id.
58 Id. at 621.
59 Id. at 631–32; see also Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). The Court stated this proposition clearly in Morgan, declaring that discrete discriminatory acts . . . are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

Morgan, 536 U.S. at 114. Ledbetter did not claim that the timely pay decisions or the timely issuing of her paychecks were discriminatory on their own, but rather that "the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period." Ledbetter, 550 U.S. at 624 (citing Brief for Petitioner at 22). Similarly, she maintained that "the 1998 decision was unlawful because it 'carried forward' the effects of prior, unchanged discrimination decisions." Id. at 625 (citing Reply Brief for Petitioner at 20).

60 Ledbetter, 550 U.S. at 625–26.
The Court's opinion provided a summary of the established precedent in the area and drew analogies to Ledbetter's claim. The Court first drew attention to United Air Lines, Inc. v. Evans, which was the Court's first main interpretation of the continuing violation theory. The continuing violation theory has been described as "one of the most confusing theories in employment discrimination law." Generally, it "allows courts to . . . extend the limitations period so that plaintiffs may recover in part based on defendants' discriminatory conduct occurring before that period."

The continuing violation theory may be invoked by plaintiffs who claim they are presently feeling the effects of a discriminatory act that took place outside of the limitations period, such as plaintiffs victimized by a hostile work environment that provides no specific discrete act of discrimination but, when taken as a whole, culminates in a discriminatory practice. Often, the current discriminatory act gives effect to the previous discrimination by providing the impetus through which the victim is finally harmed by the prior discrimination. The theory is based upon the supposition that the defendant's discriminatory acts that occurred prior to the limitations period are "part of a continuing policy or practice that continues to the present, and therefore constitutes a single actionable event." However, a plaintiff can only invoke the continuing violation doctrine when a timely discriminatory act exists. Succinctly stated, "[t]he continuing violations doctrine . . . reflect[s] the recognition that discrimination develops and burdens its victim over time and that it is often difficult to discern until an extended pattern emerges." In response to an overzealous application of the continuing violation theory, however,
both the Supreme Court and circuit courts have been slowly under-
cutting its power.70

The Supreme Court first commented on the continuing viola-
tion doctrine in United Air Lines, Inc. v. Evans71 in 1977 and, in doing
so, seriously limited its application. Evans involved a flight attendant
who was forced to resign because United Air Lines ("United") would
not employ a married flight attendant.72 Evans did not immediately
file her claim with the EEOC, but waited until she was rehired in
1972, at which time United treated her as a new employee.73 Evans
claimed that the discriminatory system United had employed caused
her to lose her seniority status.74 While the Court recognized that
United's seniority system gave present effect to a past discriminatory
act,75 it concluded that Evans' claim was time-barred because no
present violation existed.76 In so holding, the Court stated that
[a] discriminatory act which is not made the basis for a timely
charge is the legal equivalent of a discriminatory act which oc-
curred before the statute was passed. It may constitute relevant
background evidence in a proceeding in which the status of a cur-
rent practice is at issue, but separately considered, it is merely an
unfortunate event in history which has no present legal conse-
quences.77

The Court's application was substantially narrower than that of the
federal circuit court prior to this decision.78 Plaintiffs could no long-
er breathe life into past discriminatory acts of which they continued
to feel the effects unless they could point to a present violation of the

70 Matthew Sutter, Title VII & the ADA's Continuing Violation Theory and the Single
Filing Rule: A Guide to How to "Bootstrap" and "Piggyback" Stale Claims onto Fresh Ones, 23
QUINNIPIAC L. REV. 299, 320 (2004). Sutter commented on the continual retreat of
the continuing violation theory by stating:
[S]ince the announcement of the hostile work environment and the
paycheck approach, the Supreme Court and other lower courts have
been curbing the application of the continuing violation theory. Modern-
ly, the continuing violation theory requires that the claimant tie to-
gether numerous instances of adverse treatment into a narrative of es-
calating harm—thereby limiting the theory's applicability to many
claimants.

Id. at 320.
72 Id. at 554.
73 Id. at 555. United had rescinded its no-marriage policy in 1968. Id.
74 Id.
75 Id. at 557.
76 Id. at 558.
77 Evans, 431 U.S. at 558.
78 See generally Larson, supra note 53.
statute or one which occurred during the limitations period.\textsuperscript{79} The requirement of a present violation is now central to the continuing violation theory.\textsuperscript{80}

In his \textit{Ledbetter} opinion, Justice Alito stated that the Court in \textit{Evans} had "rejected an argument that is basically the same as Ledbetter's."\textsuperscript{81} According to Justice Alito, \textit{Evans} made it clear that a present violation must exist in order to invoke the continuing violation theory\textsuperscript{82} and that the Court could not impute the discriminatory intent of a previous act upon a subsequent impartial decision.\textsuperscript{83} The Court posited that the "relationship between past discrimination and adverse present effects was the same in \textit{Evans} as it is here."\textsuperscript{84} Applying this reasoning to Ledbetter's claim, the Court observed that the prior decisions were not actionable simply because their effects continued into the charging period.\textsuperscript{85} The Court recognized that it could not attach the discriminatory intent associated with the decisions that were made beyond the reach of the charging period to subsequent acts; without a present discriminatory intent, Ledbetter's claim did not constitute a continuing violation.\textsuperscript{86}

The \textit{Ledbetter} Court also relied on \textit{Delaware State College v. Ricks}.\textsuperscript{87} \textit{Ricks} dealt with a college's allegedly discriminatory decision to deny an African American professor tenure.\textsuperscript{88} The reasoning of this case, as in \textit{Evans}, focused on the time of the actual discriminatory act, as opposed to when the plaintiff felt the effects of the discrimination.\textsuperscript{89} Ricks, who had gained knowledge of the college's decision to deny him tenure in 1974, filed his claim with the EEOC over a year later.\textsuperscript{90} Ricks asserted that his claim was not time-barred because it was filed

\begin{itemize}
\item \textit{Evans}, 431 U.S. at 558.
\item See supra notes 64-70 and accompanying text.
\item \textit{Id.} at 625-66.
\item \textit{Id.} at 629.
\item \textit{Id.} at 637.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Ricks}, 449 U.S. at 257.
\item \textit{Id.} at 258 (noting that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful" (quoting Abramson v. Univ. of Haw., 594 F.2d 202, 209 (1979) (emphasis omitted))).
\item \textit{Id.} at 258.
\end{itemize}
within 180 days of the termination of his employment when he first began to feel the effects of the discriminatory decision.\textsuperscript{91}

The Court posited that the limitations period began to run when Ricks learned of the discriminatory decision, not a year later when his employment ended as a result of the school's refusal of his tenure.\textsuperscript{92} The Court did not allow Ricks to invoke the continuing violation theory because he could not identify any specific discriminatory act "that continued until, or occurred at the time of, the actual termination of his employment."\textsuperscript{93} Ricks was terminated because his non-renewable contract had expired.\textsuperscript{94} In accordance with Evans, the Ricks Court "did not take the discriminatory intent that the college allegedly possessed when it denied Ricks tenure and attach that intent to its subsequent act of terminating his employment."\textsuperscript{95} Evans and Ricks, when read together, make clear that the present effects of discrimination that took place beyond the limitations period are not actionable.\textsuperscript{96}

