The 45Th Anniversary of Title VII: Where We are, Where We've Been, and Where We May Go

Sarah Crabtree
Daphnie Stock

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Recommended Citation
Crabtree, Sarah and Stock, Daphnie (2010) "The 45Th Anniversary of Title VII: Where We are, Where We've Been, and Where We May Go," Hofstra Labor and Employment Law Journal: Vol. 27: Iss. 2, Article 5.
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol27/iss2/5
NOTES

THE 45TH ANNIVERSARY OF TITLE VII: WHERE WE ARE, WHERE WE’VE BEEN, AND WHERE WE MAY GO

I. INTRODUCTION

Title VII was enacted as part of the Civil Rights Act of 1964 to prohibit discrimination in the employment context. Since its enactment, the broad language of Title VII has been litigated to precisely define its meaning. The Supreme Court, from the 1970s through the late 1980s, went beyond the plain statutory language of Title VII and expanded the ways in which a plaintiff may bring a claim. The best example of this, sharply criticized as legislation from the bench, is the creation of the "disparate impact doctrine." After a series of cases defining the disparate impact doctrine, all analyzed in turn in this note, Congress stepped in and amended the Civil Rights Act in 1991 not only to give the disparate impact doctrine a formal statutory basis, but to "restor[e] the civil rights protections that were dramatically limited by [Supreme Court] decisions." Since the 1991 Amendments, the disparate impact concept has been expanded to other anti-discrimination contexts as well.

We begin this note by providing a historical background to Title VII, both its legislative history and the socio-political climate in which it was enacted. We then examine the plain language of the statute. Next,

2. Through its decisions from the time of the enactment of the Civil Rights Act of 1964, the Court has considered disparate treatment, disparate impact, and affirmative action claims. Each will be examined in turn in this note. See infra Parts I-VI.
6. See infra Part II.
we analyze the Supreme Court’s 1971 decision, *Griggs v. Duke Power Co.*, and its progeny, which judicially created and defined the disparate impact doctrine.\(^7\) In our analysis, we consider the ideological make-up of the Supreme Court and the particular philosophical tendencies of the individual Justices. The series of cases developing the disparate impact doctrine serve as a window to analyze the judicial decision-making processes of the bench and view the ideological conflicts that exist among its members.

Since the enactment of the Civil Rights Act of 1991, codifying the disparate impact doctrine, Title VII litigation has shifted focus to the application of the statute of limitations imposed on plaintiffs under the statute. The series of cases leading up to *Ledbetter v. Goodyear Tire & Rubber Co.*\(^8\) demonstrates the clash of political ideologies on the bench and how Congress has stepped in to resolve them through the enactment of the Lilly Ledbetter Fair Pay Act in 2009.\(^9\)

The development of both the disparate impact and *Ledbetter* line of cases demonstrate the political attitudes and influences that seep into judicial decision-making, even at the Supreme Court level. The development of these areas in Title VII is also a concrete example of how our system of checks and balances works, as Congress has stepped in when there is legislation from the bench that has arguably gone too far.

We will conclude this note by looking specifically at the year 2009, a year marking the 45th anniversary of the Civil Rights Act of 1964 and Title VII.\(^10\) President Barack Obama took office in January of 2009, and since he began his presidency, he has played a crucial role in shaping labor and employment law and policy. In less than one year, President Obama has signed into law the Fair Pay Act,\(^11\) appointed Hilda Solis to his Cabinet as Secretary of Labor,\(^12\) and has appointed liberal Justice Sonia Sotomayor to the Supreme Court.\(^13\) It will be interesting to see what the future holds.

\(^7\) See infra Parts II-IV.
\(^8\) 550 U.S. 618 (2007).
\(^10\) See infra Part VIII.
II. HISTORICAL BACKGROUND OF TITLE VII AND THE BIRTH OF DISPARATE IMPACT

"Title VII" seems to be more than just a single provision of a larger Act of Congress; it has a significance all its own. It carries with it a force and recognition on par with the entire Act itself as its purpose was to remedy pervasive employment inequality deeply rooted in American business and society on the whole. The language of section 703(a) states:

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

As a part of the Civil Rights Act of 1964, Title VII works as one piece of a comprehensive legislative scheme to put an end to racial inequality by making employment decisions based on race, national origin, or sex illegal. The 1960s were a tumultuous time wrought with extreme social and political tension, but also a time when the civil rights movement saw great transformation.

18. During the Civil Rights Movement of the late 1950s through the 1960s, the Supreme Court was in support of eliminating racial discrimination in all realms. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (protecting the equal right of African Americans to travel); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (desegregating public
enactment of Title VII, Senator Humphrey, principal floor leader on the measure, stated, “[t]he goals of this bill are simple ones: To extend to Negro citizens the same opportunities that white Americans take for granted.”19 President Kennedy also reflected on the particular cruelty of discrimination in the employment context commenting:

In many of our larger cities, both North and South, the number of jobless Negro youth—often 20 percent or more—creates an atmosphere of frustration, resentment, and unrest which does not bode well for the future. . . . Employment opportunities moreover, play a major role in determining whether . . . [rights like voting, public accommodations, etc.] are meaningful. There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.20

The fight for civil rights of all Americans was not borne by Congress alone. On the contrary, it was the plight of all branches of the federal government acting as one.21 The Supreme Court, at the time of the enactment of the Civil Rights Act, was presided over by Chief Justice Earl Warren.22 The Warren Court transformed the law in the areas of freedom of speech, rights of criminal suspects, and the then emerging field of an individual’s right to privacy.23 However, it was not until 1971, after conservative Chief Justice Warren Burger had taken the reins, that a case involving racial discrimination in the employment context was brought before the Supreme Court, Griggs v. Duke Power.
By the time Chief Justice Burger took over, the political ideology of the Court, and the country for that matter, had dramatically shifted to the right.

The facts of Griggs are straightforward. The plaintiff, Willie Griggs, filed a class action lawsuit challenging the employment practice at Duke Power Company that required a high school diploma and the passage of two separate aptitude tests for promotion. The District Court dismissed Mr. Griggs’ claim and the Court of Appeals affirmed, finding no unlawful intentional discriminatory practices, as the company policy was facially neutral. The Supreme Court then granted certiorari and found that Duke Power Company’s policy, although not intentionally discriminatory, did in fact have a discriminatory effect. Specifically, the Griggs Court concluded that where a facially neutral employment practice has a disproportionately adverse effect on minorities (“disparate impact’’), that practice cannot be used unless it is justified under a standard that came to be known as “business necessity.” This unanimous decision vastly expanded individual rights under Title VII by allowing discrimination claims based on a new theory, “disparate impact.” The Griggs decision “turned this unequivocally colorblind statute into a device for promoting racial balancing and preferential treatment.”

The Griggs Court did not stand firmly on precedent or legislative direction from Title VII itself, but instead took a “pragmatic” approach to reach its conclusion, finding a legal basis in what it deemed the “spirit of the Act.” This approach was the source of scathing criticism.

25. TOOBIN, supra note 23, at 11. Then President Nixon won on a platform of revitalizing conservativism and reigning in the liberalism of the bench from the Warren-era. Id. at 12.
27. Id. at 428 (emphasis added).
28. See id. at 432 (emphasis added). “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” Id.
29. Id. at 431.
31. Id. at 263.

[Instead of citations to legislative history or precedent or even legal theory, one finds only a few undocumented assertions.... The court cited not a line in a committee report, not a colloquy on the floor of either house of Congress, not the testimony of a witness before a committee, not even the report of a journalist in a newspaper.

