

***Ledbetter*, Gender Equity and Institutional Context**

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In feminist and anti-discrimination circles, Justice Ginsburg's name is synonymous with gender equality. She is famous not just for her work as a litigator who argued foundational equal protection/sex discrimination cases before the U.S. Supreme Court in the 1970s,¹ but for her contributions on the bench.² She had the rare opportunity of first advocating for a fundamental change in the way the Court approached gender classifications in the law and then applying this new "heightened scrutiny" as a sitting Justice. More recently, she has become identified with her stirring dissent in *Ledbetter v. Goodyear Tire and Rubber Co.*,³ a Title VII pay equity case decided in 2007 in which the Justice took the unusual step of issuing an oral dissent from the bench and signaling her strong disagreement with the majority's cut back on women's rights.⁴

Perhaps the most important part of Ginsburg's dissent was its closing lines when she pointedly declared that "[o]nce again, the ball is in Congress'

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¹ For discussions of Justice Ginsburg's career as a litigator, see Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976*, 8 COLUM. HUM. RTS. L. REV. 373 (1976); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 199–217 (1998); Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73 (1989). In addition to pursuing litigation, Ginsburg was also a leading academic who co-authored the first published casebook on women and the law. See KENNETH DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION (1st ed. 1974).

² On the U.S. Supreme Court, Justice Ginsburg's more notable gender discrimination opinions include *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting) (partial birth abortion); *United States v. Virginia*, 518 U.S. 515 (1996) (exclusion of women from the Virginia Military Institute); *Miller v. Albright*, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting) (gender-based citizenship rules); and *Harris v. Forklift Systems*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (hostile environment sexual harassment). See generally Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39 (2004).

³ 550 U.S. 618, 643 (2007).

⁴ See Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 40–47 (2008) (discussing significance of Justice Ginsburg's oral dissent in *Ledbetter*); Linda Greenhouse, *Oral Dissents Give Ginsburg a Voice*, N.Y. TIMES, May 31, 2007, at A1.

court”⁵ and issued a challenge to Congress to override the Court’s ruling. In her view, the majority of the Court had repeated the mistake of reading the nation’s anti-discrimination laws too narrowly, adopting what she called a “cramped” and “parsimonious” interpretation of Title VII.⁶ Once the threat of a filibuster ended, Congress did indeed take up her challenge by passing the Lilly Ledbetter Fair Pay Act⁷—the first bill signed into law by President Obama in January 2009.

This essay discusses Justice Ginsburg’s dissent in *Ledbetter* as an example of her trademark approach to gender equality in the workplace. Perhaps because of her prominence as a feminist litigator, many persons believe that her approach to gender discrimination can be summed up simply by reference to her deep understanding of the various forms sex discrimination takes in our society and her willingness to root out subtle as well as blatant forms of gender bias. That deep understanding of gender bias is certainly present in her opinions and merits her reputation as a judicial champion of gender equality. But her opinions also display a sensitivity for the institutional context in which employment and other types of decisions are made. They reflect an equally deep appreciation for how legal doctrine is likely to translate into norms and practices in real-world settings. Thus, *Ledbetter* is an important precedent not only for feminists, but for organizational theorists and “law and society” scholars who study the law as it operates on the ground.

Interestingly, Lilly Ledbetter’s story became familiar only after she lost her case in the U.S. Supreme Court.⁸ She then became well known for the public role she took on in the heated period leading up to the 2008 election. Quite soon after Justice Ginsburg issued her challenge to Congress, Lilly Ledbetter agreed to lend her support to the Democratic presidential candidates and others who sought passage of legislation to overturn the ruling in the case. Although she had never before engaged in political activism, she testified before congressional committees, wrote an op-ed, appeared on YouTube and gave speeches across the country. Her activities generated a tremendous amount of publicity as public sympathy mounted for this seventy-year-old grandmother who was seen as advocating for the

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

⁶ *Id.*

⁷ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

⁸ See Robert Barnes, *Exhibit A in Painting Court as Too Far Right*, WASH. POST, Sept. 5, 2007, at A19 (“Lilly Ledbetter’s pay discrimination case before the Supreme Court raised no constitutional quandaries and never received much attention. Until it was decided.”).

interests of working-class women and their daughters.⁹ The most memorable moments of Ledbetter's campaign were her speech at the Democratic National Convention and her presence at the signing of the bill that bore her name. Despite these political victories, however, Ledbetter was not able to recover her jury award; although the new legislation applied retroactively, it could not reverse the final judgment in her case.¹⁰

