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What Counts as Discrimination in Ledbetter and the Implications for Sex Equality Law

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WHAT COUNTS AS "DISCRIMINATION" IN *LEDBETTER* AND THE IMPLICATIONS FOR SEX EQUALITY LAW

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I. INTRODUCTION

There is more interrelation between statutory and constitutional law as a source of substantive antidiscrimination protections than is generally acknowledged. Although the Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[1] purports to be a narrow procedural ruling regarding the start of the statutory limitations period for Title VII claims,[2] at its core, the decision turns on a cramped and narrow understanding of what it means to discriminate on the basis of sex. This understanding has much broader implications for sex equality law than the procedural hurdles the decision presents for victims of pay discrimination pursuing Title VII claims. By choosing the most narrow, limiting conception of discrimination, the Court undermines the potential for statutory law to fill in the

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1. 127 S. Ct. 2162 (2007).
2. *Id.* at 2177.

details of the Constitution's broad provisions for equal protection and to add meaningful content to the promise of equal citizenship.

My contribution to this symposium will consider three aspects in which the Court's recent decision in *Ledbetter* undermines the Constitution's promise of equal protection. First, by adopting a narrow and restrictive conception of what constitutes discrimination, the Court further dilutes the strength of statutory antidiscrimination law, which has been the primary source of sex equality guarantees in our modern law. Second, by further narrowing the category of acts that constitute unlawful discrimination, the Court continues its trajectory of leaving Congress less room to legislate under Section Five of the Fourteenth Amendment. Finally, by contributing to a legal culture that understands discrimination narrowly, the Court's decision adds to the legal narratives that make it difficult to perceive discrimination when it happens. If discrimination occurs only when an identifiable actor consciously and overtly acts out of animus against women, then what might otherwise seem like discrimination must really be something else. An overly narrow definition of discrimination legitimizes status quo inequalities that are not attributable to such conduct, promoting the perception that choice, ability, or some undiscovered factor must be responsible for whatever inequality remains. For these reasons, I view *Ledbetter* as a decision that significantly undercuts the Constitution's promise of equal protection of the law, despite its statutory and procedural origins.

II. THE IMPORTANCE OF STATUTORY LAW IN SECURING EQUAL PROTECTION OF THE LAW: "SUPER-STATUTES" AS QUASI-CONSTITUTIONAL LAW AND THE DISAPPOINTINGLY HOLLOW SEX EQUALITY NORMS IN *LEDBETTER*

For some time now, the Constitution's guarantee of equal protection, at least insofar as it is enforced by courts, has been overshadowed by statutory protections against discrimination. The major federal statutes proscribing discrimination based on sex, such as Title VII of the Civil Rights Act of 1964[3] (Title VII), the Pregnancy Discrimination Act[4] (PDA), Title IX of the Education Amendments of 1972[5] (Title IX), the Equal Pay Act[6] (EPA), and the Fair Housing Act,[7] have done much more to secure sex equality in recent decades than the Constitution's Equal Protection Clause, at least as the Clause has been judicially enforced against state actors. This is partially due to the way courts have interpreted the Constitution's Equal Protection Clause, as discussed below, and partially due to the differences between the institutional sources of statutory and constitutional equality guarantees. Unlike the Court's interpretation of the Constitution, the Court's interpretation of statutes results in a stronger connection to a majoritarian mandate because statutes stem from the mobilization of popular majorities that support codifying legal protections. Because of the importance of statutory law in adding content to the Constitution's broad promise of equal protection, this symposium on the Roberts Court and equal

3. 42 U.S.C. §§ 2000e–2000e17 (2000).
4. *Id.* § 2000e(k).
5. 20 U.S.C. §§ 1681–1688 (2000).
6. 29 U.S.C. § 206(d) (2000).
7. 42 U.S.C. §§ 3601–3619 (2000).

protection properly devotes attention to the implications of the Court's recent *Ledbetter* ruling and its interpretation of pay discrimination under Title VII.

A. Sex Discrimination Statutes as Adding Content to Constitutional Norms of Equal Protection

1. The Emptiness of Constitutional Sex Equality Rights

The Constitution itself encompasses only very narrow sex equality guarantees, at least insofar as it creates substantive rights that are judicially enforceable against state actors. The Constitution's guarantee of equal protection has been severely constrained by numerous bedrock precedents embodied in constitutional law: *Personnel Administrator of Massachusetts v. Feeney*,[8] adopting a strict intent requirement for challenging facially neutral practices with a discriminatory effect;[9] *Geduldig v. Aiello*,[10] refusing to regard discrimination based on pregnancy as sex discrimination;[11] and a number of precedents, beginning with the *Civil Rights Cases*[12] and culminating in the *United States v. Morrison*[13] decision, that have adopted a strict state action requirement and that have defined state action very narrowly.[14]

As a result of these limiting doctrines, the Constitution's equal protection promise of sex equality has been practically limited to those few instances where sex discrimination is enforced by a state actor through a sex-based facial classification[15] that cannot be plausibly defended on the basis of "real" differences between the sexes.[16] With few exceptions, the most meaningful substantive constraints on sex equality have come from antidiscrimination statutes and not directly from judicial interpretation of the Equal Protection Clause.

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8. 442 U.S. 256 (1979).

9. *Id.* at 279.

10. 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

11. *Aiello*, 417 U.S. at 497.

12. 109 U.S. 3 (1883).

13. 529 U.S. 598 (2000).

14. *Id.* at 619–27.

15. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 541, 557 (1996) (finding that Virginia violated women's right to equal protection by not providing them with a comparable education to that received by men at the Virginia Military Institute).