Id. at 480-81.
Burstein, Adjunct Professor at the University of Washington, wrote, "[i]ndeed, the relevant evidence conclusively reveals a Congressional intent exactly obverse from that which the court asserted." Even more interesting, from a political standpoint, Burstein found that although the case was decided during a time when the Court was moving toward a more "cautious approach to Constitutional issues," Griggs was a "sensitive, liberal" interpretation of Title VII. Not only was the Griggs standard problematic from a legal standpoint, but also in practice, as employers found themselves with a need to balance their workforce in terms of minority representation in order to avoid discrimination claims based on this new type of discrimination. The disparate impact doctrine functionally imposed a quota system on employers, leaving the door open for whites to bring claims after being displaced from their jobs in an effort to equalize the workforce. Therefore, although the Court attempted to remain constant in its commitment to the civil rights movement and the legislative purpose of Title VII, the Griggs standard led to a wave of litigation in the years to follow due to its ambiguities and the practical difficulties in its application.

III. WILLIAM HUBBS REHNQUIST JOINS THE BENCH

William Hubbs Rehnquist was nominated to the Supreme Court by President Nixon and took his seat as Associate Justice on January 7, 1972, just shy of one year after Griggs was decided. Prior to his appointment, Rehnquist had served in the United States Air Force in World War II, graduated from Stanford University and later Harvard Graduate School and Stanford Law School, served as law clerk to Supreme Court Justice Robert H. Jackson, and served as Assistant

33. See, e.g., Lund, supra note 30, at 264-65.
36. Redefining Discrimination, supra note 34, at 126.
Attorney General in the State of Arizona from 1969-1971.\textsuperscript{40} He quickly established himself as a conservative justice, voting against women’s abortion rights, further desegregation policies for public schools, prayer in schools, capital punishment and states’ rights.\textsuperscript{41}

In 1979, \textit{United Steelworkers v. Weber} was decided.\textsuperscript{42} Rehnquist’s dissent in this decision earned him a coveted spot on the cover of Time Magazine accompanied by the headline “Reagan’s Mr. Right.”\textsuperscript{43} Rehnquist’s dissent found Title VII’s prohibition of all discrimination meant no discrimination was permitted, whether targeted at whites or at blacks.\textsuperscript{44}

He denounced the quota system established in \textit{Griggs}, stating “[t]here is perhaps no device more destructive to the notion of equality than the \textit{numerus clausus}—the quota. Whether described as ‘benign discrimination’ or ‘affirmative action,’ the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.”\textsuperscript{45} In contrast to the majority in \textit{Weber}, Rehnquist’s dissent showed he favored merit-based hiring and promotion practices, a largely pro-employer stance.\textsuperscript{46}

\textit{Weber} was a landmark decision because it was the first affirmative action employment case to reach the Supreme Court.\textsuperscript{47} It is also regarded as one of the principal cases in federal statutory

\begin{footnotes}
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{44} \textit{Weber}, 443 U.S. at 220 (Rehnquist, J., dissenting).
\textsuperscript{45} Id. at 254.
\textsuperscript{46} See id. at 219-55.
\textsuperscript{47} See Lund, supra note 30, at 266. The \textit{Weber} decision came on the coattails of \textit{Regents of the Univ. of Cal. v. Bakke}, 438 U.S. 265, 311 (1978), which dealt with affirmative action in student admissions to the medical school at the University of California, a public institution. Justice Powell’s decision in \textit{Bakke} has been summarized as:

Justice Powell, who wrote only for himself but nonetheless controlled the outcome in \textit{Bakke}, reached an arguably moderate, perhaps a compromise, position on affirmative action in publication education. On one hand, Justice Powell condemned racial quotas, such as the one used by the medical school, even if the quota was designed to ensure minority representation in the student body rather than to exclude historically disadvantaged persons. On the other hand, Powell endorsed admission plans in use at elite private universities that considered the overall diversity of the student body, racial and otherwise, as a factor in making admission decisions. He did so because he thought “diversity” in the educational setting was a compelling governmental interest and that using race as a “plus” factor was a reasonable means for attempting to effectuate that interest.

\end{footnotes}
The racial quota that was a direct result of the "disparate impact" doctrine created in Griggs was challenged in Weber by an employee who argued he would have otherwise been admitted to the Kaiser Aluminum training program but for his race. Specifically, the affirmative action policy at issue reserved half of the spaces in its training program for black employees to increase the number of the company's black skilled workers and meet the statutory minimum. The Supreme Court held that the employer's policy did not violate Title VII when read against the backdrop of legislative history and in the "spirit" of the Act, as it was decided that when an employer's hiring plan is "voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" it is permissible and not a violation of Title VII. The majority concluded that since the plan did not call for displacement of white workers to make room for blacks and did not bar advancement of already employed white workers it was lawful. Further, the decision stated that Kaiser's plan was to be implemented temporarily and solely with the purpose of remedying racial imbalance, but not with the purpose of establishing a quota to maintain racial balance.

Rehnquist's dissenting opinion follows much of the same logic of the critique of Griggs, the case upon which the majority places heavy reliance. Rehnquist argued that the majority relied not on the statutory language, as the Court deemed it ambiguous, but instead relied on an amorphous concept it deemed the "spirit" of Title VII. However, the language the drafters of Title VII crafted is arguably unambiguous and therefore, as Rehnquist makes clear in his dissent, based on the rules of statutory interpretation when analyzing Title VII, the plain language should not be overlooked. Rehnquist argued:

48. Frickey, supra note 47, at 1171 & n.9.
50. Id. at 198.
51. Id. at 201, 208.
52. Id. at 208.
53. Id.
54. Id. at 219-55 (Rehnquist, J., dissenting); see also discussion of Griggs critique, supra Part I.
55. See Weber, 443 U.S. at 221 (Rehnquist, J., dissenting). "Accordingly, without even a break in syntax, the Court rejects 'a literal construction of § 703(a)' in favor of newly discovered 'legislative history'..." Id. It is important to note that Griggs was decided before Rehnquist's appointment to the Court. It is also a point of analysis that Chief Justice Burger wrote the majority opinion in Griggs, which has been criticized as not being well-founded in any of the traditional legal bases, however in Weber, Burger joined Rehnquist in the dissent. Id. at 219-55.
56. See id. at 222. Thus, by a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language,
[T]he legislative history invoked by the Court to avoid the plain language of §§703 (a) and (d) simply misses the point. To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons.57

This opinion is an example of Rehnquist’s strictly plain language approach to statutory interpretation. Because the explicit statutory text does not leave room for such a result, Rehnquist could not join in the majority opinion in Weber.58 He saw this decision as a clear case of legislating from the bench and an infringement on the fundamental separation of powers.59 Furthermore, Rehnquist reasoned that in light of the legislative purpose of Title VII, the prohibition of discrimination of any group in the workplace, the type of reverse discrimination at issue in Weber, is just what Congress intended to prohibit.60 Rehnquist found:

The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions. The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another.61

As evidence that he thought the Griggs Court was impermissibly legislating from the bench, Rehnquist commented that he would have likely voted in favor of the result the majority reaches in Weber had he voted for it on the floor of Congress.62

IV. REHNQUIST’S ELEVATION TO CHIEF JUSTICE

Seven years after the Supreme Court’s decision in Weber, in 1986, the country was operating within a very different political landscape than in 1979, as Republican President Ronald Reagan was already in his

57. Id. at 228-29.
58. See id. at 228. “Quite simply, Kaiser’s racially discriminatory admission quota is flatly prohibited by the plain language of Title VII.” Id.
59. See id at 228 & n.9 (quoting Caminetti v. United States, 242 U.S. 470, 490 (1917)).
60. Id. at 230.
61. Id. at 228 n.10.
62. Id.
second term of office. However, it was not until 1986 that President Reagan made one of "[t]he most valuable and lasting contribution[s] of his presidency," when Associate Justice Rehnquist was elevated to Chief Justice. Later that same year, through a wave of federal judicial appointments, Antonin Scalia joined the bench as an Associate Justice. Rehnquist had a new-found political ally in Scalia, however, the Supreme Court bench in 1986 was still characterized as liberal, although only slightly liberal. In fact, it was the liberal majority joined by swing voters O'Connor and Powell who carried the day in the Title VII decision, Johnson v. Transportation Agency, decided in March of 1987.