The facts of Ledbetter's case struck a responsive chord with the American public, perhaps because her case so easily fit the script of a token woman treated unfairly in an intensively male-dominated environment. For nineteen years, Lilly Ledbetter worked for Goodyear as a supervisor and an area manager at its Gasden, Alabama, tire plant. For much of that time, she was the only woman in her position.¹¹ At first all the supervisors received the same pay. However, when the company switched to a new compensation system in the early 1980s—purportedly one based on merit and performance—it started to keep its salaries confidential.¹²

For most of the years Ledbetter worked at Goodyear, she got raises. And one year she even secured a Top Performance Award.¹³ However, she did suspect that she might be a victim of pay discrimination at one point when she rejected her supervisor's sexual advances and worried that he would penalize her when it came time to set raises.¹⁴ She went to the EEOC and inquired about filing a charge but was told that she could not win a suit unless other women also came forward with discrimination claims as well.¹⁵ She approached some other women at work, but they refused to come forward because they were afraid of losing their jobs.

Ledbetter felt that, because she did not have any hard facts to back up her suspicion of unequal treatment, she should simply continue working.¹⁶ In 1998, just as she was ready to take early retirement, Ledbetter received an

⁹ During the presidential campaign, Ledbetter became the Democrats' answer to "Joe the Plumber." See Robert Pear, *Justices' Ruling in Discrimination Case May Draw Quick Action by Obama*, N.Y. TIMES, Jan. 5, 2009, at A13.

¹⁰ The Act applies retroactively to May 28, 2007 (the day before the Supreme Court's *Ledbetter* decision), to cover all claims pending on or after that date. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, § 6, 123 Stat. 5.

¹¹ *Ledbetter*, 550 U.S. at 643 (Ginsburg, J., dissenting).

¹² See *Impact of Ledbetter v. Goodyear on the Effective Enforcement of Civil Rights Laws: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, Comm. on the Judiciary*, 110th Cong. 8 (2007) (prepared statement of Lilly Ledbetter) [hereinafter *House Hearing*].

¹³ 550 U.S. at 659 (Ginsburg, J., dissenting).

¹⁴ *Id.* at 632 n.4.

¹⁵ See *House Hearing*, *supra* note 12, at 70 (statement of Lilly Ledbetter).

¹⁶ *Id.* at 67.

anonymous note which compared her salary to the salaries of other male supervisors.¹⁷ It indicated that she made fifteen to forty percent less than each of her male counterparts.¹⁸

She then filed a charge with the EEOC and eventually a claim in federal court for sex-based pay discrimination under Title VII. At trial, Ledbetter presented evidence that her pay was well below that of her male peers, in one year even falling under the minimum set for her position. She introduced testimony of two other female managers who told the jury that they also had been discriminated against and paid less than the men, one woman receiving pay below that of the male employees she supervised.¹⁹ The sex discrimination alleged by Ledbetter was not subtle: she testified that the plant manager told her that the “plant did not need women, that [women] didn’t help it, [and] caused problems.”²⁰ The jury found in favor of Ledbetter on her pay discrimination claims, finding that she had been the victim of intentional discrimination. Their verdict awarded Ledbetter over \$3.8 million, representing backpay, compensatory and punitive damages. The trial judge subsequently reduced that amount to \$360,000, in accordance with the very low caps imposed on compensatory and punitive damages under Title VII.²¹

When Ledbetter’s case reached the U.S. Supreme Court, however, her entire award was taken away. The Supreme Court ruled that her claim was time barred by Title VII’s short statute of limitations which requires cases to be filed within 180 days of the discriminatory act or unlawful discriminatory practice.²² It is quite amazing that this socially important case revolved around a highly technical point of law—namely, when the 180-day statute of limitations starts running. Writing for the 5-4 majority of the Court, Justice

¹⁷ *Id.* at 9.

¹⁸ 550 U.S. at 649 (Ginsburg, J., dissenting). At trial, Ledbetter presented an exhibit that showed that on her date of hire (April 1, 1979) she earned the same amount (\$16,760.52) as five comparator male supervisors. On the last day she worked, Ledbetter’s salary was \$44,724.00, compared to salaries ranging from \$55,679.16 to \$59,028.00 for the same male supervisors. *See House Hearing, supra* note 12, at 12.