16. *See, e.g.*, Nguyen v. I.N.S., 533 U.S. 53, 73 (2001) (upholding the constitutionality of an immigration statute that made proof of citizenship more difficult for children whose fathers, rather than mothers, were United States citizens, stating that the failure to note the biological differences between men and women in the birth process would render the Equal Protection Clause "superficial"); Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) (finding that restrictions placed on women regarding combat justified a federal act that only required men to register for the draft); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471, 476 (1981) (finding that statutory rape imposing criminal liability on only males was justified because of the different risks and consequences men and women experience as a result of sexual intercourse).

2. Sex Discrimination Statutes as "Super-Statutes"

Given the Court's longstanding rejection of a more vibrant and far-reaching constitutional guarantee of equality, statutory law has long held the most promise for furthering sex equality. In a recent article, Professor William Eskridge explains that this is true for most of our fundamental understandings of the basic legal rules and commitments that structure our civil society.[17] He argues that for institutional reasons, the Court does not give detailed substantive content to major normative constitutional guarantees like sex equality.[18] Instead, it is necessary to look to "super-statutes,"such as Title VII, the PDA, and Title IX, that embody a broad normative proposition.[19] To qualify as a super-statute, a statute must meet three criteria: (1) it "seeks to establish a new normative or institutional framework for state policy;" (2) it "'stick[s]' in the public culture," and (3) the statute "and its institutional or normative principles have a broad effect on the law."[20] Under this formulation, Title VII, along with other major federal sex discrimination statutes like the PDA, Title IX, and the EPA, are clearly super-statutes. Professor Eskridge argues that such statutes play an important role in defining the contours of our constitutional commitments[21] and that judges "should interpret [them] liberally to carry out their great public purposes."[22] Because these statutes are a result of the democratic process, judges should not interpret them under the same institutional constraints that produce underenforced constitutional norms;[23] rather, judges should recognize the full content and scope of these statutes, with special attentiveness to agency interpretations, because these agencies are also more politically accountable.[24] Professor Eskridge views this model of statutory supplementation, the PDA Model,[25] as more vibrant than the *Marbury* Model[26] for American Constitutionalism,[27] in which judicial constitutional interpretation can only be overridden through the process of constitutional amendment.[28]

Under the PDA Model, the *Ledbetter* decision is a significant setback for Title VII's sex equality norm and represents the failure of the Court to recognize the full normative content of a super-statute. Apart from its procedural limitations on employees' assertions of Title VII rights, the decision takes an extremely narrow view of the actions that constitute violations of the statute's mandate of sex equality.

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17. William N. Eskridge, Jr., *America's Statutory "constitution,"* 41 U.C. DAVIS L. REV. 1, 6 (2007).

18. *Id.* at 31–32 (noting the Court's lack of staff, dependence on other branches of government for enforcement of its rulings, and the need to use its "scarce political capital . . . cautiously").

19. *See id.* at 36.

20. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

21. *Id.* at 1216–17.

22. Eskridge, Jr., *supra* note 17, at 36.

23. *See supra* note 18 and accompanying text.

24. *See* Eskridge, Jr., *supra* note 17, at 36–39.

25. *Id.* at 29.

26. *Id.* at 22.

27. *Id.* at 30.

28. *Id.* at 22–23.

B. Ledbetter's Constricted View of Intentional Discrimination: Narrowing the Scope of the Antidiscrimination Principle

In a recent article, Professor Tristin Green discusses what she calls the "insular individualism" at the root of the Court's opinion in *Ledbetter* and the implications it has for Title VII disparate treatment law.[29] According to Professor Green, these implications include the potential limitations on relevant evidence for proving discrimination and the threat of further intrusions into the requirement of vicarious liability, particularly, the lure of the so-called "cat's paw" approach to employer liability.[30] I agree with Professor Green that *Ledbetter* reflects an overly narrow view of what counts as discrimination. The Court's opinion limits intentional discrimination to instances of an individual bad actor who consciously and demonstrably acts upon an invidious sex-based motive toward the plaintiff.[31] Rather than focus on the implications for further doctrinal developments that stem from this conception of discrimination under Title VII, this discussion focuses on the effects this narrow approach to intentional discrimination has on broader norms of sex equality in our constitutional culture.

Unfortunately, *Ledbetter* does not represent a recent innovation or a sudden inability by courts to grasp the complexity of workplace discrimination. Rather, *Ledbetter* is the continuation, and perhaps escalation, of a trend in discrimination law ushered in by conservative courts that equate discrimination with the discrete actions of individuals acting with a conscious group-based animus. Discrimination law has followed this path for some time now, as evidenced by numerous Title VII decisions. In *St. Mary's Honor Center v. Hicks*,[32] the Court upheld a lower court's determination that the plaintiff, who had made a Title VII racial discrimination claim, had disproved the employer's proffered nondiscriminatory reason for the adverse employment action, but had nevertheless failed to convince the factfinder that the real reason for the decision was not simply a personality conflict.[33] By treating a negative reaction to an employee's personality and the intent to discriminate as mutually exclusive, the Court implicitly equated intentional discrimination with conscious racial animus. The Court's companion cases that set forth a framework for determining employer liability for sexual harassment, *Burlington Industries, Inc. v. Ellerth*[34] and *Faragher v. City of Boca Raton*,[35] further continued this trend toward a constrained approach to discrimination law. By adopting a framework that separates innocent employers from errant individual harassers,[36] the Court implicitly rejected a broader conception of institutional discrimination in favor of a narrower, individualized approach.

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29. Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, HARV. C.R.-C.L. L. REV. 353, 354(2008).

30. *Id.* at 368–72.

31. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2169, 2174 (2007).

32. 509 U.S. 502 (1993).

33. *Id.* at 508, 524–25.

34. 524 U.S. 742 (1998).

35. 524 U.S. 775 (1998).