Justice Alito next discussed the landmark decision of \textit{National Railroad Passenger Corp. v. Morgan.}\textsuperscript{97} In Morgan, a former employee of Amtrak claimed "he ha[d] been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment."\textsuperscript{98} Most of the discriminatory conduct took place outside of the reach of the limitations period.\textsuperscript{99} While the Court recognized that hostile work environment claims merited application of the continuing violation theory, the Court distinguished such claims from those alleging discrete discriminatory and retaliatory acts.\textsuperscript{100}

Writing for the majority, Justice Thomas reasoned that while discrete acts were "easy to identify[,] . . . [the] very nature [of hostile work environment claims] involves repeated conduct,"\textsuperscript{101} and "is comprised of a series of separate acts that collectively constitute one
"unlawful employment practice."102 In so holding, the Court implemented a new standard based on whether the alleged discriminatory actions were "discrete," such as "termination, failure to promote, denial of transfer, or refusal to hire."103 These discrete acts now were actionable only so far as they took place within the limitations period, regardless of the continuity of discrimination beyond the period.104

In a concurring opinion, Justice O'Connor posited that discrete claims should contain a notice requirement.105 Unlike the notice condition in Ricks,106 this requirement would act to extend the limitations period for plaintiffs who did not have notice of their employers' discrete acts of discrimination.107 While the Court emphasized the importance of the characterization of the alleged discriminatory actions, it did not provide a concrete definition of "discrete."

Applying the Morgan framework, the Ledbetter Court held that "a pay-setting decision is a discrete act that occurs at a particular point in time."108 The Court focused on the fact that Ledbetter "ma[de] no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her."109 The Court reasoned, however, that Ledbetter should have brought a claim in a timely fashion after the pay decisions were made.110 While the Court gave proper effect to the precedent delineating the continuing violation theory, it referenced Ledbetter's failure to allege insufficient knowledge about the original decisions.111 Ledbetter stood solely on the grounds that the "conduct during the charging period gave present effect to discriminatory conduct outside of that period."112 The Court's continual reference to Ledbetter's failure to assert some other justification for her late filing leaves open a window for later investigation into the properness of the current discovery rule. Ledbetter's reliance on the continuing violation theory, however, drew the majority of its influence from Bazemore v. Friday, a case in which the

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102 Id. at 117.
103 Id. at 114.
104 Morgan, 536 U.S. at 122.
105 Id. (O'Connor, J., concurring).
106 See supra notes 86–95 and accompanying text.
107 Morgan, 536 U.S. at 124 (O'Connor, J., concurring).
109 Id. at 628.
110 Id.
111 Id.
112 Id.
theory was applied directly to wage discrimination and which developed the "pay-check accrual rule."115

_Bazemore v. Friday_114 involved an employer that had segregated its employees into "white" and "Negro" branches, systematically paying the African American employees less than their Caucasian counterparts.115 In response to the passage of the Civil Rights Act of 1964, the company merged the two divisions but never resolved the disparities that were sharply demarcated along racial lines.116 In a per curiam opinion, the Supreme Court overturned the decision of the United States Court of Appeals for the Fourth Circuit, which held that the company had no affirmative duty to correct the disparities in pay, as the disparities originated before Title VII became applicable to public employees, and the claims were therefore time-barred.117

To invoke Title VII, the Court had to point to a present violation in accordance with _Evans_ and _Ricks_.118 As Justice Brennan stated in his concurring opinion, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."119 This succinct statement provided the Court's most straightforward interpretation in the area of continuing violation to date and was generally interpreted by lower courts to mean that the limitations period could be tolled by every paycheck received that reflected an alleged discriminatory practice.120

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113 Id. at 633.
115 Id. at 390–91 (Brennan, J., concurring).
116 Id.
117 Id. at 394 ("The Court of Appeals reasoned that the Extension Service was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972 when Title VII became applicable to public employees such as the Extension Service."); see also id. at 394 n.5 ("As originally enacted, Title VII of the Civil Rights Act of 1964 applied only to private employers. The Act was expanded to include public employees by the Equal Employment Opportunity Act of 1972, 86 Stat. 105, whose effective date was March 24, 1972." (citing 42 U.S.C. §§ 2000e(a), (b), (f), (h) (1972))).
118 See supra text accompanying note 96.
119 Bazemore, 478 U.S. at 395–96. The Court distinguished _Bazemore_ from _Evans_ factually by pointing out that the employer in _Evans_ had discontinued its discriminatory practice, while the employer in _Bazemore_ had not. Id. at 396 n.6.
120 See, e.g., Goodwin v. Gen. Motors Corp., 275 F.3d 1005, 1011 (10th Cir. 2002) (holding that plaintiff's claim was timely as each paycheck received that was affected by the racially discriminatory decision amounted to a violation of Title VII); Cardeñas v. Massey, 269 F.3d 251, 257–58 (3d Cir. 2001) (holding that the employee's claim was not time-barred, even though it was brought more than 180 days beyond the discriminatory pay decision, because he had received a paycheck that was affected by the discriminatory decision within the limitations period); Calloway v. Part...
Bazemore stood for the proposition that the payment of compensation that was limited by a discriminatory decision was in itself an actionable violation of Title VII. This actionable violation could then breathe life into the prior discriminatory decision due to the continuing violation theory. In the aftermath of Bazemore, however, the Court pulled in the reins on the continuing violation theory by frequently distinguishing subsequent cases from Bazemore.

The majority opinion in Ledbetter distinguished Bazemore by emphasizing that the pay structures in Bazemore were themselves facially discriminatory and therefore constituted present violations of Title VII. Justice Alito posited that each paycheck associated with pay structures that intentionally subvert a suspect class must be treated as violations of Title VII because “an 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.” In so holding, the Court limited the paycheck accrual rule, established in Bazemore, to pay structures that are themselves discriminatory, excluding neutral policies which have been applied in a discriminatory manner. Ledbetter, therefore, could not rely on Bazemore, as she did not allege that Goodyear’s pay system was adopted “in order to discriminate on the basis of sex.” The paycheck accrual rule was of no use to Ledbetter, and her claim was therefore deemed untimely.