¹⁹ 550 U.S. at 660 (Ginsburg, J., dissenting).

²⁰ *Id.* (Ginsburg, J., dissenting).

²¹ *See Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1176 (11th Cir. 2005). Ledbetter’s jury award consisted of \$223,776 in backpay, \$4662 in compensatory damages and \$3,285,979 in punitive damages. For large employers such as Goodyear who employ more than 500 employees, the Title VII cap on combined compensatory and punitive damages is \$300,000. 42 U.S.C. § 1981a(b)(3) (2006). The trial court reduced Ledbetter’s award to \$360,000—representing \$60,000 in backpay and \$300,000 in compensatory and punitive damages—to comply with Title VII’s cap on damages and the two-year limitation on recovery for backpay. *See* 42 U.S.C. § 2000e-5(g) (2006).

²² 42 U.S.C. § 2000e-5(f)(1).

Alito held that the statute started running the moment the employer initially made the decision to pay Ledbetter less than a similarly situated man,²³ way back when Goodyear's managers first started giving her smaller pay raises than the men. In so ruling, the Court got rid of a longstanding rule—known as the paycheck accrual rule²⁴—which had provided that the relevant date (the “unlawful employment practice”) was not just the initial decision to pay an employee less, but also occurred each time an employer issued a paycheck to an employee that was tainted by discrimination.

The majority regarded the case as unexceptional, requiring only that it apply “established precedent in a slightly different context.”²⁵ Justice Alito's opinion emphasized that Ledbetter had the burden of proving that the managers at Goodyear had “intentionally” discriminated against her in setting her pay and repeatedly noted that this proof of intent was “the defining element”²⁶ of her disparate treatment claim. Significantly, the Court did not regard the intentional carrying forward of depressed wages into a new paycheck to be a form of intentional discrimination. For the majority, pay discrimination, much like a refusal to hire or promote, could be traced to a “discrete act that occurs at a particular point in time”²⁷ and that starts the statute of limitations running. The majority did not engage any of the policy arguments offered by Ledbetter, claiming that it was bound by precedent and the unambiguous language of the statute.²⁸ Instead, as the majority framed it, the major issue in the case was whether Ledbetter alleged “a single wrong consisting of a succession of acts” or, rather, as the majority concluded, “a series of discrete discriminatory acts . . .”²⁹ This highly conceptual framing of the controversy ended the matter. The Court barely mentioned Lilly Ledbetter or the facts surrounding her particular case.³⁰

Justice Ginsburg's dissent presented a cogent analysis of the relevant legal precedents, ably countering the majority's contention that the outcome

²³ 550 U.S. at 621 (“Because a pay-setting decision is a ‘discrete act,’ it follows that the period for filing an EEOC charge begins when the act occurs.”).

²⁴ Ledbetter argued that the “paycheck accrual” rule had been adopted by the Supreme Court for Title VII cases in *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam), a pay discrimination case involving race discrimination. *Ledbetter*, 550 U.S. at 633. The paycheck accrual rule is also used to determine limitations issues under the Equal Pay Act. *Id.* at 640.

²⁵ 550 U.S. at 621.

²⁶ *Id.* at 624, 629.

²⁷ *Id.* at 621.

²⁸ *Id.* at 642–43.

²⁹ *Id.* at 638–39.

³⁰ See *Ledbetter*, 550 U.S. at 621, 632 n.4 (referring to Ledbetter's particular case and factual allegations).

of the case was compelled by statutory language or prior decisions.³¹ However, the power of her dissent did not come from her deft interpretation of precedent, but from her ability to argue for a legal rule that was grounded in “[t]he realities of the workplace”³² and the “real-world characteristics”³³ of discrimination, a theme she repeated five times.³⁴ In particular, she emphasized the special nature of pay discrimination. It was here that the Justice drew upon her feminist leanings and explained why the majority’s ruling was impractical and unfair.

In marked contrast to the majority, Justice Ginsburg was interested in analyzing how pay determinations were actually made and communicated within organizations and institutions and how employees reacted to news about their salaries, raises, and overall compensation. In her words, Justice Ginsburg explained:

Pay disparities often occur, as they did in Ledbetter’s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.³⁵

With this rich description, Ginsburg captured the mysterious process of salary determinations from the employee’s perspective. Contrary to popular belief, research indicates that it is often very difficult for employees to recognize when they have experienced discrimination. At the individual level, social psychologists have documented the tendency of victims to minimize events and to resist perceiving and acknowledging bias, even when they experience behavior that objectively qualifies as discrimination.³⁶ These

³¹ The most relevant precedent was *Bazemore v. Friday*, see discussion *supra* note 24, which the majority asserted applied only to “facially discriminatory” pay systems unlike the covertly discriminatory practices alleged by Ledbetter. 550 U.S. at 634. Justice Ginsburg disagreed, insisting that *Bazemore* had established the paycheck accrual rule for all pay discrimination challenges under Title VII. *Id.* at 647 (Ginsburg, J., dissenting).