36. *See Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08. Both cases held that an employer can assert an affirmative defense to vicarious liability for sexual harassment committed by one of its employees so long as no tangible employment action, such as "discharge, demotion, or undesirable reassignment," is taken. *Faragher*, 524 U.S. at 808 (citing *Burlington*, 524 U.S. at 762–63).

On the constitutional law side, *Personnel Administrator of Massachusetts v. Feeney* has long been a paragon for those advocating a narrow intent requirement, holding that a policy that has a discriminatory impact on women does not warrant serious constitutional scrutiny unless predicated upon a discriminatory purpose,[37] which the Court defined as a decision to impose the harmful effects *because of* its harm to women, not *in spite of* such harm.[38] In a similar vein, the Court's decision in *United States v. Morrison*,[39] which found that the Violence Against Women Act[40] was outside of Congress's power to remedy equal protection violations,[41] rested on the Court's view that the states' inadequate responses to violence against women did not amount to intentional discrimination against women so as to support this exercise of the Section Five power.[42] By implication, "benign" neglect or a lack of concern for women's situations does not amount to intentional discrimination. Far from a sharp break from recent precedent, *Ledbetter* represents more of the same: a continuation and perhaps acceleration of the direction in which the Court has been headed rather than a reversal.

In continuing the trend toward equating the law's conception of discrimination with the narrowest possible understanding of bias and extending it into the pay setting, *Ledbetter* is a notable development. In part due to the EPA, pay discrimination claims have heretofore largely escaped the elusive search for conscious, intentional bias in making pay decisions.[43] Although courts have consistently limited Title VII pay claims, as opposed to claims brought under the EPA, to instances of intentional sex-based discrimination, they have often inferred the employer's intent to discriminate from the existence of pay discrepancies between women and men who do the same work, at least where the differential cannot be explained by "a factor other than sex" or other adequate justification.[44]

The *Ledbetter* Court, however, takes a much more constrained approach, defining the trigger of the limitations period as the point in time when the decisionmaker possessed and acted upon a conscious, intentionally discriminatory mindset to create a sex-based pay disparity.[45] The majority chastised Ledbetter for

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37. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

38. *Feeney*, 442 U.S. at 279 (quotation marks omitted).

39. 529 U.S. 598 (2000).

40. Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 16, 18 & 42 U.S.C.).

41. *Morrison*, 529 U.S. at 627.

42. *Id.* at 626–27.

43. *See* 2 CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 7.08[B][4], at 507 (3d ed. 2002) (citing Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Brobst v. Columbus Servs. Int'l, 761 F.2d 148, 157 (3d Cir. 1985)) (explaining that under the EPA, evidence that an employer has paid women less for performing substantially the same work as males establishes a prima facie case of pay discrimination). An employer may still avoid liability by arguing for one of the four authorized defenses, one of which is that the pay differential was based on some "factor other than sex." *Id.* at 507–08 (citing *Corning Glass*, 417 U.S. at 196); *cf.* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2187 (2007) (Ginsburg, J., dissenting) (explaining that the key difference between pay claims asserted under Title VII and those asserted under the EPA is that "Title VII requires a showing of intent").

44. *See generally* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 7.15, at 481–83 (2d ed. 2004) (describing the plurality of views from the lower courts on the interrelation between Title VII and the EPA, including those courts that infer a Title VII violation from an EPA violation).

45. *Ledbetter*, 127 S. Ct. at 2169.

failing to allege the existence of discriminatory intent within the charging period, stating "Ledbetter . . . makes no claim that intentionally discriminatory conduct occurred during the charging period."[46] But in fact, Ledbetter did argue that intentionally discriminatory conduct occurred during the charging period on the theory that each paycheck that pays a woman less because of her sex is intentional discrimination under Title VII; because the act of paying Ledbetter less due to her sex continued into the charging period, the unlawful employment practice continued as well.[47] The Court's refusal to recognize Ledbetter's argument as alleging intentional discrimination within the charging period reflects the Court's assumption that discrimination requires an individual decisionmaker to possess and act upon a conscious sex-based animus.[48] In the Court's view, an ongoing pay disparity that stems from a discriminatory mindset formed and acted upon earlier amounts only to the lingering effect of prior intentional discrimination and is not itself a form of ongoing intentional discrimination.[49] Importantly, the Court's refusal to view the continuing pay disparity as intentional discrimination was not based on the Court's failure to see the plaintiff's sex as the cause of the pay

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46. *Id.*

47. *See* Brief for the Petitioner at 21–22, *Ledbetter*, 127 S. Ct. 2162 (No. 05-1074), 2006 WL 2610990.

48. In this respect, the Supreme Court adopted the same narrow understanding of discrimination as the Eleventh Circuit below. *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1186 (11th Cir. 2005) ("There was no evidence that [the employer] purposefully underrated Ledbetter's performance for 1997. There was no evidence that [the employer] bore any ill will towards Ledbetter or toward women generally."); *id.* at 1187 n.21 ("Ledbetter . . . testified that some of the audits upon which [the employer] would have relied in completing her performance appraisal were purposefully falsified . . . . This, however, is relevant only to the accuracy of [the employer's] rankings, not to his intent. It is not discriminatory to honestly rely on inaccurate information, . . . and there was no evidence that [the employer] acted any way but in good-faith reliance on the information he was using.") (citations omitted). The Court's failure to see the error in this reasoning does not bode well for the so-called "cat's paw" method of determining vicarious liability where a decisionmaker unwittingly takes an adverse employment action based on the discriminatory recommendation of a subordinate. *See* Green, *supra* note 29, at 368–72 (discussing the implications of the *Ledbetter* decision on this issue).

49. The Court's summary of Ledbetter's argument is instructive. The majority states the following:

> In an effort to circumvent the need to prove discriminatory intent during the charging period, Ledbetter relies on the intent associated with other decisions made by other persons at other times . . . .
>
> Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound. It would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.