The majority opinion outlined the current interpretation of the continuing violation theory and provided sound reasons for limiting its application. The Court did not, however, provide sound policy reasons for turning away other methods of expanding the scope of

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121 Bazemore, 478 U.S. at 395-96.
122 Id.
123 See Florida v. Long, 487 U.S. 223, 239 (1988) (holding that the receipt of checks in connection with a retirement benefits program based on a discriminatory decision did not invoke the continuing violation theory). The Court distinguished Bazemore on the grounds that the Bazemore case dealt with wages which were being provided for current work, as opposed to past work, and that such a payroll is not funded on an actuarial basis, as a retirement plan is. Id. The Court also noted that application of the continuing violation theory to a retirement plan would cause employers to be liable for conduct far in the past. Id. at 238; see also Lorance v. AT&T Tech., Inc., 490 U.S. 900, 913 n.3 (1989).
125 Id. at 634.
126 Id. at 627, 636.
127 Id. at 637.
128 Id.
Title VII to claims such as Ledbetter's.\textsuperscript{129} In her dissent, Justice Ginsburg attacked both the majority's interpretation of the relevant precedent as well as its unwillingness to consider the realities accompanying wage discrimination.\textsuperscript{130} While Justice Ginsburg's discussion of *Bazemore* and *Morgan* do little to challenge the interpretation of the majority, her insight into the nature of wage discrimination and the realities of the workplace indicate a need to develop a mechanism which would set claims of wage discrimination aside and provide employees facing these sorts of claims leeway when dealing with the limitations period.

\textbf{D. Ginsburg's Dissent}

In her dissent, Justice Ginsburg characterized the majority's interpretation of Title VII as "cramped" and stated that it was "incompatible with the statute's broad remedial purpose."\textsuperscript{131} Justice Ginsburg's insight into the true nature of wage discrimination and the "realities of the workplace"\textsuperscript{132} provided the impetus leading to a con-
gressional response intended to reinstate the paycheck accrual rule as it was interpreted prior to *Ledbetter.*

As Justice Ginsburg explained, employers do not generally publicize disparities in their employees' salaries. As discussed above, the inherent difference between *Ledbetter*'s claim and the discrete acts identified in *Morgan* is the ability of the aggrieved plaintiff to accurately recognize such injustice. The inability of employees to identify an employer's wage discrimination is not unique to *Ledbetter*'s situation. As Justice Ginsburg explained:

Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory. . . . It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in *Ledbetter*'s situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

According to Justice Ginsburg, the current framework adopted by the Court allows "[a]ny annual pay decision not contested immediately . . . [to] become[] grandfathered, a fait accompli beyond the province of Title VII ever to repair." Such a result allows discrimination to continue in ways the drafters of Title VII did not foresee. While the Court recognizes that discriminatory pay structures cannot escape

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Employees often don't know about a discriminatory decision until it is too late. Pay disparities are difficult to discern. Many employers prohibit employees from discussing their salaries, and workplace norms warn against asking coworkers about their salaries. Additionally, a minor pay disparity adopted for discriminatory reasons in the beginning of a career may go unnoticed until, years later, after subsequent percentile adjustments, it is too large to ignore.

135 *Id.*
136 See generally Brake & Grossman, supra note 69.
137 *Ledbetter,* 550 U.S. at 645 (Ginsberg, J., dissenting) (citations omitted).
138 *Id.* at 644.
139 *Id.; see also supra* notes 8-9 and accompanying text.
judicial review, it distinguishes facially neutral pay structures that are applied in a discriminatory manner. However, the aggrieved employees suffering from wage disparities suffer the same harm regardless of this distinction. The fact that most employees are not given sufficient access to information to decipher when wage discrimination has taken place compels different treatment of such cases by the Court. In her dissenting opinion, Justice Ginsburg called upon the legislature to correct this injustice, and in recognition of her plea, Congress drafted the Ledbetter Fair Pay Act.

E. The Ledbetter Fair Pay Act

In response to the Court's holding in Ledbetter, the House of Representatives drafted the Ledbetter Fair Pay Act of 2007. Despite early opposition, the Senate's version of the bill eventually made it through both legislative houses, and was signed into law by President Barack Obama on January 29, 2009. The law acts to reinstate the paycheck accrual rule, such that every paycheck infected with a prior discriminatory decision now constitutes an unlawful employment practice. The law states:

140 Ledbetter, 550 U.S. at 637 ("Bazemore stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure.").

141 Id.

142 Bierman & Gely, supra note 7, at 168. Bierman and Gely's studies support the conclusion that most employees are not given sufficient access to information to decipher when wage discrimination has taken place:

[W]hile discussion of financial matters is often acceptable in some parts of the world, it is generally considered "crass" in the United States. In short, discussion by individuals of their salaries and related matters can be seen as violating an American "social norm." One-third of United States private sector employers have reinforced this norm by adopting specific rules prohibiting employees from discussing their wages with co-workers, rules known as pay secrecy/confidentiality ("PSC") rules. Moreover, legal and human resource management experts recognize that in addition to workplaces with specific PSC rules, a significant number of other employers have more informal expectations that employees "keep their lips sealed about their salaries."

Id. (citations omitted).

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


145 See id. § 2(a).


147 See id. § 3(A).
For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.\textsuperscript{146}

The law essentially nullifies the Court's holding in \textit{Ledbetter} and allows plaintiffs suffering from latent wage discrimination under facially neutral pay structures the full protection of Title VII.\textsuperscript{149} The law imputes the discriminatory motives of past decisions to the current act of tendering wages, thereby reinstating the paycheck accrual rule as it was interpreted at the appellate level before \textit{Ledbetter}.\textsuperscript{150}

\section*{III. \textsc{Congress's Misapplication of the Paycheck Accrual Rule and the Need for a Broad Discovery Rule}}

As Congress recognized, the practical effect of the \textit{Ledbetter} Court's holding was to place an undue burden on plaintiffs asserting claims of wage discrimination.\textsuperscript{151} In the wake of the Court's rejection of the paycheck accrual rule, victims of wage discrimination were unable to bring their claims unless they had learned of their employer's discriminatory intent within the short limitations period. As Justice Ginsburg noted, the realities of the workplace exacerbate this problem, as the vast majority of employees do not have access to information regarding their wage decisions and, therefore, would be unable to bring Title VII claims if they subsequently learned of their employer's discriminatory intent.\textsuperscript{152}

In support of its decision, however, the Court provided sound reasons for denying the application of the continuing violations doctrine and for applying the limitations period in a strict manner. The Court conducted a sensible analysis of the continuing violations theory and accurately stated that imputing the discriminatory intent of past decisions to current "neutral" acts would improperly distort

\begin{small}
\textsuperscript{146} Id. § 6.
\textsuperscript{149} See id.
\textsuperscript{150} See supra notes 121-28.
\end{small}
The nature of the theory. The Court also pointed out that statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." While the 180-day time limit Congress placed on claims under Title VII evinces a motive to promote the swift resolution of claims, Title VII's progeny of case law provides ample evidence that Congress's intent was to protect against discrimination whenever possible. Congress, however, must recognize the need to prevent the filing of stale claims and must balance the equities in order to discover where the judicial scales shift away from righting discriminatory wrongs and towards protecting "employers from the burden of defending claims arising from employment decisions that are long past."  