In Johnson, plaintiff-petitioner Paul Johnson, a white male, brought suit against the Transportation Agency under Title VII for discrimination on the basis of his sex. In 1979, the Agency announced a vacancy for a road dispatcher position. The Equal Employment Opportunity Commission ("EEOC") designated the position as one for a "Skilled Craft Worker." Twelve employees applied for the promotion, including Diane Joyce, the only female applicant, who was ultimately selected. Both Joyce and Johnson were designated as "well-qualified." Johnson alleged the sole reason Joyce was chosen for the position was because it was in accordance with the Agency's affirmative

63. In 1979, when Weber was decided, the country was in the midst of the 1980 Presidential election campaign. President Reagan was up against incumbent Democratic President Jimmy Carter. By 1986, Reagan was in his second term after a "reelection landslide" that was viewed as "an enthusiastic expression of hope for continuance of the state of economic well-being and patriotic euphoria in which Americans, by and large, found themselves in late 1984." Coral Bell, From Carter to Reagan, 63 FOREIGN AFF. 490,490 (1984).


65. Id.


68. Id. at 616.

69. Id. at 619.

70. Id. at 623.

71. Id. To challenge an employment practice that one believes is in violation of Title VII, the person must first file a charge with the EEOC, the federal agency that handles workplace discrimination complaints. U.S. Equal Employment Opportunity Commission, Federal Laws Prohibiting Job Discrimination Questions and Answers, http://www.eeoc.gov/facts/qanda.html (last visited Jan. 27, 2010).


73. Id. at 625.
action plan, which he claimed was unlawfully discriminatory under Title VII. The Supreme Court ultimately held in favor of the Agency, deciding that although the Agency’s plan was not implemented to remedy past discrimination, this was because there were no women present in the skilled craft positions at that time. Thus, the Court found, as it did in Weber, that “[Title VII] does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups against discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose.”

The Court in Johnson expanded the application of the affirmative action model, originally defined in Weber in two key ways. First, the Court extended the application of the Weber framework to public employers. Second, it loosened the requirements for an employer to lawfully implement an affirmative action plan by not requiring proof that the plan was created to remedy past discriminatory practices. Specifically, the Court held, as it did in Weber, that employers may engage in voluntary affirmative action plans to remedy past discrimination and equalize the racial balance of the workforce as long as the purposes of the plan mirror those of Title VII. Additionally, the plan may not “unnecessarily trammel the interests of the white employees . . . [and may] not require the discharge of white workers and their replacement with new black hires. ‘Nor did the plan create’ an absolute bar to the advancement of white employees.’

Justice Scalia viewed the Johnson majority’s decision much as Rehnquist viewed the outcome of Weber. In fact, Rehnquist joined Scalia in his dissent in Johnson, arguing for Weber to be overruled entirely. Through his strongly worded critique of Johnson, Scalia accused the majority of “complet[ing] the process of converting [Title VII] from a guarantee that

74. Id.
75. Id. at 624, 637.
76. Id. at 646 (Stevens, J., concurring).
77. Id. at 627-28 & n.6. Just one term prior, the Court held that racial classifications for employment in a public school setting were a violation of the Equal Protection Clause absent a compelling government interest. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986). Johnson was a case brought under Title VII and one question before the Court was whether the statutory definition of “employer” under Title VII included public employers. See Johnson, 480 U.S. at 627 n.6.
78. See id. at 632, 636-37. All that is required is that an employer take into account numerous factors in making hiring decisions and not just engage in “blind hiring” based on a simple imbalance in the workforce. Id. at 636.
79. Id. at 628.
81. Id. at 673 (Scalia, J., dissenting).
race or sex will not be the basis for employment determinations, to a
guarantee that it often will." Justice Scalia went on to state, "we
effectively replace the goal of a discrimination-free society with the
quite incompatible goal of proportionate representation by race and by
sex in the workplace." Further, he recognized Rehnquist's dissent in
Weber as being "literally unanswered."

Justice Scalia began his dissent in Johnson with the type of sarcasm
that pervades the entire opinion: "[w]ith a clarity which, had it not
proven so unavailing, one might well recommend as a model of statutory
draftsmanship, Title VII of the Civil Rights Act of 1964 declares . . . ." He
asserted that not only should Weber itself be overruled but, even as it
stands as relevant precedent, the Court is not following its holding. He
argues that:

The most significant proposition of law established by [the majority]
decision is that racial or sexual discrimination is permitted under Title
VII when it is intended to overcome the effect, not of the employer's
own discrimination, but of societal attitudes that have limited the entry
of certain races, or of a particular sex, into certain jobs.

The dissent went on to note that the reason women were
underrepresented in the Agency's road dispatcher category is that
women themselves did not see it as desirable work. He asserted that it
was an "alteration of social attitudes, rather than the elimination of
discrimination, which [the majority's] decision approves as justification
for state-enforced discrimination." Justice Scalia went on to call the
holding an "enormous expansion, undertaken without the slightest
justification or analysis."

Through a series of cases leading up to the passage of the Civil
Rights Act of 1991, the Rehnquist Court worked to legitimate and clarify
the judicially-created disparate impact framework as well as affirmative

82. Id. at 658.
83. Id.
84. Id. at 665 n.3.
85. Id. at 657 (Scalia, J., dissenting).
86. See id. at 670 ("It would be better, in my view, to acknowledge [Weber] as fully
applicable precedent, and to use the Fourteenth Amendment ramifications—which Weber did not
address and which are implicated for the first time here—as the occasion for reconsidering and
overruling it.").
87. Id. at 664.
88. Id. at 668.
89. Id.
90. Id.
action in the employment context. These cases, according to some opinions, were based largely on the legislative history and "spirit" of Title VII rather than the plain statutory language itself. To analyze the Court's struggle between those justices advocating for the expansion of Title VII's application and those staunchly in favor of a strict plain language interpretation of the statute, a closer look at two decisions, Watson v. Fort Worth Bank & Trust Co. and Ward's Cove Packing Co. v. Atonio is warranted.

V. THE BUILD UP TO THE CIVIL RIGHTS ACT OF 1991

Justice O'Connor delivered the majority opinion in Watson, a decision that expanded the disparate impact theory, previously only applicable to objective selection practices by employers, to apply to subjective selection practices as well. She wrote:

[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's workforce. The plaintiff must begin by identifying the specific employment practice that is challenged.... Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

In Watson, the Petitioner, a black employee, was passed over four times for promotion by the Fort Worth Bank & Trust. There was no evidence that she was less qualified than the white employees who were ultimately selected based on the subjective determinations of white supervisors. There was no formal employment policy in place at the time of the adverse decisions, but instead, the Bank found that since the supervisors were best acquainted with the job candidates and were familiar with the nature of the jobs to be filled they were in the best

92. See, e.g., Johnson, 480 U.S. 657-75 (Scalia, J. dissenting); Weber, 443 U.S. at 219-55 (Rehnquist, J. dissenting); see also discussion of the critique of Griggs, supra Part I.
95. Watson, 487 U.S. at 990.
96. Id. at 994.
97. Id. at 982.
98. See id.
position to make employment decisions. The District Court, utilizing
the individual disparate treatment model of analysis set forth in
_McDonnell Douglas Corp. v. Green_, allowed the plaintiff to proceed
with her individual claims and found that she had made out her prima
facie case. The burden of production then shifted to the defendant to
show a legitimate, non-discriminatory reason for its decision. The
District Court, in this case, found that the plaintiff did not meet this final
burden of showing the non-discriminatory reason was but a pretext for
discrimination and dismissed the action.

On appeal to the Fifth Circuit, Watson argued that her case should
have instead been analyzed under the disparate impact model, discussed
in _Griggs_. The Fifth Circuit held that a challenge to a subjective
promotion system can only be analyzed under the disparate treatment
model, and thereby, affirmed the lower court's decision. The
Supreme Court granted certiorari to decide whether this was the correct
conclusion in light of other circuits finding that disparate impact could,
in fact, apply to subjective hiring practices. The Supreme Court
ultimately held that the disparate impact theory of discrimination applies
to subjective hiring practices just as it does to objective practices and
remanded the case.