Ledbetter, 127 S. Ct. at 2169–70 (citations omitted). It is clear from this discussion that the "requisite intent" the Court requires is a conscious sex-based animus held and acted upon by an identifiable discriminator. *See id.* at 2174 ("Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus . . . ."). Under this view, an employer that pays a female worker less than similarly situated male workers without a sex-neutral justification does not necessarily engage in intentional discrimination, unless the motivation for the pay disparity can be shown to be intentionally discriminatory and linked to the person who makes the pay decisions.

disparity.[50] Even though Ledbetter's sex unquestionably played a role in her receipt of lower pay extending into the charging period,[51] the Court limited the discrimination to the moment in time when the discriminatory mindset coincided with the decision to pay her less.[52] In effect, the Court separated causation from intent, limiting discrimination to actions based on conscious animus toward women rather than a broader inclusion of employment practices that disfavor an employee because of her sex.[53] The Court's understanding of pay discrimination effectively eviscerates Title VII's right to equal pay, because rarely can pay disparities between similarly situated women and men be traced to a demonstrably conscious sex-based animus held by an individual decisionmaker.[54]

The sex equality norms reflected in Title VII and related statutes encompass the most robust sex equality norms our laws provide and have been far more significant in securing meaningful sex equality rights than the Equal Protection Clause of the Constitution. When the judiciary limits the scope and reach of these statutes, it undermines our laws' most important normative commitments to sex equality.

III. *LEDBETTER* AND THE INCREASINGLY STRICT CONSTITUTIONAL LIMITS ON SEX EQUALITY STATUTES

The constitutional source for the antidiscrimination super-statutes, at least insofar as they apply to state and local governments, is Section Five of the Fourteenth Amendment.[55] In recent years, the Court has insisted on an increasingly narrowly tailored congruence and proportionality between the statutory prohibitions and the scope of the Fourteenth Amendment violation targeted.[56] The power to enact super-statutes thus depends on both the Court's interpretation of what acts of "discrimination" violate the Fourteenth Amendment as well as the closeness of the relationship between the remedial measures enacted by Congress and the underlying Fourteenth Amendment violation.

In recent years, the Court has increasingly limited the scope of Congress's power to enact valid Section Five legislation. Starting with *City of Boerne v. Flores*,[57] the Court has required Section Five legislation to be narrowly tailored to

50. *See Ledbetter*, 127 U.S. at 2169 ("[C]urrent effects alone cannot breathe life into prior, uncharged discrimination . . . .").

51. *See id.* at 2181 (Ginsburg, J., dissenting) ("[Ledbetter] charged insidious discrimination building up slowly but steadily. . . . Over time, she alleged and proved, the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained.").

52. *Id.* at 2169, 2172.

53. *See Ledbetter*, 127 S. Ct. at 2176 (citing 29 U.S.C. § 206(d)(1) (2000)) (noting that the analysis of a discrimination claim under "the EPA and Title VII are not the same," as "the EPA does not require . . . proof of intentional discrimination").

54. *See id.* at 2171 ("[I]n a case such as this in which the plaintiff's claim concerns the denial of raises . . . . the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time.").

55. In order to abrogate a state's Eleventh Amendment immunity, Congress must ground a statute on its power under Section Five of the Fourteenth Amendment. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.11, at 61 (7th ed. 2004) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237 (1985)).

56. *See id.* § 15.3, at 1101–05 (summarizing the relevant Supreme Court opinions regarding this issue).

57. 521 U.S. 507 (1997).

the constitutional violations targeted.[58] In addition, in determining the scope of the Fourteenth Amendment violation to be remedied, the Court has held that Congress is bound by the Court's interpretation of what conduct violates that Amendment.[59] Consequently, the *Ledbetter* decision, by narrowing the definition of intentional discrimination,[60] contributes to a body of law that sets the outer boundaries of the conduct that Congress may remedy through the use of its Section Five power. Together, the limits on both the scope of the violations that Congress may remedy and the means that it may use to remedy these violations have made it increasingly difficult to secure gender equality through statutory law, as illustrated by the fate of the Violence Against Women Act.[61]

Ledbetter will only add to the tension created by simultaneously tightening the means-ends relationship required and narrowing of the permissible ends of Section Five legislation. As the meaning of intentional discrimination becomes further identified with and limited to actions based upon a conscious animus, the scope and content of permissible statutes for promoting sex equality narrow considerably. The result is a constitutional collision course in which only the most narrow statutes that do the least to promote actual sex equality will likely survive. Because any super-statute worth its ink will do more than remedy only that conduct which actually violates the Equal Protection Clause, such statutes are increasingly vulnerable to the challenge that they reach beyond Congress's power to secure the equal protection of the laws.

The Court took a somewhat more cautious and deferential approach in *Nevada Department of Human Resources v. Hibbs*[62] than it did in *United States v. Morrison*.[63] The *Hibbs* Court carefully described the underlying violation to be remedied by the Family and Medical Leave Act[64] (FMLA) as state leave policies that denied parental leave to men while granting it more generously to women.[65] The Court, therefore, upheld the parental leave provision of the FMLA as a proper exercise of Congress's Section Five power.[66] However, the fact that the Court had to contort the gender equality issue at the heart of the FMLA into a problem of discrimination against men illustrates the narrow confines of the Section Five power. Because the mere failure to attend to women's needs in the workplace would not rise to the level of a *Feeney*-type discriminatory intent[67] so as to establish intentional discrimination in violation of the Equal Protection Clause, the Court was obliged to identify the constitutional violation as one involving the facially

58. *See, e.g.*, *id.* at 533 (finding that the legislation at issue was a proper exercise of Congress's Section Five power as a proportionate means of remedying unconstitutional state action).

59. *Id.* at 519.

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

61. United States v. Morrison, 529 U.S. 598, 627 (2000) (striking down Congress's attempt to provide a federal remedy for "victims of gender-motivated violence").