A. The Ledbetter Fair Pay Act: An Overzealous Congressional Response

Although a narrow application of the statute of limitations may preclude the adjudication of legitimate claims of wage discrimination, the implementation of the Ledbetter Fair Pay Act will distort the nature of the continuing violation theory. As the majority stated in Ledbetter, the continuing violation theory does not toll the limitations period, but rather allows plaintiffs to include related acts to amass a Title VII claim. A present violation must exist in order to gather together other related acts. Wage discrimination, within the context of a facially neutral compensation system, lacks the requisite intent to form a present violation. The continuing violations theory allows plaintiffs to amass discriminatory acts that are significantly related because they accumulate to form a single claim. The theory is based, however, upon the continual presence of discriminatory intent. It is this discriminatory intent that provides the plaintiff with an actionable offense under Title VII. As the Ledbetter Court noted, applying the paycheck accrual rule to facially nondiscriminatory pay systems would require an attachment of the discriminatory intent of

153 Id. at 629-30; see infra text accompanying notes 157-63.
154 Ledbetter, 550 U.S. at 630 (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citation omitted)).
155 See supra Part II.
157 See supra notes 64-70 and accompanying text.
158 See supra notes 64-70 and accompanying text.
159 See supra notes 64-70 and accompanying text.
160 See supra notes 64-70 and accompanying text.
prior acts to subsequent "neutral" acts. Such an imputing of discriminatory intent would attach liability to a nondiscriminatory act, and would constitute an improper application of the continuing violation theory, as the continuing violation theory comprises the continuation of discriminatory intent. Wage discrimination is not cumulative in this sense, as no present discriminatory intent exists. The continuing violation theory, therefore, should not apply to latent wage discrimination, and the Ledbetter Fair Pay Act provides an unmerited and overzealous response to Ledbetter.

Although wage discrimination does not fulfill the elements of a continuing violation, the practical effect of the Ledbetter decision is to prevent victims of wage discrimination from bringing their claims. While Congress should step in to remedy this problem, the Ledbetter Fair Pay Act provides an inequitable solution, not only because it will overstretch the continuing violations doctrine, but for several policy reasons as well.

Allowing employees to assert their claims within 180 or 300 days of when any compensation is paid, regardless of the presence of a discriminatory intent, may "discourage the prompt investigation and resolution of discrimination," and would overlook the sound policy for implementing stringent limitations. Permitting the statute to toll in the manner proposed will allow employees to bring their claims years after the alleged discrimination took place, and may allow situations in which employers would lose the means necessary to defend themselves from such claims. The passage of this legislation will result in the shifting of an unjust burden from victims of past discrimination to employers who may not be able to defend themselves from stale claims. As this Comment advocates, the tolling of the statute for equitable purposes through the implementation of a discovery rule, instead of an extension of the continuing violations theory, would suffice to allow aggrieved plaintiffs to assert their claims, as well as to allow businesses an avenue for the swift resolution of claims.

The legislation signed into law by President Obama allows employees to file suit in a timely fashion when they are "affected by ap-

162 Id. at 629.
163 See supra notes 64–70 and accompanying text. Hostile work environment claims, for example, invoke the application of the continuing violation doctrine because all of the acts upon which liability can be based harbor discriminatory intent.
165 Id. (statement of Rep. Fox).
166 See infra Part IV.
plication of a discriminatory compensation decision or other practice.167 While Title VII must be applied broadly in order to serve its purpose, this law will allow plaintiffs to bring their claims years after they were notified of a previously undisclosed discriminatory pay decision. While most plaintiffs would not passively sit on their rights, allowing them this leisure may lead to stale claims in which employers would be unable to unearth any sufficient evidence defending their policy. The law will also act to discourage employers from addressing such issues with their employees, as they would hold nothing to gain by bringing any discriminatory decisions to light. If Congress were to redraft this legislation and advocate a bold discovery rule, employers might seek to redress these problems on their own, as they could limit their potential liability by beginning the tolling of the charging period at a set time, rather than with each subsequent pay check.168

Furthermore, allowing such treatment of “other practices” may allow plaintiffs who are the victims of truly discrete discriminatory acts—such as termination,169 failure to promote, or denial of transfer—to reserve the right to assert their claims years into the future, essentially holding their employers at ransom. For example, applying this legislation to Ricks would have resulted in a timely claim, despite the fact that Ricks knew of the discriminatory practice all along.170 In addition, during his presidential tenure, President Bush acknowledged the problems inherent in applying this standard to “other practices,” and claimed that this legislation “could effectively waive the statute of limitations for a wide variety of claims . . . traditionally regarded as actionable only when they occur.”171 In fact, President Bush’s threatened veto may have halted the progress of this bill during his presidency.

168 See infra Part IV.
169 Employees receiving pensions or other forms of compensation post-termination may be able to toll their claims in accordance with this Act.
B. Latent Wage Discrimination: The Need for a New Standard

Although a proper analysis of the continuing violations theory precludes its application to latent wage discrimination, the *Ledbetter* opinion indicates the need for making a corrective measure available to victims of wage discrimination. The Court overlooked several points which support the conclusion that denying Ledbetter and other similarly situated plaintiffs some form of an equitable tolling of the limitations period procures an unjust result.

For example, the Court based its reasoning upon the factual similarities of Ledbetter's and Evans' claims. The Court, however, failed to acknowledge the obvious differences between the two claims. Evans was aware of the discriminatory decision the day it was made and had ample opportunity to bring her Title VII claim through the proper channels. Ledbetter, on the other hand, had no knowledge of the discriminatory evaluations until years after they took place. Ledbetter knew that the evaluations took place, but she did not know that her pay was negatively affected as a result, or that her co-workers were receiving better compensation for doing the same job. Ledbetter knew of the act, but not of the injury.

Ledbetter's ignorance of the discriminatory decisions did not stem from her own malfeasance or indolence, but rather from the nature of pay decisions themselves. As Justice Ginsburg articulated in her dissent, discrimination of the nature that Ledbetter suffered is not "easy to identify" as "compensation disparities . . . are often hidden from sight." Goodyear kept the relevant salary information confidential, making it difficult for Ledbetter "to discern at once that she ha[d] experienced an adverse employment decision." While it makes sense to deny Evans the protection of Title VII because she knew of her employer's discriminatory decisions and chose not to act in a timely fashion, it defies reason to deny Ledbetter the protection of Title VII, as she had no analogous choice. In other words, while the *Evans* Court's denial of the application of the continuing viola-

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172 In the context of facially neutral pay systems, *Bazemore* solidifies the application of the continuing violations doctrine to facially discriminatory pay systems. See *Bazemore* v. Friday, 478 U.S. 385 (1986) (per curiam).
175 *Ledbetter*, 550 U.S. at 621.
176 See id.
177 See id.
178 Id. at 649.
179 Id. at 650.
tion theory is ingrained in a sense of fairness, the Ledbetter Court's denial produces an inherently unjust result. This blatant factual disparity between Ledbetter and Evans evidences the need to carve out an exception for victims of latent wage discrimination.

In addition, the Ledbetter Court failed to acknowledge a fundamental principal of Ricks. Ricks evidenced the importance of the employee's notice of the discriminatory decision. The Ricks Court recognized that the time at which the employee learned of the discriminatory decision affected the tolling of the charging period. While the Court did not draw on this notion any further, Ricks supports the idea that the tolling of the charging period should somehow reflect the employee's knowledge of the discrimination.