³² 550 U.S. at 649 (Ginsburg, J., dissenting).

³³ *Id.* at 655 (Ginsburg, J., dissenting).

³⁴ *Id.* at 646, 649, 654, 655, 656 n.6 (Ginsburg, J., dissenting).

³⁵ *Id.* at 645 (Ginsburg, J., dissenting).

³⁶ See Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J.

problems are only exacerbated when an employee faces possible pay discrimination. As Justice Ginsburg indicated, disparities are likely to start out small and are not easy to identify until compounded through the passage of time. This is particularly true if the affected employee receives a raise but is unaware that her co-workers have gotten higher raises.³⁷ In many such situations, Justice Ginsburg hypothesized, even the employee who suspects she has been a victim of sex discrimination may be reluctant to complain because “the amount involved may seem too small, or the employer’s intent too ambiguous, to make the issue immediately actionable—or winnable.”³⁸

The psychological barriers to challenging pay discrimination are greatly reinforced by structures and practices adopted by employers. In the U.S. workplace, employers rarely disclose company-wide salary information and workplace norms and policies discourage employees from comparing their salaries. Justice Ginsburg cited research indicating that one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers and only one in ten employers has adopted a pay openness policy.³⁹ There is also research indicating that women are more likely to compare themselves to other women and to have access only to gender-specific social networks where they are unlikely to find out what comparably situated men in their organization are being paid.⁴⁰

Although pay disparities may start out small and invisible, this does not mean that pay discrimination is a trivial matter. Feminist scholars have analyzed a phenomenon called the “accumulation of small disadvantages” that tracks how relatively minor disparities can develop into major deficits over the course of a career.⁴¹ Pay discrimination is often cited as the classic example of this phenomenon, with one prominent scholar estimating that an initial pay disparity of \$5000 between two employees at the start their career

GENDER & L. 679, 688–711 (2007); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25–28 (2005) (discussing social science research).

³⁷ *Ledbetter*, 550 U.S. at 650 (Ginsburg, J., dissenting) (“Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision.”).

³⁸ *Id.*

³⁹ *Id.* (citing 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, 171 (2004)).

⁴⁰ See Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 203 (2005) (discussing sociological research into gender-specific comparison groups).

⁴¹ E.g., VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 3–6 (1999).

will balloon into a \$360,000 disparity at retirement age.⁴² Particularly given the common practice of calculating raises based on a percentage of an employee's current salary⁴³ and the frequency with which a new employee's salary is based on the amount he or she earned in a prior job,⁴⁴ it is not difficult to appreciate the mounting impact of even small pay disparities traceable to sex.

By focusing on the hidden nature of pay discrimination and its insidious cumulative effect, Justice Ginsburg highlighted the dilemma faced by employees—most often women employees—who wonder whether they have been treated fairly but believe they are in no position to challenge their employers, particularly when they are new hires or are regarded, like Ledbetter, as “outsiders” in their jobs. Such employees often refrain from complaining because they fear retaliation, the number one reason employees cite for failing to challenge discriminatory practices.⁴⁵ Even Professor Linda Babcock, the author of the best-selling book *Women Don't Ask*,⁴⁶ who has urged women to negotiate more often and more forcefully with their employers, has conducted new research indicating that women are more likely than men to be penalized for asking for higher salaries.⁴⁷ Justice Ginsburg recognized this double bind and resisted a strict rule that requires an “immediate contest”⁴⁸ over an employee's salary, long before the employee has even had time to evaluate her own worth to the company.

⁴² LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1* (2003). See also JESSICA ARONS, CENTER FOR AMERICAN PROGRESS, *LIFETIME LOSSES: THE CAREER WAGE GAP 2* (2008), http://www.americanprogressaction.org/issues/2008/pdf/equal_pay.pdf (estimating \$434,000 as the median amount a full-time female worker loses in wages over a 40 year period as a result of the gender wage gap).