In articulating her rationale behind applying disparate impact
analysis to cases in which the alleged discrimination was through the
vehicle of a subjective or discretionary hiring practice, Justice O'Connor
noted that to hold otherwise could abolish the entire disparate impact
model.

---

99. _Id._
100. 411 U.S. 792 (1973). This case established a burden-shifting framework for individual
disparate treatment cases. First, the plaintiff has the burden of meeting the elements of the prima
facie case, namely that he or she applied, was qualified, and was passed over for the position. _Id._ at
802. Then the burden of production shifts to the defendant to articulate a legitimate non-
discriminatory reason for the adverse employment action. _Id._. Finally the burden shifts back to the
plaintiff to prove by a preponderance of the evidence that the defendant employer's articulated
reason was a pretext for discrimination. _Id._ at 804.
101. _Watson_, 487 U.S. at 983-84.
102. _Id._ at 984; see also _McDonnell Douglas_, 411 U.S. at 802.
103. _Watson_, 487 U.S. at 984.
104. _Id._ at 984; see also discussion _supra_ Part II.
105. _Watson_, 487 U.S. at 984.
106. _Id._ at 984-85; see, e.g., _Griffin v. Carlin_, 755 F.2d 1516, 1525 (11th Cir. 1985); _Segar v.
Smith_, 738 F.2d 1249, 1276 (D.C. Cir. 1984).
107. _Watson_, 487 U.S. at 999-1000.
108. _Id._ at 990.
challenges. Further, Justice O'Connor argued that in principle, a disparate impact analysis should be no less applicable to subjective employment criteria since, "[i]n either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." The Court went on to highlight that the expansion of disparate impact would not have a "chilling effect" on business practices, as there is a high threshold level of proof required for a plaintiff to sustain his burden. Specifically, when subjective practices are at issue, not only must a plaintiff show a statistical disparity, but the showing must be "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." The defendant is at all times free to rebut this evidence, making it a difficult burden for the plaintiff to bear and reducing the possibility, according to the plurality, that there will be seriously detrimental business implications.

Justice Blackmun's concurrence criticizes the majority conclusion by arguing that the proof structure established by the plurality, increasing the burden on the plaintiff, is an incorrect mimicking of the allocation of the burden of proof in what he deems "the very different context" of disparate treatment cases. He argues, and Justices Brennan and Marshall agree, that when the plaintiff establishes the elements of the prima facie case through a showing of sufficient statistical evidence, the burden of proof, not simply the burden of production, shifts to the employer. Justice Blackmun goes on to argue that the employer must prove that the proffered business necessity must "directly relate to a prospective employee's ability to perform the job effectively."

With this decision, the Court pushed the bounds of the Title VII framework established to date. The scathing criticisms in Weber by Justice Rehnquist and in Johnson by Justice Scalia were absent from this decision, as both voted with the plurality. In fact, there was no dissent in this case. Watson is clearly an expansion of the disparate impact

109. Id.
110. Id.
111. Id. at 993-94.
112. Id. at 994.
113. Id. at 994-96.
114. Id. at 1002.
115. Id. at 1001.
116. Id. at 1005.
117. Id. at 981.
118. Id.
The combined effect of *Watson* and *Ward's Cove*, discussed below, ultimately pushed Congress to check the unbridled discretion the Supreme Court seemed to be taking in analyzing Title VII cases.\(^{120}\)

In the 1989 case, *Ward's Cove Packing Co. v. Atonio*, the Supreme Court scaled back its holding in *Watson* and decided that the plaintiff's proffered statistical evidence did not establish a prima facie case of disparate impact under Title VII.\(^{121}\) The plaintiffs in this case were Alaskan cannery workers, employed seasonally for the salmon runs.\(^{122}\) At issue was the racial disparity between the company's two employment classifications: cannery and noncannery positions.\(^{123}\) Cannery positions were generally filled by non-white, Filipino and Alaskan workers, while the non-cannery positions were predominately held by whites.\(^{124}\) The plaintiffs, non-white cannery workers, brought a Title VII action alleging that the employer's hiring practices led to "nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within-were responsible for the racial stratification of the work force . . . "\(^{125}\) The Court of Appeals held that the comparison between the racial compositions of the cannery workforce to the non-cannery workforce was enough to make out a prima facie case in the disparate treatment context.\(^{126}\)

The Supreme Court, however, analyzed the disparate impact challenge looking to Justice O'Connor's opinion in *Watson*.\(^{127}\) Under *Watson*, the plaintiff bears the burden of going beyond statistical evidence and must isolate specific employment practices that are responsible for disparities.\(^{128}\) The plaintiff must go beyond a showing of imbalance at the employer's bottom line and must allege with...
particularity the specific practice at issue.\textsuperscript{129} The Court cited \textit{Watson}, and argued that this specific causation requirement is not unduly burdensome on plaintiffs as they are given liberal discovery rules providing for broad access to information to establish their claims.\textsuperscript{130} Although agreeing with \textit{Watson} that the ultimate burden of persuasion remains at all times with the plaintiff, the majority in \textit{Ward's Cove} increased the plaintiff's initial burden of making a prima facie case and at the same time lowered the burden on the employer to show business necessity.\textsuperscript{131} \textit{Watson} established that the employer had the burden of proving business justification.\textsuperscript{132} The majority in \textit{Ward's Cove} found that this burden was only one of production and seemed to overlook the clear wording of Justice O'Connor's opinion in \textit{Watson}, allocating a burden of proof to the employer once the plaintiff makes its prima facie case, although keeping the ultimate burden of persuasion on the plaintiff.\textsuperscript{133} This arguable misconstruction by Justice White and the \textit{Ward's Cove} majority is the fuel for Justice Blackmun's dissent.\textsuperscript{134} In his dissent, Justice Blackmun agreed with Justice Stevens' argument that the facts of \textit{Ward's Cove} are so clearly "overt and institutionalized discrimination ... [that they] ... resemble[] a plantation economy."\textsuperscript{135}

It was \textit{Watson} and \textit{Ward's Cove} and their inconsistent, quick expansion and constriction of the disparate impact model that sparked prompt legislative response through the enactment of the Civil Rights Act of 1991.\textsuperscript{136} As stated in the legislative history, one of the primary purposes of the 1991 amendments was to "respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions . . . ."\textsuperscript{137} Ultimately, Congress specifically codified "business necessity," a concept judicially created in \textit{Griggs}, and overruled \textit{Ward's Cove} to the extent it made "business necessity" a defense.\textsuperscript{138}

From the time Rehnquist joined the Supreme Court bench in 1972, just following the establishment of the disparate impact doctrine in \textit{Griggs}, Title VII litigation increasingly expanded the application of the

\begin{itemize}
  \item \textsuperscript{129} ld. at 657.
  \item \textsuperscript{130} id.
  \item \textsuperscript{131} See id. at 659.
  \item \textsuperscript{132} Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997-98 (1988).
  \item \textsuperscript{133} Ward's Cove, 490 U.S. at 659.
  \item \textsuperscript{134} See id. at 661 (Blackmun, J., dissenting).
  \item \textsuperscript{135} Id. at 662.
  \item \textsuperscript{136} Hearings on H.R. 1, supra note 4, at 3.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id. at 5.
\end{itemize}
law to employers.\textsuperscript{139} Griggs was initially criticized for lacking statutory basis.\textsuperscript{140} However, the doctrine continued to develop and expand, originally only applying to objective hiring practices, but later to subjective practices as well.\textsuperscript{141} Finally, when the Court was viewed to have gone too far in \textit{Ward's Cove}, Congress stepped in and amended Title VII to not only give a statutory basis for the disparate impact doctrine, but also to expressly overrule the Court's decision in \textit{Ward's Cove}.\textsuperscript{142} With the 1991 amendments to the Civil Rights Act there was a shift from litigation defining the contours of disparate impact to litigation applying the newly codified doctrine to other legal contexts.\textsuperscript{143}