While the expansion of the continuing violation theory may swing the pendulum too far from center, the broad application of a discovery rule would provide remedial measures for those aggrieved as well as protect the sanctity of the statute of limitations. The remainder of this Comment will focus on the current application of the discovery rule and the need for its expansion.

IV. BALANCING INTERESTS: A BROAD DISCOVERY RULE FOR VICTIMS OF WAGE DISCRIMINATION

To provide victims of wage discrimination the opportunity to bring their claims without overextending the continuing violation theory, Congress should draft new legislation repealing the Ledbetter Fair Pay Act and initiating a mandatory and broad discovery rule into Title VII. The rule should state that in the case of wage discrimination, the limitations period begins to run when the plaintiff knew or should have known that the adverse pay decision may have been discriminatory. A more robust discovery rule makes sense in light of the Supreme Court's precedent and the congressional intent to apply Title VII broadly. Such a rule would take into account the realities of

180 Del. State Coll. v. Ricks, 449 U.S. 250, 256 (1980). In its later decision in Morgan, the Court clarified that even though an employee gained knowledge of a discriminatory decision which negatively affected his or her employment, subsequent discriminatory acts occurring beyond the limitations period could breathe life back into those prior acts if the acts were part of a continuing hostile work environment. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 118 (2002). Justice O'Connor also recognized the need for a notice provision in her concurring opinion. Id. at 122 (O'Connor, J., concurring).
181 Ricks, 449 U.S. at 256.
182 See infra Part IV.
183 Congress would have to define the term "wage discrimination." The definition would have to encompass discrimination manifesting itself in the form of a wage discrepancy.
the workplace, which often hides information from employees that would shed light on possible wage discrimination. While the Ledbetter Fair Pay Act accomplishes the same goal, it does so by mutilating the continuing violation theory. In addition, a more robust discovery rule would provide a more concrete point from which to toll the limitations period and would allow the filing of fewer stale claims than the Ledbetter Fair Pay Act.

A. Current Application of the Discovery Rule

When discussing limitations periods, the federal courts have generally recognized that "[a] cause of action accrues . . . when the plaintiff knows or has reason to know of the injury which is the basis of the action." This doctrine, often referred to as the discovery rule, could provide a plaintiff who has been denied the application of the continuing violation doctrine the opportunity to recover damages for pay inequity stemming from discrimination taking place beyond the charging period. The Court first recognized the existence of the discovery rule in the context of a Title VII claim in Zipes v. Trans World Airlines, Inc. by holding that "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." While waiver and estoppel apply to situations in which an employer has actively concealed information from the employee, the discovery rule and the doctrine of equitable tolling cover a far wider scope of events.

184 Admittedly, determining exactly when an employee learns or should have learned of information evincing a discriminatory motive may cause challenges. Such challenges, however, are worth undertaking in light of the current inequity surrounding wage discrimination.
186 455 U.S. 385 (1982).
187 Id. at 393.
188 Note, Equitable Modification of Title VII Time Limitations to Promote the Statute’s Remedial Nature: The Case for Maximum Application of the Zipes Rationale, 18 U.C. DAVIS L. REV. 749, 779 (1985); see also Larson, supra note 53, § 72.06. Larson clarified the difference between estoppel and tolling:
Some courts seem to draw no distinction between equitable tolling and estoppel, requiring design or action on the part of the employer to delay the filing as a prerequisite to equitable tolling as it is with estoppel. The Eleventh Circuit’s decision in an ADEA action, Cocke v. Merrill Lynch & Co., is instructive as to the difference between equitable estoppel and equitable tolling. . . . The court noted that equitable estoppel was appropriate only when the employer had engaged in fraud or other misconduct, but that equitable tolling was warranted whenever an employee with “a reasonably prudent regard for his rights” would be
Although the Court recognized the application of these doctrines in *Zipes*, it has never discussed the discovery rule in depth in the context of Title VII.\(^{189}\) When presented with situations ripe for the discussion of the discovery rule, the Court has generally resisted and reserved the issue for later debate.\(^{190}\) Since *Zipes*, the Court has recognized that the "time period for filing a charge is subject to equitable doctrines such as tolling or estoppel,"\(^{191}\) but has merely commented that such doctrines "are to be applied sparingly."\(^{192}\) Nevertheless, the Court has refrained from clearly defining the boundaries of the discovery rule.\(^{193}\) In the wake of *Morgan* and *Ledbetter*, the federal case law discussing the discovery rule in the context of Title VII has been both inconsistent and unpredictable.\(^{194}\)

Ignoring the presence of the *Ledbetter Fair Pay Act*, the current application of the discovery rule in unison with the *Ledbetter* Court's holding unduly hinders the ability of plaintiffs to recover for the injurious conduct of their employers. Specifically, the current framework justified in relying on the employer's good faith efforts to find him another job.

\(^{189}\) See Brake & Grossman, *supra* note 69, at 874, 876.
\(^{191}\) Nat'l R.R. Passenger Corp. v. *Morgan*, 536 U.S. 101, 113 (2002); see also *Zipes v. TWA*, 455 U.S. 385, 393 (1982) ("[F]iling 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.").
\(^{192}\) *Morgan*, 536 U.S. at 113; see also *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) (although *Irwin* has been questioned by later courts, the controversy centers around the Court's creation of a rebuttable presumption for equitable tolling in suits against the government, and is unrelated to the Court's discussion of the general application of equitable tolling). The *Irwin* Court recognized the rareness of the application of the equitable tolling doctrine:

But an examination of the cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

\(^{193}\) See *Morgan*, 536 U.S. at 114 n.7 ("One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue."); see also Brake & Grossman, *supra* note 69, at 876.
\(^{194}\) See Brake & Grossman, *supra* note 69, at 874.
ignores the realities of the workplace by interpreting the limitations period in an unreasonable way and disregards the inherent problems in discrimination that manifest solely in the form of wage discrepancies. The current application of the discovery rule is particularly troublesome when dealing with a plaintiff who had no knowledge of the alleged discriminatory decision until the limitations period has already tolled. In addition, many empirical studies have shown that people generally react to latent discrimination in a hesitant fashion, often attributing such discrimination to some unforeseen legitimate purpose and often allowing such discrimination to continue without taking the proper legal action.

By and large, arguments for an equitable tolling of the charging period rarely succeed. The lower courts have generally adhered to the Supreme Court's limited guidance and applied the discovery rule sparingly. Although the circuit courts apply the discovery rule differently, tolling of the statute is generally only permitted when there are "exceptional extenuating circumstances, such as deception by the employer, or a mistaken filing in the wrong forum." Even a threat of retaliation upon a plaintiff-employee for bringing a discrimination lawsuit has failed to merit an equitable tolling of the charging period in the Seventh Circuit. Worst of all, courts have rarely allowed an

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195 See generally Brake & Grossman, supra note 69.
196 Id.; see also Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) ("Pay disparities are thus significantly different from adverse actions 'such as termination, failure to promote, . . . or refusal to hire,' all involving fully communicated discrete acts, 'easy to identify' as discriminatory." (citations omitted)).
197 Ledbetter, 550 U.S. at 645-46; see also Morgan, 536 U.S. at 114.
198 See Brake & Grossman, supra note 69, at 887-88 n.140. Brake observes the tendency to underperceive discrimination as follows:

Evidence from the field of social psychology suggests that the underperception of discrimination is more the norm than hypervigilance. For example, even when women experience behavior that objectively qualifies as sexual harassment, many do not perceive that they have been sexually harassed. This example is part of a broader and widely documented phenomenon whereby members of stigmatized groups acknowledge that their group experiences discrimination but deny that they have experienced it individually.