62. 538 U.S. 721 (2003).

63. *Morrison*, 529 U.S. at 624–27 (finding that the civil remedy enacted by Congress in the Violence Against Women Act could not be sustained under its Section Five powers).

64. 29 U.S.C. §§ 2601–2654 (2000).

65. *Hibbs*, 538 U.S. at 731.

66. *Id.* at 735.

67. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

disadvantageous treatment of men.[68] Where such contortions are not plausible, statutes addressing gender inequality are constitutionally vulnerable.

Although I do not foresee the imminent invalidation of our major federal sex equality statutes, the tightening of the test for passing Section Five legislation coupled with the shrinking category of what counts as intentional discrimination creates a real tension in constitutional law that is hostile to broad sex equality statutes. Unless one of these trends is halted or, better yet, reversed, the scope of valid antidiscrimination statutes will continue to narrow. So far, courts have rebuffed the most ambitious efforts to undo the major super-statutes in this area. Nevertheless, the fact that state defendants are bringing such challenges reveals the extent to which these converging doctrinal trends create opportunities for unraveling the statutory landscape for promoting sex equality. Perhaps even more importantly, the increasing viability of Section Five challenges to federal antidiscrimination statutes demonstrates the potential to limit the capacity of Congress to take broader and more sweeping measures in the future.

In recent years, state defendants have urged courts to invalidate a wide variety of antidiscrimination statutes, using arguments that were unthinkable even a short time ago. For example, state defendants have challenged the Section Five basis for Congress's prohibition on retaliation for challenging perceived discrimination under a number of antidiscrimination statutes on the grounds that such protection extends beyond conduct that amounts to unlawful discrimination under these statutes.[69] The extension of Title VII to cover disparate impact discrimination, which goes beyond the Equal Protection Clause's ban on intentional discrimination, has also been challenged.[70]

Even the EPA has been the subject of Section Five challenges—albeit without success—on the ground that the Act permits a finding of liability based on proof that men and women are paid differently for substantially the same work, unexplainable by "a factor other than sex," without additional proof of the employer's intent to discriminate.[71] While these challenges have failed to persuade

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68. *See Hibbs*, 538 U.S. at 731–35.

69. *See, e.g.*, Crumpacker v. Kan. Dep't of Human Res., 338 F.3d 1163, 1172 (10th Cir. 2003) (rejecting a defendant's challenge to Congress's Section Five authority to enact Title VII's antiretaliation provision, which protects employees who challenge not just practices that actually violate Title VII but also practices which the employee reasonably believes violate Title VII); Warren v. Prejean, 301 F.3d 893, 899 (8th Cir. 2002) (rejecting a challenge to Congress's Section Five authority to abrogate state immunity under Title VII's antiretaliation provision); Malone v. Shenandoah County Dep't of Soc. Servs., No. 5:04CV0014, 2005 WL 1902857, at *5 (W.D. Va. 2005) (rejecting a challenge to Congress's Section Five authority to enact the antiretaliation provision of the FMLA); Lewis v. Smith, 255 F. Supp. 2d 1054, 1064–66 (D. Ariz. 2003) (rejecting a challenge to Congress's Section Five authority to enforce the antiretaliation provisions of both Title VII and the EPA); Nelson v. Kansas, 220 F. Supp. 2d 1216, 1220–22 (D. Kan. 2002) (rejecting a challenge to the validity of Title VII's antiretaliation provision).

70. *See* Okruhlik v. Univ. of Ark. *ex rel.* May, 255 F.3d 615, 627 (8th Cir. 2001) (rejecting a defendant's challenge to Congress's Section Five authority to abrogate states' Eleventh Amendment immunity regarding both disparate treatment and disparate impact claims brought under Title VII).

71. *See* Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 553 (7th Cir. 2001); Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542, 551 (5th Cir. 2001); Varner v. Ill. State Univ., 226 F.3d 927, 936 (7th Cir. 2000); Kovacevich v. Kent State Univ., 224 F.3d 806, 819–21 (6th Cir. 2000); Hundertmark v. State of Fla. Dep't of Transp., 205 F.3d 1272, 1277 (11th Cir. 2000) (per curiam); O'Sullivan v. Minnesota, 191 F.3d 965, 967–68 (8th Cir. 1999); Anderson v. State Univ.

court majorities that the EPA falls outside of Congress's power to enforce the Fourteenth Amendment, they have won over dissenting judges who have opined that the Act does indeed reach too far beyond intentional discrimination to come within the Section Five power.[72] Relying on the Supreme Court's increasingly strict approach to Section Five legislation described above,[73] the dissenters have argued that the EPA exceeds the scope of a proper remedy for an equal protection violation because the Act requires only proof of a sex-based disparity in pay and not a discriminatory motive behind it.[74] Unfortunately, *Ledbetter*'s insistence on requiring proof of discriminatory intent over and above the existence of a sex-based disparity in pay lends credence to this reasoning, which, not long ago, might have been dismissed as the wishful musings of federal judges hostile to federal civil rights statutes.

Indeed, the Supreme Court itself has suggested an opening for attacking the validity of the EPA under the Section Five power. In light of its decision in *Kimel v. Florida Board of Regents*,[75] which invalidates the Age Discrimination in Employment Act[76] as inappropriate Section Five legislation,[77] the Court remanded for reconsideration two lower court decisions that had upheld the EPA under the Section Five power.[78] Although the lower courts on remand again upheld the EPA as valid Section Five legislation,[79] the Court's actions in remanding the cases may signal its own belief that the EPA is vulnerable to challenge under its recent Section Five caselaw. Furthermore, the Court's reasoning in *Ledbetter*, sharply distinguishing the EPA from Title VII, on the ground that the former does not require proof of discriminatory intent,[80] combined with the *Ledbetter* decision's approach equating discriminatory intent with the decisionmaker's conscious animus,[81] also suggests that the EPA is still vulnerable to attack.