VI. FROM 1991 TO THE CHANGE OF TIDES IN 2005

After the enactment of the 1991 Amendments, it seemed that proponents of both sides were able to claim victory. Those representing plaintiffs were pleased that the restorative effects of the amendments after \textit{Ward's Cove} and \textit{Watson}.\textsuperscript{144} Victims of employment discrimination were pleased as they were arguably better compensated under the new law,\textsuperscript{145} which in turn deterred employer wrongdoing.\textsuperscript{146} President George Bush Sr. and those on the side of employers, also claimed victory as they saw the Act as denouncing a quota system which would be a "litigation monster."\textsuperscript{147}

The major focus of Title VII litigation since the 1991 Amendments has been in the application of the statute of limitations.\textsuperscript{148} \textit{National R.R. Passenger Corp. v. Morgan},\textsuperscript{149} litigated under Chief Justice Rehnquist's Court, concerned employee rights under Title VII. These rights were

\textsuperscript{140} See discussion of Griggs critique \textit{supra} Part I.
\textsuperscript{141} See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).
\textsuperscript{142} \textit{Hearings on H.R. 1, supra} note 4, at 3.
\textsuperscript{143} See, e.g., Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (making disparate impact applicable to claims brought under the Age Discrimination in Employment Act).
\textsuperscript{145} See id. at 1474. In fact, although leading to an interpretive dispute, Section 102 of the Act, which provides for compensatory and punitive damages, created an "explosion of charges... filed with the Equal Employment Opportunity Commission. . . . [I]nformed observers have attributed a substantial portion of the increased filings to the Civil Rights Act's 'major new incentives for individuals to sue their current or former employers."' Id. at 1475 (citations omitted).
\textsuperscript{146} Nager & Broas, \textit{supra} note 144, at 1482.
\textsuperscript{147} Id. at 1473.
\textsuperscript{148} Also to be discussed \textit{infra} Part VII.
\textsuperscript{149} 536 U.S. 101 (2002).
again ultimately expanded and it was made easier to file claims of discrimination with the EEOC.150

In National Railroad, an African American employee brought action against Amtrak for racial discrimination and retaliation under Title VII.151 While the Court held that only acts of discrimination within 300 days of the date the employee filed the charge with the EEOC were actionable under Title VII, if at least some of the discriminatory acts alleged took place within the statutory period or the acts were part of a systematic practice of discrimination, the claim was actionable.152 The majority decision was over dissenting votes from Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy.153 Conflicted on the point, the Court held that although discrete discrimination claims must be filed within the statutory period, hostile work environment claims are not time-barred as long as one of the hostile acts falls within the statutory period.154 The dissent specifically disagreed with the majority’s determination that hostile work environment claims could be seen as one broad, single occurrence rather than individual occurrences, some of which may be time-barred.155 The dissent argued such a holding may encourage a plaintiff to “sleep on his or her rights” knowing that as long as some discriminatory act occurred within the statutory period the action could stand.156 Justice O’Connor noted that the majority holding is not only contrary to the policy behind Title VII, but is also contrary to the purpose behind a statute of limitations.157 The dissent argued that although each overt act of discrimination that causes injury to the plaintiff is relevant and starts the tolling of the limitations period, it should not logically follow that a plaintiff should be permitted to use the recent injury to obtain damages for a previous act.158 Therefore, Justice

150. Id. at 105. The court considers what events may permit suit under Title VII outside the statutory period. Id.
151. Id. at 104.
152. Id. at 105; see also Linda Greenhouse, Court had Rehnquist Initials Intricately Carved on Docket, N.Y. TIMES, July 2, 2002, at A16.
154. Id. at 105.
155. Id. at 123-24 (O’Connor, J., concurring in part and dissenting in part)
156. Id. at 125.
157. Id. at 125 (“Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” (citing R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944)).
158. See id. at 124-25.
O'Connor, along with Chief Justice Rehnquist, would have preferred to hold in a way that employee rights would be limited based on a strict adherence to the statutory text, its legislative purpose, and the purpose behind a statute of limitations. This line of cases dealing with statute of limitations issues culminated with Ledbetter, which was overruled in 2009 and is discussed in detail in Part VI.

In sum, although the 1991 Amendments curbed litigation with regard to the parameters of the disparate impact doctrine, it did not bring Title VII litigation to a halt. The focus merely shifted.

VII. A CHANGE OF CHIEF JUSTICE BUT A CONTINUANCE OF CONSERVATIVE IDEOLOGY

On September 29, 2005, John G. Roberts, a former law clerk for the late Chief Justice Rehnquist, as well as Associate Counsel to President Ronald Reagan, was confirmed as Chief Justice of the Supreme Court. With Roberts' confirmation came a continuation of the conservative leadership seen on the bench since Chief Justice Burger's tenure. In his 2005 term, Chief Justice Roberts was faced with his first Title VII action in Burlington Northern & Santa Fe Railway Co. v. White. The plaintiff, Sheila White, the only woman in her department, replaced a male co-worker and began to operate the forklift on her jobsite. White complained that her supervisor disparaged her and her position in front of male co-workers, after which he was suspended. Concurrent with the suspension, however, White was removed from her forklift responsibilities and reassigned to lower level tasks. White alleged this was in response to complaints that a "more senior man" should be assigned the forklift operator position.

Plaintiff White filed a complaint with the EEOC, alleging that she was discriminated against on the basis of her gender, as well as in retaliation for the complaints she made about her supervisor. A few

159. See id. at 124 (stating the dissent would hold that the statute of limitations should apply to all claims brought under Title VII).
163. Id. at 57.
164. Id. at 58.
165. Id.
166. Id.
167. Id.
months later, she filed a second EEOC claim alleging additional retaliatory activities, including surveillance monitoring by her employer.\textsuperscript{168} Shortly thereafter, Ms. White and a supervisor had a disagreement, after which she was deemed to be "insubordinate" and was suspended without pay.\textsuperscript{169} However, following certain internal company procedures, it was determined that White had not been insubordinate and she was awarded backpay for the duration of her suspension.\textsuperscript{170} Finally, Ms. White resorted to filing suit for unlawful retaliation under Title VII.\textsuperscript{171} A jury ultimately found in her favor and awarded her compensatory damages.\textsuperscript{172}

The Court held that aside from the protections afforded by Title VII for victims of employment discrimination on the basis of "race, color, religion, sex, or national origin," there is an additional protection afforded anyone who has been retaliated against for initiating or participating in a Title VII proceeding.\textsuperscript{173} The Court determined that the anti-retaliation provision of the Act covers only "employer actions that would have been materially adverse to a reasonable employee or job applicant"\textsuperscript{174} to the extent that it could "dissuade a reasonable worker from making or supporting a charge of discrimination."\textsuperscript{175} The Court held that a jury could reasonably conclude that Ms. White's suspension was materially adverse, and affirmed the jury's judgment.\textsuperscript{176} Eight of the Supreme Court justices joined in this opinion, with Justice Alito being the sole concurrence.\textsuperscript{177}