199 Larson, supra note 53, § 72.08 n.1.
200 Id; see also Brake & Grossman, supra note 69, at 875.
201 See Larson, supra note 53, § 72.08.
202 See Beckel v. Wal-Mart Assocs., 301 F.3d 621, 624 (7th Cir. 2002). The Beckel court commented on retaliation as a basis for extending the statute of limitations as follows:

Rather than deterring a reasonable person from suing, it would increase her incentive to sue by giving her a second claim, in this case a claim for retaliation on top of her original claim of sexual harassment.
equitable tolling of the charging period based upon an employee’s lack of information if such deficiency was not caused by the employer’s malfeasance.\textsuperscript{203}

Although the application of the discovery rule has been largely fruitless,\textsuperscript{204} the range of its application within the circuits has been great. While some early cases discuss the outright refusal to apply the discovery rule,\textsuperscript{205} more recent cases have developed an increasingly liberal acceptance of the doctrine.\textsuperscript{206} Despite the lack of a uniform standard, all the circuit courts utilize the discovery doctrine in some way to “postpone[] the triggering of a limitations period from the date of injury to the date a plaintiff should reasonably have discovered the injury,”\textsuperscript{207} or until the “plaintiff knew or reasonably should have known that [he or] she was being discriminated against.”\textsuperscript{208} Despite this general consensus, the courts are in utter disagreement as to when a plaintiff should have made such a discovery and what situations merit the tolling of the statute.

One of the most constrained interpretations of the discovery rule came out of the U.S. Court of Appeals for the Fourth Circuit in \textit{Hamilton v. 1st Source Bank}.\textsuperscript{209} J.D. Hamilton filed a complaint with the EEOC claiming age discrimination after he was fired without advance notice.\textsuperscript{210} A year later during discovery, Hamilton learned that he was paid less than his co-workers, leading him to file another complaint with the EEOC claiming wage discrimination.\textsuperscript{211} A jury found for Hamilton on both the wage discrimination and the wrongful discharge claims.\textsuperscript{212} A panel of the Fourth Circuit affirmed the

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To allow the use of retaliation as a basis for extending the statute of limitations would not only distort the doctrine of equitable estoppel but circumvent the limitations that Title VII imposes on suits for retaliation, including the statute of limitations, which the plaintiff’s argument implies never runs on such a suit. \\
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\textit{Id.}
\textsuperscript{203} See Brake & Grossman, \textit{supra} note 69, at 875.
\textsuperscript{204} \textit{Id.} at 874–78.
\textsuperscript{205} See Chapman v. Homco, Inc., 886 F.2d 756, 758 (5th Cir. 1989); Merrill v. S. Methodist Univ., 806 F.2d 600, 604–05 (5th Cir. 1986).
\textsuperscript{206} See Adams v. CBS Broad., Inc., 61 F. App’x 285, 288 (7th Cir. 2003); Carter v. West Publ’g Co., 225 F.3d 1258, 1265 (11th Cir. 2000); Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009, 1025 (N.D. Iowa 2002).
\textsuperscript{207} \textit{Adams}, 61 F. App’x at 287 (citations omitted).
\textsuperscript{208} \textit{Carter}, 225 F.3d at 1265 (citing Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 661 n.19 (11th Cir. 1993)).
\textsuperscript{209} 928 F.2d 86 (4th Cir. 1990) (en banc).
\textsuperscript{210} \textit{Id.} at 86–87.
\textsuperscript{211} \textit{Id.} at 87.
\textsuperscript{212} \textit{Id.}
jury verdict, reasoning that the 180-day statute of limitations for a pay discrimination charge does not begin to run until an employee 'discovers or by exercise of reasonable diligence could have discovered that she or he was a victim of pay discrimination.' The court reheard the issue based on 1st Source Bank's petition “arguing that the ‘discovery’ rule was contrary to congressional intent as well as circuit precedent, and contending that Hamilton’s charge of pay discrimination was time-barred.”

Reversing the judgment, the court posited that “the ‘discovery’ rule that Hamilton would have us adopt completely abandons the statute.” The court reasoned that Congress has expressly written discovery rules into other statutes and that the absence of such language here precluded the application of such a rule. The court further attacked the discovery rule as a “vague and uncertain period,” and even mentioned the large time gap between the decision to pay Hamilton less and the filing of his claim as evidence that the rule would overstretch the statute. In rejecting the discovery rule, the court expressly addressed the difference between wage discrimination and discriminatory discharge claims, and stated that the distinction was negligible. The court refused to empower Hamilton’s assertion that he was unable to ascertain the discrimination because of his employer’s policies of discouraging discussion about wages between employees. In general, the court refused to acknowledge the supposition that adverse pay decisions do not sufficiently put aggrieved employees on notice of discrimination.

The dissenting opinion, authored by Judge Sprouse, included an interesting interpretation of the court’s decision by drawing upon the reasoning of Ricks. Judge Sprouse observed the emphasis the Supreme Court placed on Ricks’s notice of the discrimination, and suggested that “a fair reading of the opinion indicates that notice is

214 Hamilton, 928 F.2d at 87 (citing Hamilton, 895 F.2d at 165).
215 Id.
216 Id.
217 Id. at 88.
218 Id.
219 Id. at 88.
220 Hamilton, 928 F.2d at 89.
221 Id. at 89 n.3.
222 Id. at 86–89.
223 Id. at 91 (Sprouse, J., dissenting).
224 Id.
important in preserving the tenor of statutes . . . which were enacted 'in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.' Justice Sprouse concluded that the reasoning of *Ricks* "support[s] an approach that notice of the decision to take a discriminatory pay action is the key and recognition of a discovery rule in this case is consistent with that approach." In line with this conclusion, Judge Sprouse went on to discuss the nature of pay decisions as opposed to an employer's decision to terminate, and refuted the majority's assumption that such a difference was negligible. Judge Sprouse accurately commented that the "adverse nature of [a decision to terminate] is inherent and obvious," while a pay decision does not convey such notice "[d]ue to its confidential nature." Judge Sprouse accurately identified both the strong policy reasons for advocating a discovery rule for wage discrimination cases as well as such a policy's link to previous case law. The majority opinion, however, has survived as good case law in the Fourth Circuit and has been utilized numerous times to quell attempts to invoke the discovery rule.