Perhaps the most troubling implication of these doctrinal tensions, as they are unfolding in the lower courts, is the reasoning courts have used to uphold the EPA: their reasoning suggests that the Act marks the outer limits of the Section Five

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of N.Y., 169 F.3d 117, 120–21 (2d Cir. 1999), *vacated*, 528 U.S. 1111 (2000); Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1270 (D. Kan. 2004); Kusjanovic v. Oregon *ex rel.* Portland State Univ., 243 F. Supp. 2d 1137, 1139 (D. Or. 2002).

72. *See* Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio, 261 F.3d 542 (5th Cir. 2001), *reh'g en banc denied*, 292 F.3d 221, 222 (2002) (Smith, J., joined by Demoss, J., dissenting).

73. *See supra* text accompanying notes 57–61.

74. *Siler-Khodr*, 292 F.3d at 224–25 ("Unfortunately, the EPA goes far beyond forbidding intentional sex discrimination . . . . Moreover, even where sex was the determining factor in a particular decision, it may not have been the result of 'a . . . course of action [adopted] at least in part because of, not merely in spite of, its adverse effects on' women.") (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (alteration in original) (internal quotation marks omitted)).

75. 528 U.S. 62 (2000).

76. 29 U.S.C. §§ 621–634 (2000).

77. *Kimel*, 528 U.S. at 91.

78. Anderson v. State Univ. of N.Y., 169 F.3d 117, 120–21 (2d Cir. 1999), *vacated*, 528 U.S. 1111 (2000), *remanded to* 107 F. Supp. 2d 158 (N.D.N.Y. 2000); Varner v. Ill. State Univ., 150 F.3d 706, 717 (7th Cir. 1998), *vacated*, 528 U.S. 1110 (2000), *remanded to* 226 F.3d 927 (7th Cir. 2000).

79. *Varner*, 226 F.3d at 936; *Anderson*, 107 F. Supp. 2d at 165.

80. Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2176 (2007) ("[T]he EPA and Title VII are not the same. In particular, the EPA does not require . . . proof of intentional discrimination.").

81. *See* discussion *supra* Part II.B.

power and that Congress cannot go any farther to remedy the wage gap between women and men. In upholding the EPA against Section Five challenges, courts have emphasized that the Act is a valid exercise of the Section Five power because it limits its reach to intentional wage discrimination that would violate the Equal Protection Clause.[82] For example, the Seventh Circuit emphasized that "[i]n passing the Equal Pay Act, Congress did not prohibit all wage practices that result in a disparate impact upon the sexes, nor did it provide for liability upon a mere showing of unequal pay."[83] Although the Act shifts the burden of proof to the employer to justify the pay disparity once the plaintiff has established its prima facie case of discrimination,[84] the Seventh Circuit explained that this provision did not exceed Congress's Section Five power because the Act provides "a broad exemption from liability . . . for any employer who can provide a neutral explanation for a disparity in pay, . . . effectively target[ing] employers who intentionally discriminate against women."[85] This reasoning suggests that the provision in the Act for the defense that the disparity must stem from "a factor other than sex" is not only a policy determination about the proper scope of liability but also a constitutionally necessary limit in order for the Act to fall within the Section Five power to enforce the Fourteenth Amendment.

This reasoning does not bode well for efforts to extend the reach of pay equity laws to address gender wage disparities that result from labor market segregation, different approaches to salary negotiation, reliance on prior salary in setting wages, or other sex-linked disparities that might be proven to be "a factor other than sex," especially if that phrase excludes all but intentionally motivated sex-based differentials. Women's groups have argued that such changes are needed to strengthen pay equity laws and significantly shrink the wage gap between women and men.[86] Responding to such arguments, members of the House of

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82. Cherry v. Univ. of Wis. Sys. Bd. of Regents, 265 F.3d 541, 551, 553 (7th Cir. 2001) (citing *Varner*, 226 F.3d at 932, 934) (agreeing with its previous ruling in *Varner*, which had emphasized that the EPA was a proper exercise of Congress's Section Five power because it permits the employer to defend its actions by offering any reason for the pay differential "other than sex," thus reaching only intentional discrimination); *Varner*, 226 F.3d at 933–34 (emphasizing that the EPA targets intentional discrimination and emphasizing the "factor other than sex" defense (quoting 29 U.S.C. § 206(d)(1)(iv) (2000))); Kovacevich v. Kent State Univ., 224 F.3d 806, 819–20 (6th Cir. 2000) (explaining that the target of the EPA is intentional wage discrimination so that "the standard for liability under the EPA closely approximates the equal protection analysis for state-sponsored gender discrimination"); Hundertmark v. State of Fla. Dep't of Transp., 205 F.3d 1272, 1276 (11th Cir. 2000) (per curiam) ("Under the Act, liability for wage discrimination is only actionable if an employer cannot provide any factor other than gender to justify the wage disparity."); Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1268–70 (D. Kan. 2004) (adopting the reasoning of other circuits that the EPA targets intentional discrimination based on gender); *Anderson*, 107 F. Supp. 2d at 161 ("[L]egislation prohibiting intentional gender-based wage discrimination is proper legislation under [Section Five] . . . ."); *see also* O'Sullivan v. Minnesota, 191 F.3d 965, 967–68 (8th Cir. 1999) (using broader reasoning to uphold the EPA as remedial legislation and stating that "[e]ven though the EPA does not require an employee to show purposeful discrimination to recover, the Act is remedial rather than substantive legislation").

83. *Varner*, 226 F.3d at 933 (citations omitted).

84. *See id.* at 934.

85. *Id.* at 934.