Similarly, in \textit{Arbaugh v. Y & H Corp.},\textsuperscript{178} the majority decision favored the plaintiff-employee.\textsuperscript{179} In this case, an employee sued a former employer for sexual harassment under Title VII.\textsuperscript{180} Arbaugh was employed at a restaurant owned by Y & H.\textsuperscript{181} She alleged that she was sexually harassed by one of the owners, and that he hastened her

\begin{itemize}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 58-59.
\item \textsuperscript{171} \textit{Id.} at 59.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.} at 72.
\item \textsuperscript{174} \textit{Id.} at 57.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.} at 70.
\item \textsuperscript{177} \textit{Id.} at 73 (Alito, J., concurring).
\item \textsuperscript{178} 546 U.S. 500 (2006).
\item \textsuperscript{179} \textit{Id.} at 504, 516 (reversing the Court of Appeals holding which dismissed the plaintiff's case for lack of subject matter jurisdiction).
\item \textsuperscript{180} \textit{Id.} at 503-04.
\item \textsuperscript{181} \textit{Id.} at 507.
\end{itemize}
termination with Y & H. A jury found that Arbaugh had in fact been the victim of sexual harassment and was constructively discharged, both actions in violation of Title VII, and awarded her a considerable verdict. Subsequently, the employer made a motion to dismiss for lack of subject matter jurisdiction. The basis of the employer’s motion was that it was not an “employer” within the meaning of Title VII. Under section 2000e(b), an “employer” is someone with fifteen or more employees. The employer, for the first time on this motion, argued he did not meet that criteria, and therefore could not be sued under Title VII, in an attempt to hinge the case on a jurisdictional issue. The Supreme Court rejected this argument, holding that “Congress could make the employee-numerosity requirement ‘jurisdictional’ . . . [but] neither § 1331, nor Title VII’s jurisdictional provision, 42 U. S. C. § 2000e–5(f)(3), [authorizing jurisdiction over actions brought under Title VII], specifies any threshold ingredient akin to 28 U.S.C. § 1332’s monetary floor.”

Again, eight of the nine Supreme Court justices joined in the majority opinion written by Justice Ginsburg. This time however, Justice Alito refrained from taking part in the decision. The Court analyzed a variety of cases in its analysis presenting similar or the same fact patterns as Arbaugh, and determined that those cases were decided in favor of the employer because the employee “fail[ed] to state a claim upon which relief can be granted,” rather than because of a procedural defect. Therefore, in fairness to Arbaugh, the Court allowed her claim to proceed.

While the Arbaugh Court in the 2005 term was hesitant to lean in favor of the employer based on a jurisdictional issue, namely the employee-numerosity requirement in the Title VII’s definition of “employer,” in 2006, it appears the Court was less steady in its convictions. In the first Title VII decision of the 2006 term,

182. Id.
183. Id. at 508.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id. at 514-15.
189. Id. at 502.
190. Id.
191. Id. at 512.
192. Id. at 511-12.
193. Id. at 513-14.
Ledbetter, an employee filed an EEOC charge claiming sex discrimination, offering into evidence evaluations which showed disparate pay based on the employee’s gender. Ledbetter worked for Goodyear for almost twenty years, where her pay raises were determined by supervisor performance evaluations. In the last year of her employment, Ledbetter filed a charge with the EEOC alleging pay discrimination in violation of Title VII. Ledbetter alleged that she had received poor evaluations based on her gender affecting her pay, which was considerably less than male employees. A jury agreed and awarded her backpay for the discriminatorily lower pay she had been receiving, as well as damages. Her employer appealed, alleging that her discrimination claim was time-barred for the first 18 years of her employment and that no pay disparity occurred in her last year as an employee. The Eleventh Circuit reversed the trial court’s decision, holding that the time bar Goodyear asserted prevented Ledbetter from bringing suit for the majority of her employment, and that evidence to show discriminatory pay in her last year of employment was inadequate.

In her appeal to the Supreme Court, Ledbetter argued that there was a discriminatory disparity in the paychecks issued to her during the 180-day time period before she filed suit with the EEOC, and therefore, her claim is not time-barred, or in the alternative, that the most recent paychecks she received were lower than deserved because they were built on disparities from previous years.

The Supreme Court, in a more divided opinion than its previous Title VII decisions, held that Ledbetter’s claim was time-barred because later effects of past discrimination do not restart the clock for filing an EEOC charge. To file an EEOC charge asserting a violation of Title VII, an employee must file the charge “within a specified period (either 180 or 300 days, depending on the State)” identifying the specific violations alleged. The Court reasoned that Congress has a "strong
preference for the prompt resolution of employment discrimination”
claims and analogized Ledbetter’s case to others where employees were
similarly situated. As part of this analysis, the Court noted that
employee’s arguments in other cases had been rejected as well, since
although the effects on pay may still have been felt by the employee, no
“present violation existed.”

The Court rejected that the pay-raise denial in her final year of
employment violated Title VII, triggering a new EEOC charging
period. The Court said that to seek retribution for those past alleged
violations, Ledbetter should have filed more timely EEOC charges to
receive compensation for them. Through fault of her own, she did not
file those charges, and the Court says this is enough to prevent her from
bringing such claims at a later date.

Surprisingly, the Ledbetter majority was written by Justice Alito,
who had concurred or not taken part in the last two Title VII decisions,
and he was joined by four other justices. Justice Ginsburg dissented,
and was joined by three other justices. Ginsburg, a proponent for the
employee in Arbaugh, dissented in Ledbetter in her continued support
for the employee. Ledbetter clearly favors the employer and places
heavy restrictions on employees when the discriminatory effect of an
employer’s action does not manifest itself within the time period allotted
for the filing of a charge with the EEOC. The Court seemed intent on
deciding in favor of the employer based on case precedent, and
unwilling to do what some may see as fair. The dissent expressed its
disdain for the decision because it limits employees’ ability to bring suit
due to the rigidity of Ledbetter’s inflexible time period requirements.

205. Id. at 630-32.
206. Id. at 625. See also Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 104-05 (2002);
Lorance v. AT&T Techs., Inc., 490 U.S. 900, 908 (1989); Del. State Coll. v. Ricks, 449 U.S. 250,
254-56 (1980). When a discriminatory act takes place in violation of Title VII, the time period to
file an EEOC charge begins. This time period does not restart when further “non-discriminatory”
actions are taken that result in discriminatory effects based on the past Title VII violation.
However, any intentional violation results in the time period starting over. See Ledbetter, 550 U.S.
at 623, 637 (2007).
207. Ledbetter, 550 U.S. at 628.
208. Id. at 628-29.
209. Id.
210. Id. at 620.
211. Id.
212. Id. at 643-61 (Ginsburg, J., dissenting).
213. See generally id. at 623-24 (holding in favor of the employer by stating that the time to
file a charge was not restarted by “later effects of discrimination”) (majority opinion).
214. See id. at 632.
215. See generally id. at 649-52 (Ginsburg, J., dissenting) (discussing the differences between
singular discrete acts and acts of pay discrimination).
The majority ruled that to waver on the issue would frustrate Title VII’s enforcement abilities and its purpose. However, some argued that the Court’s decision in *Ledbetter* does in fact frustrate the purpose of Title VII, as the law was arguably enacted to provide greater remedies for the employee; and to be flexible enough to accommodate the various employment discrimination cases that may arise. While the time frame within which to file an EEOC charge is rigid, others argue that these strict regulations ensure that employers are not defending themselves against claims brought by employees based on issues from times gone by, where the surrounding circumstances may no longer exist. In essence, the time bar prevents frivolous claims by disgruntled employees, unless the employee takes it upon himself or herself to allege discriminatory impact at or around the time when the actual act occurs.