⁴³ *Ledbetter*, 550 U.S. at 654 (“[E]ven a relatively minor pay disparity will expand exponentially over an employee's working life if raises are set as a percentage of prior pay.”).

⁴⁴ See Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of “Factors Other Than Sex” Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1108 (1989) (arguing that employers should bear the burden of justifying use of prior salary when it results in unequal pay). Most courts, however, have upheld the prior salary defense in Equal Pay Act cases. See, e.g., *Wernsing v. Ill. Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005); *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 615–16 (4th Cir. 1999).

⁴⁵ See Brake, *Retaliation*, *supra* note 36, at 28–37.

⁴⁶ BABCOCK & LASCHEVER, *supra* note 42.

⁴⁷ Shankar Vedantam, *Salary, Gender and the Social Cost of Hagglng*, WASH. POST, July 30, 2007, at A7 (discussing new experiments by Linda Babcock and Hannah Riley Bowles).

⁴⁸ *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

Many commentators picked up on this aspect of Justice Ginsburg's dissent and applauded her ability to understand the employee's perspective and the harshness of requiring workers to challenge pay discrimination prematurely.⁴⁹ But there is another aspect of her dissent that has received less attention and that showcases Justice Ginsburg's sensitivity to the institutional context in which decisions are made. Her dissent also stressed that the management at Goodyear knew or should have known about the pay disparities and yet apparently did nothing to address and correct the situation in the nearly twenty years that Ledbetter worked for Goodyear. Because Ledbetter was one of the very few women supervisors at Goodyear, it was readily apparent to the managers who set salaries that she lagged behind her male peers in compensation.⁵⁰ Significantly, Goodyear took no steps to investigate why the sole woman supervisor made less than each of her male counterparts—there was no record of the company undergoing a self-evaluation or audit to make sure that its performance compensation system accurately measured differences in performance and was not infected with gender or other forms of bias. Although Goodyear was in the best position to evaluate the fairness of salaries across its workforce, it apparently took no steps to prevent and correct discrimination, a stance entirely at odds with the “prophylactic” objectives of Title VII.⁵¹

Equally as important, Justice Ginsburg pointed out that it is often in the interest of employers to maintain gender pay disparities, rather than root them out. She explained:

[A]n employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer. When a male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched. But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented.⁵²

Thus, as an institutional matter, Justice Ginsburg saw clearly that, although pay discrimination is often uniquely in the province of employers to detect and correct, those same employers have incentives to keep the

⁴⁹ See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 871–75 (2008).

⁵⁰ *Ledbetter*, 550 U.S. at 659 (Ginsburg, J., dissenting) (noting that “Ledbetter’s pay . . . fell below Goodyear’s minimum threshold for her position”).

⁵¹ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975).

⁵² *Ledbetter*, 550 U.S. at 650–51 (Ginsburg, J., dissenting).

disparities under wraps and simply to pocket the gains from discrimination.⁵³ She concluded that something had to be done to ameliorate this imbalance. Her dissent argued that employees should be permitted time to discover the discrimination and sue their employers, thus providing employers with some incentive—namely, the threat of litigation—to evaluate their own pay systems and correct longstanding pay inequities.

Justice Ginsburg's analysis in *Ledbetter* fits well with an institutional approach to wage discrimination that has been embraced by feminist economists and organizational sociologists who distinguish themselves from more mainstream, neoclassical economists.⁵⁴ As they have been articulated in the last few decades, mainstream economic models generally regard employers as passive price takers and tend to assume that in the long run the market will purge itself of discrimination. In this account, an employer who engages in pay discrimination is one who employs a supervisor who flat-out refuses to pay a female employee the going market rate for her labor, presumably based on the supervisor's hostility or animus toward women generally. The solution is to identify the supervisor, pinpoint the discriminatory action and correct the individual anomaly.

In contrast, institutional scholars are interested in analyzing the dynamics within organizations that operate to perpetuate entrenched gender disparities.⁵⁵ For these scholars, markets matter but so do institutional practices. In the institutional account, wage setting within a particular firm consists of a complex set of practices that involves human judgment, internal politics and cultural factors in addition to market forces. Institutionalists assert that the market does not always dictate pay rates because, for example, it is often very difficult to discern a particular market rate for a given job,⁵⁶ or an employer rejects the advice of pay consultants and other experts who

⁵³ See *id.*

⁵⁴ See, e.g., DEBORAH M. FIGART, ELLEN MUTARI & MARILYN POWER, *LIVING WAGES, EQUAL WAGES: GENDER AND LABOR MARKET POLICIES IN THE UNITED STATES* 208–20 (2002) (applying a feminist economic model of wage setting); ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 81–112 (1990) (examining rhetoric of equal pay and differing cultural meanings of the term); ROBERT L. NELSON & WILLIAM BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* 53–100 (1999) (applying an organizational inequality approach to pay equity disputes).