While various other circuits have applied the discovery rule in a more sensible way, the general approach has still been too narrow to have a serious impact. The U.S. Court of Appeals for the Sixth Circuit's decision in *Amini v. Oberlin College* provides a good example of the general application of the discovery rule. Relying on Supreme Court and previous Sixth Circuit precedent, the court held that "the starting date for the 300-day limitations period is when the plaintiff learns of the employment decision itself, not when the plaintiff learns that the employment decision may have been discriminatorily motivated." Although this case involved a failure to hire and not wage discrimination, the Sixth Circuit does not differentiate between the

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225 Id. (citation omitted).
226 *Hamilton*, 928 F.2d at 91.
227 Id. at 92.
228 Id.
229 Id.
231 *See supra* note 134.
232 259 F.3d 493 (6th Cir. 2001).
233 Id. at 498.
two and has applied this case as its discovery rule standard. The standard followed by this court does not take into account an employee's inability to discover the discriminatory nature of adverse pay decisions or the realities of the workplace. While such a standard may provide justice for those with adequate notice of adverse decisions, those who are aware of the decision but not of its adverse nature are left without a remedy. Wage discrimination creates this exact situation time and time again, and the denial of a separate standard for such cases allows discrimination to continue in the manner Justice Ginsburg cautioned against in her dissenting opinion in *Ledbetter*.

In addition to limiting the starting date of the limitations period, the court in *Amini* affirmed the use of a five-part test to determine when an equitable tolling of the statute was merited. The test generally referred to the plaintiff's knowledge of the filing requirement itself, making no mention of a lack of information about the discriminatory decision or its discriminatory nature. Such a limited application of the doctrine of equitable tolling again leaves unknowing victims of wage discrimination with no remedy upon receiving notice of their employer's discriminatory motives.

The main question left open for debate between the circuits is "whether the statute of limitations should be tolled when the plaintiff is not reasonably aware of the discriminatory act or whether the limitations period should be tolled only when the defendant affirmatively

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234 See Stevenson v. Rayloc, 114 F. App'x 167 (6th Cir. 2004); Caruso v. Alltel Corp., 113 F. App'x 90 (6th Cir. 2004); Doan v. NSK Corp., 97 F. App'x 555 (6th Cir. 2004); Knapp v. City of Columbus, 95 F. App'x 718 (6th Cir. 2004).


236 *Amini*, 259 F.3d at 500.

237 *Id.* The test was stated as follows:

In determining whether the equitable tolling of the EEOC filing period is appropriate in a given case, we have consistently taken into consideration the following five factors: 1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement for filing his claim.

*Id.*

238 As stated throughout, the mere knowledge of a pay decision generally does not provide a sufficient impetus to put the employee on notice of the discrimination. Some additional information, such as learning that he or she is paid less than his or her co-workers, would suffice as putting the employee on notice. The main idea is that the employee is or should be aware of the discriminatory intent behind the pay decision.
misleads the plaintiff." Once again, other circuit courts have interpreted the discovery rule as the Sixth Circuit has, and have generally allowed the application of the discovery rule "only to include discovery of the adverse employment action, not the discovery of facts suggesting the employer's discriminatory motive." Taken a step further, the courts have typically allowed equitable tolling only when the plaintiff can show that his or her employer took part in purposeful action to delay the filing of the plaintiff's claim. The discovery rule has generally been available only in such limited circumstances and its effectiveness has been limited to extreme cases of concealment or threats by the employer and other extenuating circumstances, such as the presence of mental incompetence. Unfortunately, the discovery rule has done little to help victims of wage discrimination who were not provided with information—creating an inference that their employer had discriminated against them. However, the lack of knowledge relating to compensation, coupled with social norms discouraging people from discussing their salaries, compels an even broader application of the discovery rule in the context of wage discrimination.

B. A Robust Discovery Doctrine in Place of the Act

In response to the clear unfairness of the standard associated with wage discrimination, the 111th Congress and President Obama have passed the Ledbetter Fair Pay Act, revealing their unequivocal intent to extend the application of Title VII and to allow victims of

239 Fisher, supra note 9, at 717.
240 Brake & Grossman, supra note 69, at 877; see also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) (holding the discovery rule could act to toll the charging period until the plaintiff's notice of the employer's action, rather than the later discovery of evidence suggesting discrimination); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990) (holding the same as Oshiver).
241 See Chaffin v. Rheem Mfg. Co., 904 F.2d 1269 (8th Cir. 1990); Stark v. Dynascan Corp., 902 F.2d 549 (7th Cir. 1990); Cooper v. Wawa, Inc., No. 94-5920, 1995 WL 50061 (E.D. Pa. Feb. 2, 1995). In Cooper, the plaintiff missed an employment opportunity because the employer did not notify the employee that he had won the bid for the job. Id. at *1. The employee did not discover that his bid had been accepted until more than two years after the fact, and upon learning of this he filed a charge with the EEOC. Id. The court held that equitable tolling was not warranted since the plaintiff did not allege that the employer actively misled him. Id.
242 See generally Larson, supra note 53.
wage discrimination a lengthened charging period. As stated above, however, the Ledbetter Fair Pay Act and the extension of the continuing violation doctrine affords too extensive a charging period which will harmfully disrupt established judicial progeny. 246 Faciality neutral wage discrimination violations, moreover, are not "continuing" in nature, but are rather discrete acts with continuing effects. 246 As the Supreme Court noted in Ledbetter, shifting the intent of the previous discriminatory pay decision to the current issuing of pay-checks is "unsound" and "would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive." The effect of this shift would be to impose liability in the absence of the requisite intent." Wage discrimination cases do not comprise "present violations" because of the lack of intent, but nevertheless, present a situation in which many employees face discrimination without adequate protection from the law.

Although the Ledbetter Fair Pay Act will seek to rectify the harm felt by victims of wage discrimination, the legislation will open the door to stale claims and allow plaintiffs too large a window of recovery. 246 The application of a more robust discovery rule, however, would allow victims of wage discrimination an adequate remedy while still preserving the nature of the continuing violation doctrine. Congress should adopt a discovery rule allowing the tolling of the charging period until employees received actual or constructive notice that the decisions affecting their pay may have been discriminatory. 250 Such a standard provides a more narrowly tailored response to the inequity apparent in Ledbetter and other case law cited in this Comment, 251 and would also allow for a more concrete time period for defining the beginning of the charging period.

Although its application has been extremely limited, a bold discovery doctrine of this nature was recently employed by the U.S.
Court of Appeals for the Seventh Circuit. In *Adams v. CBS Broadcasting, Inc.*, the U.S. Court of Appeals for the Seventh Circuit overturned a lower decision denying the application of the discovery rule. A year after Adams was hired as a technician, she discovered from some of her co-workers that her wage had been calculated differently than other technicians with similar experience. The district court concluded that the discovery rule was inapplicable because Adams "knew when she was hired that... some technicians were paid more than her;... the CBA set minimum wages based upon years of CBS experience, [sic] and... Adams knew how many years of experience—-with CBS or otherwise—she had accumulated." Acknowledging that the "discovery rule postpones the triggering of a limitations period from the date of injury to the date a plaintiff should reasonably have discovered the injury," the circuit court overturned the decision and held that Adams's charge was timely. The court reasoned that Adams could not have known about the discrepancy in her salary calculation until such facts were presented to her by her co-workers, and therefore her claim accrued when her co-workers informed her of the discrepancy.