Following *Ledbetter*, in 2008 the Supreme Court heard another Title VII case, *Crawford v. Metropolitan Government of Nashville*. The Court held that Title VII’s anti-retaliation provision applies to an employee who indicates discriminatory activity during an investigation of another employee’s discrimination case. As in *Ledbetter*, Justice Alito once again fought for the employer in the concurrence. In *Crawford*, Metropolitan Government (Metro) began investigating rumors of sexual harassment by Hughes, an employee. During the course of the investigation, Crawford was questioned and reported several occurrences of sexual harassment by Hughes, after which she was terminated, with no action taken against Hughes. Metro claimed that Crawford was terminated for embezzlement, while Crawford argued she was fired in retaliation for reporting the instances of sexual

---

216. *Id.* at 629 (majority opinion).
217. See, e.g., Adrienne Nicole Calloway, Note, *180 Days or No Equal Pay: Limiting Employment Discrimination Suits in Ledbetter v. Goodyear Tire & Rubber Co.*, 59 MERCER L. REV. 785, 800 (2008) (“The Court in *Ledbetter* has limited the broad scope of the legislation and made it more difficult for employees to bring pay discrimination claims. A statute of limitations is essential . . . however, Ginsburg argues that courts should not use it to thwart the remedial purpose of Title VII.”).
218. See, e.g., Megan E. Mowrey, *Discriminatory Pay and Title VII: Filing a Timely Claim*, 41 J. MARSHALL L. REV. 325, 390 (2008) (quoting a White House statement that asserts allowing employees to bring suits years after the alleged discrimination “serve[s] to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved . . .”).
220. *Id.* at 849.
221. *Id.* at 853 (Alito, J., concurring).
222. *Id.* at 849 (majority opinion).
223. *Id.*
harassment. Crawford filed a Title VII charge with the EEOC, then filed suit in the United States District Court.

Title VII’s anti-retaliation provision provides, in relevant part, that an employer cannot discriminate against an employee because the employee has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” The District Court granted Metro summary judgment, stating that Crawford had not opened an investigation, but rather had answered questions in an open investigation, and the Court of Appeals affirmed. The Supreme Court reversed and remanded, in another strong decision favoring the employee, stating that “[i]f it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others.” To discourage reporting of unlawful discrimination would severely undermine the statutory and legislative purpose of Title VII. The case was remanded because Metro’s summary judgment motion contained additional defenses that had not yet been discussed.

Justice Alito concurred, emphasizing “that the Court’s holding does not and should not extend beyond employees who testify in internal investigations...” Alito believed that the Court extended protection too far to those that are silent about a Title VII violation until questioned, and that doing so would allow many more employees to bring claims against employers even if they had never given the employer any notice that such activity was occurring.

VIII. THE PEOPLE SPEAK: CONGRESS’ RESPONSE TO THE LEDBETTER DECISION

Few decisions have been as controversial as Ledbetter, a decision that clearly favors employers, and to which there was a strong public response. Some argued that the decision would unfairly impact
certain employees and "creates [p]erverse [i]ncentives for [e]mployer [b]ehavior." This is because the practical effect of Ledbetter was to "deny remedies to many victims of employment discrimination who do not file their claims within the brief limitations period." The Court's strict construction of the allotted time within which to file under Ledbetter would have had the adverse result of generating obstacles for employees who intended on bringing suit against their employers when the discrimination was not immediately noticeable or actionable. Justice Ginsburg recognized the majority's point that it will be difficult for employers to defend themselves regarding decisions made a long time ago, and that the time bar will in effect alleviate that difficulty. However, Ginsburg argued that the employer will not be defending suits regarding employment decisions made on one instance long ago in the past, but rather instances that occur over a period of time. Additionally, Ginsburg emphasized her concern for groups protected under Title VII and their ability to bring successful claims. She discussed that the time limit mandated by the Court in Ledbetter will adversely affect employees' chances of bringing successful claims since employees will rush to bring suit before the evidence is sufficiently in their favor to prevent being time-barred.

Ginsburg argued that the decision reinforced employer's retaliatory abilities since employees will likely bring more unreasonable claims for fear of being shut out by the statute of limitations. This may flood the court with frivolous lawsuits, wasting time and judicial resources. Furthermore, Ledbetter could potentially defeat the purpose of Title VII's internal controls because employers, no longer fearful of employee suits over pay discrimination, may fail to objectively maintain fair salaries.

Mostly in response to Justice Ginsburg's dissent, the Lilly

235. Calloway, supra note 217, at 796.
236. Id. at 796-97.
238. Id.
239. Id. at 354.
240. Hearing, supra note 234.
241. Id.
242. Authors predict this will be the result, as is the case when any unreasonable and unripe cases are brought before the Court.
243. See generally Mowrey, supra note 218, at 392 (stating the result reached in Ledbetter may "pose significant challenges to potential plaintiffs").
Ledbetter Fair Pay Act of 2007 ("Fair Pay Act") was introduced. On January 8, 2009, the Fair Pay Act was introduced in the Senate and passed by a vote of sixty-one to thirty-six. Five days later, the House also passed the bill (250 to 177), resulting in Congressional unity on this front. On January 29, 2009, the newly elected President Obama, standing next to Lilly Ledbetter, signed his first bill into law as the Fair Pay Act. The Act amends Title VII to recognize "an unlawful discriminatory action each time an employee is paid after an initial discriminatory compensation decision." The Act will encourage "employers to assess whether they engage in gender discrimination on a continuing basis" to avoid liability at each paycheck issued.

The uproar following Ledbetter indicated that it might soon be congressionally overruled. The Fair Pay Act is the legislative outlet that was used to overrule Ledbetter and further clarify Title VII to achieve a result more in line with Justice Ginsburg's dissent. The potential limitation to wage discrimination suits suggests that Congress should broaden the scope of the Act to stretch beyond that of the specific facts in Ledbetter, in order "to make clear that each application of a discriminatory policy, whether or not related to compensation, constitutes an unlawful employment practice." The Fair Pay Act intends to prevent future Courts from applying portions of the holding to different factual cases brought before the Court, since the legislation would broadly encompass all discriminatory situations.

244. Id. at 388.
246. Id.
247. President Barack Obama: Lilly Ledbetter didn't set out to be a trailblazer or a household name. She was just a good hard worker who did her job—and did it well—for nearly two decades before discovering that for years, she was paid less than her male colleagues for the very same work. Over the course of her career, she lost more than $200,000 in salary, and even more in pension and Social Security benefits—losses she still feels today. Wage Discrimination Lawsuits (C-SPAN television broadcast Jan. 29, 2009), available at http://firedoglake.com/2009/01/29/breaking-lilly-ledbetter-fair-pay-act-signed-into-law-by-president-obama.
250. See generally Calloway, supra note 217, at 798-801 (discussing Congress' quick reaction to Justice Ginsburg's dissent in Ledbetter).
251. See Kathryn A. Eidmann, Comment, Ledbetter in Congress: The Limits of a Narrow Legislative Override, 117 YALE L.J. 971, 972 (2008).
252. Id.
253. See id.
Some argued that the Fair Pay Act would result in the opposite of what it intended to achieve. Courts may assume that because Congress reconsidered the issue decided in Ledbetter and did not abrogate parts of the Court’s decision, it intended to acquiesce to the Court’s interpretation in the portions of the decision that were not overridden specifically. Essentially, the argument is that courts may infer from Congress changing only one part of the statute at issue that Congress intended the other part of the statute to remain intact. This might lend itself to the argument that the Fair Pay Act would actually strengthen Ledbetter’s authority.

However, even facing staunch opposition from a variety of class and party lines, the Fair Pay Act was successfully passed, effectively overruling the majority’s decision in Ledbetter. The Act restores the pre-Ledbetter position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began. The Fair Pay Act covers discriminatory compensation claims retroactively as of May 28, 2007, and re-extends the time within which employees can sue employers for wage based discrimination. The signing of the Act has been lauded by many, including Stuart Ishimaru, Acting Chairman of the EEOC.

The Act, while especially beneficial for women receiving lower pay than their male counterparts, is also a huge leap forward for all unfairly paid workers that may not realize they have a right to legal recourse. Furthermore, the Act reestablishes Congressional intent in protecting workers from discrimination. “The Act states that with respect to pay discrimination, an unlawful employment practice occurs ‘each time wages, benefits, or other compensation is paid, resulting in whole or in part from [a pay] decision or other practice.’” While the Act will not

254. Id. (discussing the limitations of the Fair Pay Act).
255. Id. at 974.
256. Id. at 974-75.
257. Id.
259. Id.
261. EEOC Press Release, supra note 260.
262. See id.
263. Id.
264. Id.
apply retroactively to Lilly Ledbetter herself, its impact will be felt by other employees facing wage discrimination.265

IX. READING THE CRYSTAL BALL: WHAT DOES THE FUTURE HOLD?

On January 20, 2009, there was an ideological shift in the United States with the presidential inauguration of Barack H. Obama.266 Obama, a liberal Democrat and the 44th President of the United States,267 is a stark contrast to his predecessor, a conservative Republican, George W. Bush. With such a sweeping change of political ideology in the White House, changes in Title VII, and anti-discrimination law more generally, are likely.