⁵⁵ See Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 583 (2001) (discussing approach of organizational sociologists Robert L. Nelson and William Bridges) (book review).

⁵⁶ *Id.* at 588–90 (describing how internal politics and discretionary judgments affected the pay-setting process, including market survey of salaries in “benchmark jobs”).

recommend changes to its wage structures to reflect performance and enhance efficiency;⁵⁷ or employees with political clout or allies in management have more power to demand and receive higher wages than less “connected” co-workers.⁵⁸ In particular, the forces of inertia and custom can become facilitators of discrimination, as existing wage disparities begin to appear normal and legitimate. In the institutional account, gender pay disparities occur not only as a result of an initial devaluation of a woman’s labor, but because the disparity is later compounded by inaction and eventually accepted as natural and just. One common danger is that management will come to regard a female employee as worth less primarily because she is paid less, another way that small disadvantages translate over time into sizeable losses. Most significantly for purposes of the statute of limitations issue at stake in *Ledbetter*, the institutional approach fixes on whether the organization has acted fairly in carrying forward a pay disparity when there is reason to suspect that gender bias could be at work.

In *Ledbetter*, Justice Ginsburg applied an institutional analysis that supported the plaintiff’s case, and her dissent criticized the Court for being out of touch with reality. It should be noted, however, that Justice Ginsburg’s institutional approach to employment discrimination cases is context dependent and has not invariably favored the employee. A notable contrasting case more favorable to employers is her 2004 majority decision in *Pennsylvania State Police v. Suders*,⁵⁹ a constructive discharge case. The issue in *Suders* was whether the employer should automatically be held vicariously liable for a supervisor’s harassment of an employee when the employee failed to report the harassment to designated personnel within the company.⁶⁰ In *Suders*, Justice Ginsburg acknowledged that sexual harassment could become so intolerable that a reasonable employee would quit her job rather than endure further harassment.⁶¹ Speaking for the Court, she recognized the claim for constructive discharge in the Title VII context, providing crucial support for countless sexual harassment victims who have been forced to quit their jobs. However, her opinion also refused to hold employers automatically vicariously liable in such situations. The Court ruled that employers might escape liability if they proved that the plaintiff

⁵⁷ *Id.* at 593 (describing failure to implement pay consultants’ recommendations at Sears).

⁵⁸ *Id.* at 595 (describing how male bank officers received compensation exceeding their market value); *id.* at 586–87 (describing how male physical plant workers used organizational strength to raise their wages in contrast to female clerical workers).

⁵⁹ 542 U.S. 129 (2004).

⁶⁰ *Id.* at 140.

⁶¹ *Id.* at 143.

unreasonably failed to report the harassment pursuant to the employer's anti-harassment policy.⁶² From an institutional perspective, Justice Ginsburg reasoned that employers might not be aware of sexual harassment inflicted by supervisors and would not be in a good position to correct the harassment, unless and until an employee reports it.⁶³ Equally as important, in the sexual harassment context—in contrast to the pay discrimination setting—the employer does not profit from its supervisors' harassment and thus has no built-in disincentive to confront the problem and fix it. Apparently Justice Ginsburg calculated that employers might be encouraged to implement effective grievance procedures and root out sexual harassment if they had a chance of avoiding liability.

I disagree with the result in *Suders* for all the reasons my colleague Professor Camille Hébert has stated in her 2007 article entitled "Why Don't 'Reasonable Women' Complain About Harassment?"⁶⁴ My point is simply that in *Suders*, institutional context and predictions about how the Court's ruling would play out in the real world trumped Justice Ginsburg's strong inclination to provide legal relief for a serious gender-related injury.

In closing, I wish to return to the *Ledbetter* dissent to indicate how important Justice Ginsburg's contributions have been in the employment discrimination field. Prior to *Ledbetter*, it looked like pay equity litigation was a dead letter. Only a tiny one percent of complaints made to the EEOC in 2008 were classified as equal pay complaints,⁶⁵ and, for more than a decade, lower courts have made it extremely difficult for plaintiffs to recover

⁶² *Id.* at 141. However, if the constructive discharge is precipitated by an "official action" such as a demotion, rather than sexual harassment, vicarious liability is automatically imposed. *Id.* at 140–41.