86. *Congress Must Act to Close the Wage Gap for Women* (Nat'l Women's Law Ctr., Washington, D.C.), Apr. 2007, at 1, *available at* http://www.nwlc.org/pdf/2007%20Paycheck%20Fairness%20Act.pdf; *The Paycheck Fairness Act: Helping to Close the Women's Wage Gap* (Nat'l Women's

Representatives introduced the Paycheck Fairness Act[87] and the Fair Pay Act of 2007,[88] two bills which would expand the scope of the EPA to require equal pay for equivalent work and replace the "factor other than sex" defense with a much narrower defense: the employer may only justify pay differentials on the basis of a factor related to job performance, such as qualifications, experience, or education.[89] There is support for the idea that such changes are indeed necessary to fully integrate women into the workplace on equal terms with men, in fulfillment of our Constitution's promise of equal citizenship.[90] Unfortunately, the increasing stringency of the constitutional limits on Congress's ability to legislate in this area may take this judgment away from Congress, at least in its ability to pass laws that are enforceable against state and local governments, which requires Congress's exercise of its Section Five power to abrogate Eleventh Amendment immunity.

Finally, the shrinking space for sex equality legislation under the Section Five power already has led some lower courts to invalidate one provision of the FMLA,[91] a law passed largely in response to the conflicts women disproportionately suffer in balancing work with family caretaking responsibilities.[92] Although the Supreme Court in *Hibbs* upheld the provision of the FMLA regarding leave to care for a family member,[93] it did not reach the Act's application to leave taken because of an employee's own serious illness or medical condition. Responding to the doctrinal shifts described above, which tightened the test for Section Five legislation and narrowly defined the category of acts constituting intentional discrimination, some courts have ruled that the self-care leave provision of the FMLA falls outside the scope of permissible Section Five legislation.[94]

These decisions regard the self-care provision as outside the scope of any legitimate remedy for an equal protection violation because both men and women become ill and would benefit from leave, and because Congress did not present

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Law Ctr., Washington, D.C.), Feb. 2002, at 1, *available at* http://www.nwlc.org/pdf/PayCheckFairness Feb2002.pdf.

87. H.R. 1338, 110th Cong. (2007).

88. H.R. 2019, 110th Cong. (2007).

89. H.R. 1338 § 3(a); H.R. 2019 § 3(a).

90. *See, e.g.*, H.R. 1338 § 2(3)(I) ("[I]n many instances, [the lower pay of similarly situated women] may deprive [them] of equal protection on the basis of sex in violation of the [Fifth] and [Fourteenth] [A]mendments."); H.R. 2019 § 2(4)–(6) (noting that women are often paid less than men for the same work).

91. 29 U.S.C. §§ 2601–2654 (2000).

92. *Id.* § 2601(a)(5), (b)(1) (noting that the primary caretaking responsibilities "often fall [] on women" and that there is a need to "balance the demands of the workplace with the needs of families").

93. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003) (citing 29 U.S.C. § 2612(a)(1)(C)).

94. Some of these rulings were issued prior to the *Hibbs* decision in 2003. *See* Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 228–29 (3rd Cir. 2000); Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 410–411 (M.D. Pa. 1999); Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1334 (M.D. Fla. 1998). However, many courts have struck down the FMLA's self-care provision since *Hibbs* was decided. *See* Toeller v. Wis. Dep't of Corr., 461 F.3d 871, 879–80 (7th Cir. 2006); Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 422 F.3d 392, 405 (6th Cir. 2005); Brockman v. Wyo. Dep't of Family Servs., 342 F.3d 1159, 1164–65 (10th Cir. 2003); Wampler v. Pa. Dep't of Labor & Indus., 508 F. Supp. 2d 416, 421–22 (M.D. Pa. 2007).

evidence that states denied women medical leave more often than they did men.[95] This reasoning, however, fails to acknowledge the reality that, without the FMLA, pregnant women would only have the right to sick leave equal to that of men under the PDA. Under the PDA, employers who do not accommodate sickness in male employees need not do so for pregnant workers either.[96] Feminist scholars have often criticized this approach as allowing employers to treat pregnant women in the same manner, and as badly, as other temporarily disabled workers.[97] The FMLA responds with an equal treatment strategy that does not single out pregnancy for special treatment, which would ultimately penalize and stigmatize women workers, but rather broadens protections for all workers with medical conditions that impair their ability to work.[98]

In failing to recognize the FMLA's self-care leave provision as a proper vehicle for securing equality for women in the workplace, courts have effectively rejected an equal treatment approach that folds accommodations for pregnancy into broader accommodations for all workers in need of a medical leave.[99] Under the Court's precedents, the failure to ensure pregnant women the right to return to their jobs after a necessary medical leave does not amount to intentional discrimination in violation of the Equal Protection Clause; as a result, the FMLA's self-care leave provision may well become the next casualty of the Court's Section Five doctrine.

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95. *See, e.g.*, *Toeller*, 461 F.3d at 879 (finding no reason, other than pregnancy, why women would be more likely than men to need short term medical leave); *Touvell*, 422 F.3d at 402 ("[T]here is virtually no evidence that those stereotypes [regarding women's role as caregivers] also concern the behavior of men and women regarding personal medical leave."); *Wampler*, 508 F. Supp. 2d at 421 (finding that nothing in the FMLA suggested that sex-based classification should "affect[] the administration of leave for self-care").

96. *See* 42 U.S.C. § 2000e(k); *Touvell*, 422 F.3d at 403–04 ("[T]he PDA did not meet one arguable social need because it did not require the provision of pregnancy-related leave by employers who offer no benefit provisions at all." (citing Laro v. New Hampshire, 259 F.3d 1, 14–15 (1st Cir. 2001))); Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) ("Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . .").