In addition to a presidential change, there were also changes in the membership of the Supreme Court following the retirement of Justice Souter in 2009.268 Supreme Court appointments are rare due to the lifelong term of the Justices, thus each appointment has significant results.269 Specifically, a new Chief Justice appointment impacts the decision-making process of the Court, as it did in 2005 with the appointment of Chief Justice Roberts.270 Often, changes in the makeup of the Supreme Court are responsible for changes in constitutional law.271 Additionally, while cases on the docket may result in surprising verdicts, cases that have already been decided are in danger of reversal, particularly those confronting explosive political issues.272 A single
Justice may be responsible for the "swing vote," and entirely shift the anticipated direction of the court and the law.\textsuperscript{273} Based on previous Title VII cases decided so far under the current Court, predictions can be made as to future outcomes.

As Roberts was appointed to replace Rehnquist, and Alito was set to replace O'Connor, the Court appeared to be moving in a more conservative direction.\textsuperscript{274} Justices Scalia and Alito have been vocal, poignant, and opinionated conservative jurists in many of the Title VII decisions discussed in this note, and have helped to shape the law as we know it today.\textsuperscript{275}

We have also witnessed the response from the legislative and executive branches to the Court's Title VII decisions, most recently regarding the \textit{Ledbetter} decision. Both Congress and President Obama took a large step toward ensuring compensation equality, with the passage of the Fair Pay Act, all within the first few days of Obama taking office.\textsuperscript{276}

In May 2009, Obama appointed Judge Sonia Sotomayor to the Supreme Court, a judge appointed by President Clinton to sit on the Second United States Circuit Court of Appeals.\textsuperscript{277} Sotomayor, a New York native, was a United States District Court judge appointed by President George H.W. Bush in 1992.\textsuperscript{278} On August 8, 2009, Justice Sotomayor became the 111th Supreme Court Justice after a swearing in ceremony administered by Chief Justice Roberts.\textsuperscript{279} A graduate of Princeton University and Yale Law School, Sotomayor was an Assistant District Attorney in Manhattan before becoming a judge.\textsuperscript{280} She received widespread Democratic support, and a general wariness from Republicans.\textsuperscript{281} Through her years as a District Court judge in the Southern District of New York, Sotomayor has decided a fair amount of labor and employment decisions, yet it is unclear as to whether her...


\textsuperscript{275} \textit{See supra} Part VII.


\textsuperscript{277} Hamby et al., \textit{supra} note 13.

\textsuperscript{278} \textit{Id.}


\textsuperscript{281} \textit{Id.}
support lies with the employer or employee.\textsuperscript{282}

While Judge Sotomayor has more experience in the area of labor and
employment law than other recent Supreme Court appointees, her
record does not, as some might expect, place her on the pro-employee
end of the spectrum. Given the number of pro-employer decisions she
has issued over the years, she appears to take a flexible approach to
labor and employment law cases.\textsuperscript{283}

The appointment of Justice Sotomayor could result in a major shift
and potentially balance out the views of staunch conservatives such as
Scalia and Alito. We have not seen liberal justices appointed to the
bench since President Clinton’s time.\textsuperscript{284} In fact, only three liberal
justices, including Justice Sotomayor, have been appointed since
President Nixon was in office.\textsuperscript{285}

President Obama has also appointed Hilda Solis, a California
Democratic Representative, to the position of Secretary of Labor, a
prominent position in his presidential cabinet.\textsuperscript{286} Ms. Solis is “the first
Latina . . . to be appointed to a senior post in a cabinet level department,
according to the National Association of Latino Elected and Appointed
Officials . . . .”\textsuperscript{287} She was appointed after a period of turmoil between
Republicans and Democrats, and was overwhelmingly chosen by
Democrats to represent the voices of the working people of the United
States (fifty-four Democrats, twenty-four Republicans, and two
Independents outvoted the seventeen Republicans against placing Solis
in office).\textsuperscript{288}

Significantly, Solis has voted in support of prohibiting job
discrimination on the basis of sexual orientation.\textsuperscript{289} While the statutory

\begin{itemize}
\item \textsuperscript{282} Jackson Lewis LLP, \textit{Supreme Court Nominee Sotomayor’s Record in Labor and
Employment Law Cases Reveals Balanced Approach}, May 29, 2009,
\item \textsuperscript{283} Id.
\item \textsuperscript{284} See Supreme Court of the United States, Members of the Supreme Court of the United
Ginsburg and Justice Breyer were both appointed during President Clinton’s term. Id.
\item \textsuperscript{285} See id.
\item \textsuperscript{286} U.S. Dep’t of Labor—Office of the Secretary of Labor,
\item \textsuperscript{287} Tyche Hendricks, \textit{Hilda Solis Confirmed as Labor Secretary—Finally}, (Feb. 24, 2009,
[hereinafter Solis Confirmed].
\item \textsuperscript{288} Mike Hall, \textit{Senate Confirms Hilda Solis as Labor Secretary}, (Feb. 24, 2009)
\item \textsuperscript{289} On the Issues, \textit{Hilda Solis on Civil Rights}, (last visited April 10, 2009)
\end{itemize}
language of Title VII does not include sexual orientation as a protected
classification prohibiting discrimination on that basis in the workplace,
nineteen states have passed laws prohibiting discrimination on that
basis. Solis supports adding that classification to the list of other
protected classes within the realm of Title VII. Solis’ support for
expanding the classes of protected individuals under Title VII seems to
indicate that the spirit and purpose of Title VII, alluded to in the
disparate impact cases from the 1970s through the early 1990s, will be
upheld, despite a 6-3 conservative majority on the Court. Perhaps the
scope of Title VII protections will even be broadened while she presides
as Secretary of Labor. Additionally, Solis is “expected to increase the
Labor Department’s focus on protecting worker health and safety and
enforcing wage and hour laws” by making recommendations from the
executive branch of the government for employers across the country.

Following the congressional reversal of Ledbetter and the signing
of the Lilly Ledbetter Fair Pay Act, it is unclear where future Title VII
cases are headed, specifically in the realm of statute of limitations issues,
and how a change in the Supreme Court bench will affect their
outcomes. However, if Obama’s first few weeks in office are any
indication of what the future brings, it appears that employees have a lot
of support on their side. With a new President paving the way
through critical appointments to the Supreme Court bench, perhaps there
will be a shift in the Supreme Court ideology regarding Title VII and
other employment decisions as well. Additionally, the appointment of
Hilda Solis, a woman who fiercely fights for workers’ rights, will likely
continue to provide remedies for the employee.

There is now a place in history for Lilly Ledbetter, a woman who
fought so that others could have their day in court. Employers may
argue that their rights are largely being abrogated with the recent
political developments in the Title VII realm; however, that argument
will likely receive opposition in this new, more liberal, political climate.

Similarly, the Fair Pay Act codified the Congressional intent
regarding the language of Title VII, and employers must act accordingly.
Despite legislative and executive support for employee rights, it seems
the only wild card for pro-employee advocates to question now is Justice
Sonia Sotomayor. While Obama, in signing the Fair Pay Act, acted as
an employee advocate, it will be interesting to see how his appointment

290. Id.
291. See id.
292. Solis Confirmed, supra note 287.
293. See supra discussion of Fair Pay Act Part VIII.
of Sotomayor, replacing Justice Souter, who was called “a conservative man in the old-fashioned sense of the term,” will swing cases up for review over the next four years.  

Sarah Crabtree & Daphnie Stock*