The standard established by this case allows victims of wage discrimination an adequate remedy and embodies the broad remedial purpose of Title VII. The facts of *Adams* also make clear that an evaluation of the application of this new discovery rule is fact-intensive and should be done carefully on a case-by-case basis. As the court acknowledged, Adams was aware that she was paid less than some of her co-workers. Some courts could determine that such knowledge would suffice as constructive knowledge. However, the fact that Adams had no possible way of knowing that her salary was calculated in a discriminatory fashion until others told her compelled the court to toll the charging period despite her knowledge that others were paid more than her.

252 61 F. App’x 285 (7th Cir. 2003).
253 Id. at 287–88.
254 Id. at 286–87.
255 Id. at 287.
256 Id. (citing Clark v. City of Braidwood, 318 F.3d 764, 767 (7th Cir. 2003)). *Clark* acknowledged the application of a discovery rule but did not flesh out the doctrine’s application as the court did in *Adams*.
257 Id. at 287–88.
259 See generally Fisher, supra note 9, at 712.
260 *Adams*, 61 F. App’x at 287.
261 Id. at 287–89.

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Applying this standard to other wage discrimination cases such as *Ledbetter*, *Hamilton*, and *Amini* would provide an equitable solution without disturbing prior precedent. In fact, a broad discovery rule corresponds well with the reasoning of *Ricks, Ledbetter*, and *Evans*. Aggrieved plaintiffs would receive adequate notice of the possible discriminatory acts of their employers, while the principles underlying the continuing violation doctrine would not be disturbed. Applying the standard proposed by the Ledbetter Fair Pay Act, on the other hand, would allow plaintiffs such as Adams, Ledbet-

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262 In *Ledbetter*, the Court recognized that a discussion about the discovery rule may have been appropriate, but declined to address this issue because Ledbetter did not raise it. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.10 (2007) ("We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.").

263 *Ledbetter*, *Hamilton*, and *Amini*’s claims would have been considered timely as they filed their claims within the requisite time following their discovery of the alleged discrimination. The period when each made their discovery was easily ascertainable. Such a result allows for an adequate recovery for those facing discrimination in accordance with the goals of Title VII without opening the employer up to unreasonable potential liability in the future.

264 See *supra* notes 172–182 and accompanying text. A broad discovery rule would match the Court’s recognition of the importance of notice in *Ricks*, as well as the Court’s recognition of Ledbetter’s lack of information in *Ledbetter*. See *supra* notes 86–95 and accompanying text; see *Ledbetter*, 550 U.S. at 621–24. This standard would also further justify the Court’s stance in *Evans* in light of the *Ledbetter* Court’s reliance on *Evans*.

265 See *Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1025–26 (N.D. Iowa 2002) for a discussion of the rationale for applying such a rule: The rationale underlying application of this principle to pay discrimination cases is obvious: it would be unfair to require a plaintiff to file a charge of discrimination when she has no knowledge of and could not have reasonably ascertained what similarly situated male coworkers were earning. Not until a discriminatory pay claimant knows she is earning less than similarly situated males does she know she is being discriminated against and is on notice of the need to assert her rights. If equitable tolling did not apply, maintaining strict salary confidentiality policies in most circumstances would isolate employers from Title VII liability because the filing period would pass before a victim of discrimination learned that she was being discriminated against. . . . Equitable tolling in pay discrimination cases, which starts the limitations clock running when a pay discrimination claimant knows or should know that she is being discriminated against, is, in this court’s view, the best reading of *Morgan* and of its impact on pay discrimination claims. This is so because this interpretation is faithful to the *Morgan* Court’s holding that discrete discriminatory acts are not actionable if time-barred, as well as is faithful to the *Bazemore* Court’s holding in pattern-or-practice pay discrimination cases.

266 *Id.* Namely, the requirement that a present violation take place.

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ter, and Hamilton to sit on their rights and would violate the strong policies for setting tangible limitations periods, as well as the original congressional intent in creating such a period. Applying the current doctrines without this new discovery rule presents an even more worrisome result, as plaintiffs without adequate notice would be precluded from exercising their rights. The adoption of a broad discovery rule provides a happy medium between precluding these aggrieved plaintiffs from recovery and allowing them to re-toll the limitations period throughout their employment regardless of their knowledge of their employers' discrimination. Although the discovery rule may allow some plaintiffs to bring their claims years after the discriminatory action, the rule would both provide a more concrete starting point for the tolling of the limitations period than the Ledbetter Fair Pay Act proposes and decrease the possibility that such stale claims would arise, as plaintiffs could not preserve their claims by simply receiving any form of compensation.

The implementation of a broad discovery rule could also provide an incentive for employers to share wage-related information more freely and shy away from policies prohibiting employees from discussing their compensation. Although employers' policies are outside of the scope of the judiciary's concern, incentives for employers to limit their possible liability stemming from wage discrimination cases could help prevent such discrimination by placing these previously secret decisions out in the open. Employers could also cap the possible litigation over these issues by providing employees with adequate information regarding their compensation up front, thereby limiting the application of the discovery rule.

V. CONCLUSION

The Supreme Court's limiting of the paycheck accrual rule in Ledbetter v. Goodyear left plaintiffs facing latent wage discrimination

\[267\] Any compensation conveyed to the plaintiff in the future that was affected by the previous decision would toll the statute. Although Ledbetter and Hamilton are no longer employed by the defendants in their respective cases, many wage discrimination cases involve current employees who, under Congress's proposed legislation, would be allowed to consciously stow their cause of action. Although most plaintiffs would not sit on their rights in this manner, such a possibility exists and was not an intended consequence of Title VII. See Fisher, supra note 9, at 712.

\[268\] See supra Part III.

\[269\] Employers who share wage-related information or allow their employees to do so may benefit by limiting the time period.

\[270\] Such a policy is not the intended goal of the standard proposed by this Comment but a mere speculative constructive corollary.
without an adequate remedy. In compliance with Justice Ginsburg's plea, Congress attempted to solve this problem and restore the broad remedial purpose of Title VII by creating the Ledbetter Fair Pay Act. The Act, however, would overstretch the application of the continuing violation doctrine and allows for too broad a period of recovery. To provide victims of wage discrimination an adequate remedy without leaving employers susceptible to excessive liability or overextending the continuing violation theory, Congress should repeal the Ledbetter Fair Pay Act and draft a broad discovery rule into Title VII. The rule should state that, in the case of wage discrimination, the limitations period begins to run when the plaintiff knew or should have known that the adverse pay decision may have been discriminatory. A number of events could trigger such recognition, resulting in a fact-intensive inquiry. Such a doctrine would adhere to the broad remedial purpose of Title VII as well as preserve established precedent.

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271 Congress would have to define the term "wage discrimination." The definition would have to encompass discrimination manifesting itself in the form of a wage discrepancy.