97. *See, e.g.*, Ruth Colker, *Pregnancy, Parenting, and Capitalism*, 58 OHIO ST. L.J. 61, 77 (1997) ("The PDA . . . imposes no duty to accommodate pregnant women if the employer does not have a policy of accommodating other workers with health or family-related problems."); Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 240 (1998) ("If the [PDA] protects women who are pregnant against any form of discrimination, one would expect it to protect women who are on pregnancy leave from being fired merely because they are on leave. Yet, it does not do this."); Jessica Carvey Manners, Comment, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 222 (2005) ("By comparing pregnant employees with nonpregnant employees, employers have little incentive to provide any accommodations to pregnant employees requesting light-duty or modified assignments.").

98. *See* 29 U.S.C. § 2601(b)(4) (noting that one of the purposes of the FMLA is to ensure "generally that leave is available for eligible medical . . . and for compelling family reasons, on a gender-neutral basis"). Professor Wendy Williams's classic article advocating an equal treatment approach to pregnancy makes a strong case for the benefits of just such an approach. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196–97 (1982).

99. *See, e.g.*, *Touvell*, 422 F.3d at 403–04 (rejecting the argument that the FMLA was a response to discrimination against pregnant women because the legislative history of the Act suggests that Congress was no more concerned with "providing leave benefits to pregnant women than with providing benefits for other seriously ill men and women").

Ledbetter's narrow view of what conduct counts as intentional discrimination adds to the pressures that make such statutes vulnerable.

Although most Section Five challenges to major sex equality statutes have so far been rebuffed in the courts,[100] the sheer number of these challenges and the reasoning courts use to decide them demonstrate that more trouble likely lies ahead. As the definition of intentional discrimination becomes increasingly narrow and the required relationship for remedial legislation becomes increasingly tight, there is less room for Congress to act to promote gender equality through statutory law. If these trends continue, some of our sex equality super-statutes may find themselves on shaky constitutional foundations. Perhaps the more likely result is that these constitutional limits will constrain future congressional action that seeks to address conduct beyond that which the Court has defined as intentional discrimination. Against this background, *Ledbetter* is an unhappy development that only furthers this trajectory.

IV. *LEDBETTER* AND THE CONSTRUCTION OF KNOWLEDGE: HOW THE NARROWING OF "DISCRIMINATION" LEGITIMATES THE STATUS QUO AND THWARTS KNOWLEDGE OF DISCRIMINATION

I have elsewhere discussed findings from social psychology documenting the barriers to perceiving discrimination, especially when it takes more subtle forms.[101] The reality of people's perception of discrimination contrasts sharply with the *Ledbetter* Court's underlying assumption that employees know, or should know, at a fixed point in time whether they have actually experienced discrimination. In fact, knowledge of discrimination is a highly relational process, dependent on social comparisons and beliefs about entitlement.[102] In this fluid process, the law's knowledge-producing function plays a role in how and whether people perceive discrimination.[103]

When the message from discrimination law promotes an understanding that equates discrimination with conscious, observable animus, law participates in suppressing knowledge of discrimination, especially when that term is more broadly understood to capture more subtle forms of bias.[104] As Professor Reva Siegel has explained, "[L]aw exerts authority as a system of meanings."[105] Constitutional culture, statutory norms, and public understanding and expectations are all highly interrelated. Although the precise boundaries and interrelationship of law and society are not easy to articulate, "[t]hrough pathways of meaning, law can structure social life."[106]

By conceptualizing discrimination as only the most obvious, conscious, and deliberate form of animus against women undertaken by individually identifiable

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100. *See supra* notes 69–81 and accompanying text.

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

102. *Id.* at 693–97.

103. *Id.* at 711–12.

104. *Id.* at 714.

105. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 317 (2001).

106. *Id.*

"bad actors," *Ledbetter* contributes to the message that discrimination, as we know it, is largely behind us. The inculcation of this message sets the stage for characterizing people who attribute inequality to gender bias as overly sensitive and unreliable. Through this process in which law influences our understanding of what constitutes discrimination, pay inequality that is not directly traceable to a conscious discriminatory animus is legitimized, defined by its separation from the category of intentional discrimination. Without an identifiable and demonstrably animus-driven bad actor, discrimination is likely to go unrecognized and unchallenged.

Of course, in this process of the construction of knowledge there is room to contest judicially-imposed meanings and develop a contrary, more sophisticated understanding of what discrimination means. The immediate and overwhelmingly negative reaction to the *Ledbetter* decision thus far suggests that just such an opportunity is upon us.[107] So far, however, the reaction to *Ledbetter* has primarily focused on the practical realities of claiming pay discrimination under the regime created by the Court.[108] While these are important issues, we should not lose sight of the Court's latest volley in the pitch to continually limit the scope and meaning of sex discrimination. The popular understanding of sex equality norms need not be passively received and internalized from the judicial interpretation of what actions constitute discrimination.

V. CONCLUSION

The Court's recent *Ledbetter* decision is much more than a narrow, procedural ruling interpreting Title VII's filing deadlines. It is the product of a Court that has taken an increasingly narrow view of the proper role of law in remedying gender inequality. At its core, the decision equates unlawful discrimination with the actions of an individual decisionmaker, actions based on a conscious animus directed against women. Such a narrow view of sex discrimination leaves little role for law in promoting gender equality, either through the Constitution's Equal Protection Clause or antidiscrimination statutes. The Court's current path will leave far less room to use the law to promote a gender equality agenda, unless perhaps the Court becomes engaged in a dialogue with other branches of government, scholars, and the public about the meaning of discrimination.

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107. *See* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 933 (2008) (summarizing the overwhelmingly negative reaction to the *Ledbetter* decision in the immediate aftermath of the Court's ruling).

108. *See, e.g., id.* at 871–78 (criticizing the *Ledbetter* decision and Title VII's broader rights-claiming framework because of the realities of employees' perceptions of and responses to discrimination).