⁶³ *Id.* at 148.

⁶⁴ L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Harassment?* 82 IND. L.J. 711, 737–42 (2007); see also Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 373–80 (2004).

⁶⁵ See EEOC, CHARGE STATISTICS FY 1997 THROUGH FY 2008 (2009), <http://www.eeoc.gov/index.html/enforcement>. The one-percent figure is a bit low because it includes only a portion of EEOC charges alleging pay discrimination. The EEOC separately tracks charges alleging Equal Pay Act violations, but does not separately track Title VII complaints alleging pay discrimination. There is currently no monitoring of Title VII charges alleging unequal pay. This omission has been criticized. See GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN'S EARNINGS: FEDERAL AGENCIES SHOULD BETTER MONITOR THEIR PERFORMANCE ENFORCING ANTI-DISCRIMINATION LAW 3–4 (2008) (estimating that more than half of pay discrimination claims are filed under Title VII).

in compensation cases.⁶⁶ I knew that the situation was dire when the casebook I assign for a course on employment discrimination—which previously had a nice chapter on compensation discrimination—dropped that material altogether,⁶⁷ reflecting the not-irrational belief that these cases were just too marginal to be taught to students.

Admittedly, the Lilly Ledbetter Fair Pay Act is a very modest piece of legislation and will not alone bring pay equity back from the dead. It simply overrides the *Ledbetter* decision and allows a plaintiff to bring a Title VII suit for pay discrimination 180 days after the “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.”⁶⁸ However, sometimes even small reforms can spawn larger changes. For example, there is currently a debate in the courts as to the scope of the Ledbetter legislation. The confusion stems from the fact that the legislation purportedly applies only to “compensation” decisions and does not govern “status” decisions,⁶⁹ such as refusals to promote or demotions, which are still regarded as discrete discriminatory acts that trigger the statute of limitations. However, it is not always easy to separate “status” decisions from “compensation” decisions because of the interconnected nature of discrimination and discrimination claims.

Even “discrete” discriminatory acts are not really over the moment the negative decision is communicated to the worker. Instead, their effects continue, at least as long as the discriminated-against employee continues to be employed in the lower-status position.⁷⁰ Not surprisingly, since the

⁶⁶ See Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solutions from Maine*, 55 ME. L. REV. 23, 31–36 (2003).

⁶⁷ Compare MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (7th ed. 2008), with MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 573–82 (6th ed. 2003).

⁶⁸ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 6 (2009).

⁶⁹ I borrowed this useful distinction from Pete Lareau, *Lareau on Aftermath of Lilly Ledbetter Fair Pay Act*, 2009 EMERGING ISSUES ANALYSIS 3783, at *5 (LEXIS), June 16, 2009, <http://www.lexis.com>.

⁷⁰ If plaintiffs have been terminated from their jobs or are victims of hiring discrimination, the Ledbetter legislation will not be of much benefit because such plaintiffs will not be receiving paychecks that serve to extend the statute of limitations. However, for those terminated employees who continue to receive monetary benefits from their prior employment, the Ledbetter legislation might presumably extend the charge-filing period. See Robin E. Shea, *Integrating the Ledbetter Fair Pay Act into Practice*, in THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009: AN IMMEDIATE LOOK AT THE LEGAL, GOVERNMENTAL, AND ECONOMIC RAMIFICATIONS OF

Ledbetter legislation was passed, some plaintiffs have been careful to allege a claim of compensation discrimination along with their claim of discriminatory denial of promotion or a discriminatory demotion. In such cases, although the promotion or demotion claim is time-barred, some courts have ruled that the Ledbetter legislation allows the plaintiff to pursue her compensation claim, despite the fact that the compensation claim grew out of the employer's failure to promote or is the byproduct of the employee's demotion to a lesser job.⁷¹ Thus, through the Ledbetter legislation, plaintiffs have indirectly been able to challenge the lawfulness of a promotion or demotion decision. Because of the potential broad scope of the new legislation, lawyers representing businesses have begun to counsel their clients to make sure to review their compensation policies and procedures, conduct pay equity audits, and revise their internal pay structures.⁷² As one practitioner describes it, the Ledbetter legislation is likely to apply "not only to direct compensation decisions but also to any other practice that in whole or part impacts wages, benefits, or other compensation."⁷³ From this vantage point, the Ledbetter reform does not appear quite so modest.⁷⁴

Beyond the specifics of the Ledbetter legislation, the public discussion spearheaded by *Ledbetter* has certainly put the issue of pay equity back on the map. Pay equity has been made a high priority for the EEOC and the OFCCP, the office within the Department of Labor responsible for assuring non-discrimination by government contractors. Most significantly, there is

NEW LEGISLATION REGARDING EQUAL PAY BASED ON GENDER 5, 7-8 (Thomson Reuters/Aspatore ed., 2009).

⁷¹ See, e.g., *Gentry v. Jackson State Univ.*, No. 3:07CV584TSL-JCS, 2009 U.S. Dist. LEXIS 35271, at *2-4 (S.D. Miss. Apr. 17, 2009) (ruling that denial of tenure claim untimely, but allowing compensation claim to proceed); *Vuong v. New York Life Ins. Co.*, No. 03 Civ. 1075(TPG), 2009 WL 306391, at *8-9 (S.D.N.Y. Feb 6., 2009) (ruling that denial of promotion claim untimely, but allowing compensation claim to proceed).

⁷² Shea, *supra* note 70 (statement by Charles M. Louderback).

⁷³ See Lareau, *supra* note 69, at *4 (internal quotation marks omitted).

⁷⁴ There is also some confusion as to remedy. Plaintiffs who have proven discrimination in compensation are clearly entitled to recover back-pay for a period up to two years preceding the EEOC charge. See 42 U.S.C. § 2000e-3(b) (2006). However, even if pay discrimination stems from a discriminatory denial of a promotion, such a plaintiff probably is not entitled to an order of reinstatement to the higher position or to a declaration that the denial of promotion was unlawful. It is not clear, however, whether a court in such a case would also enjoin the employer from paying plaintiff the discriminatorily low wage in the future, in effect giving plaintiff the monetary benefits of the promotion without the new job or new title. This strange result is the logical outgrowth of attempting to separate "compensation" from underlying "status" decisions.

finally some momentum to pass the Paycheck Fairness Act (the “PFA”),⁷⁵ a bill that had been languishing in Congress since 1997. The PFA is designed to strengthen the Equal Pay Act by increasing damages for successful plaintiffs and narrowing defenses available to employers.⁷⁶ One specific provision of the PFA particularly relevant to the *Ledbetter* debate is the protection against retaliation provided to any employee who discloses, discusses or inquires about the wages of another employee.⁷⁷ This provision is designed to chip away at the secrecy surrounding employee compensation and to begin to erode the structural barriers that prevent employees from accurately assessing their standing at work. Like the *Ledbetter* legislation, however, the PFA is not the broad stroke that anyone seriously contends will be sufficient to close the gender pay gap. If passed on the heels of *Ledbetter*, however, it would constitute a significant ripple effect that goes well beyond the highly technical point of law in Lilly *Ledbetter*’s case.

The moral of this story is that Justice Ginsburg has a way of mobilizing other institutions and organizations into action. Her *Ledbetter* dissent not only prompted a swift response by Congress, but had an impact on the behavior of private employers and raised awareness among employees and advocacy groups. She may have been the only woman on the High Court when *Ledbetter* was decided, but her voice was heard loudly and clearly and to great effect.

⁷⁵ The House of Representatives passed the PFA in January 2009. See 155 Cong. Rec. H137 (daily ed. Jan. 9, 2009); H.R. 12, 111th Cong. (2009). It is awaiting action in the Senate. See 155 Cong. Rec. S256 (daily ed. Jan. 9, 2009) (placing Senate Resolution on calendar); Editorial, *Paycheck Fairness*, N.Y. TIMES, June 24, 2009, at A28 (supporting PFA).

⁷⁶ If the PFA had been the law when Lilly *Ledbetter* filed suit, she likely would have prevailed. Her success would have been assured by the Equal Pay Act’s more liberal statute of limitations and the PFA’s damages provision that allows plaintiffs to secure awards comparable to Title VII plaintiffs. *Ledbetter* probably relied on her Title VII claim—instead of pursuing her EPA claim—because the EPA does not currently permit recovery of compensatory or punitive damages.

⁷⁷ See H.R. 12, 111th Cong. § 3(b) (2009).

