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### Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts

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## ARTICLES

### FIGHTING DISCRIMINATION WHILE FIGHTING LITIGATION: A TALE OF TWO SUPREME COURTS

Scott A. Moss\*

*The U.S. Supreme Court has issued an odd mix of pro-plaintiff and pro-defendant employment law rulings. It has disallowed harassment lawsuits against employers even with failed antiharassment efforts, construed statutes of limitations narrowly to bar suits about ongoing promotion and pay discrimination, and denied protection to public employee internal complaints. Yet the same Court has issued significant unanimous rulings easing discrimination plaintiffs' burdens of proof.*

*This jurisprudence is often miscast in simple pro-plaintiff or pro-defendant terms. The Court's duality traces to its inconsistent and unaware adoption of competing policy arguments:*

Policy 1: Employees must try internal dispute resolution before suing—or lose their claims.

Policy 2: Employees must sue promptly after discrimination starts—or lose their claims.

*These policies are plausible independently but incoherent together. Harassment plaintiffs lose by suing too quickly, without trying internal resolution; pay or promotion discrimination plaintiffs lose by delaying suit to seek internal resolution. This inconsistency exists even within the same cases: "dual-claim" plaintiffs alleging both harassment and pay or promotion discrimination face competing demands to file promptly and to delay filing. The Court has given no rationale for this difference, and the reverse would make more sense: delaying litigation is more troubling for he-said/she-said harassment cases than for pay disparity cases based on objective data, and day-to-day harassment seems harder to resolve internally than pay disparities.*

*An explanation for this inconsistency is that the Court has wavered in its commitment not to fighting discrimination, but to fighting discrimination*

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with litigation—a theory based on the Court’s broader hostility to litigation as a tool of dispute resolution. Thus, the Court continues to produce pro-plaintiff outcomes with its continued adherence to the policy of broadly construing Title VII—except in cases implicating anti-litigation policies.

The Court’s anti-litigation policies, however, place inconsistent demands on employees and significantly harm the Court’s commitment to the older policy of construing discrimination statutes broadly. Lower courts can mitigate these problems in several ways: exempt “dual-claim” harassment plaintiffs from requirements of pre-litigation dispute resolution, broadly construe exceptions to that requirement (which most courts wrongly construe as a *per se* rule), and mitigate the harshness of short limitations periods with a “discovery rule” that the limitations period begins not when discrimination starts, but when the employee reasonably should have discovered the discrimination.

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## INTRODUCTION

In employment discrimination, it is as if there are two Supreme Courts issuing conflicting rulings. After several years of "constant flux in the Court's membership,"<sup>1</sup> a string of rulings began restricting employment lawsuits:

- in 1998, allowing employers who undertake sufficient antiharassment efforts to avoid liability for even supervisors' harassment of subordinates;<sup>2</sup>
- in 2002, narrowing the statute of limitations exception for "continuing violation[s]" of the antidiscrimination laws;<sup>3</sup>
- in 2006, denying retaliation protection to many public employees;<sup>4</sup> and
- in 2007, allowing ongoing pay discrimination to continue if it was not challenged within months of its start.<sup>5</sup>

Yet during the same period, the U.S. Supreme Court also has issued several unanimous rulings<sup>6</sup> that "eased the plaintiff[s] burden of proof" in

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1. Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 Tex. L. Rev. 1097, 1110–11 (2006).

2. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

3. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 107 (2002).

4. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

5. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

cases of employment discrimination and retaliation.<sup>7</sup> Some see in these cases a “pattern of favoring plaintiffs,” at least in race and sex discrimination cases;<sup>8</sup> others see in these cases, though “pro-employee in outcome, . . . [a] conservative perspective on statutory interpretation,” a “strict textualist interpretation” of Title VII.<sup>9</sup>

This Article argues that the Court’s employment jurisprudence is misunderstood when cast in simple pro-plaintiff or pro-defendant terms. Rather, the Court’s duality can be traced to its inconsistent adoption of competing policy arguments: favoring a requirement of promptly filing suit, but also favoring a requirement that employees delay suit to try informal dispute resolution, and also favoring (contrary to the two preceding policies) construing remedial statutes broadly, in plaintiffs’ favor. Of course, some Justices *purport* to eschew policy analysis in favor of simply interpreting statutory text.<sup>10</sup> Yet as Karl Llewellyn long ago

6. The past decade has seen four 9–0 decisions relaxing plaintiffs’ burden of proof in the context of employment claims. *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2409–10 (2006) (rejecting circuit holdings that a retaliatory act is actionable only if a “materially adverse” or “ultimate” change to employment conditions, and instead holding actionable any retaliatory act that would deter a reasonable employee); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456–57 (2006) (holding, contrary to the lower court, that the following are probative of discrimination: (1) a possibly ambiguously racist term (calling an African-American “boy”), and (2) evidence that plaintiff was more qualified than other candidates even where the difference is not “so apparent as virtually to jump off the page and slap you in the face”—several circuits’ standard (quoting *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004))); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (reversing circuit holdings that only plaintiffs with “direct” (not circumstantial) evidence can exploit the rule that plaintiffs need prove only that discrimination was one “motivating factor” of an employer’s decision); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (rejecting pretext-plus rule of circuits holding that disproving defendant’s proffered reason for a firing is insufficient evidence of discrimination).

7. Barbara K. Bucholtz, *Father Knows Best: The Court’s Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002–2003 Term*, 39 Tulsa L. Rev. 75, 90–91 (2003) (“[P]ro-employee result[s] illustrate[] the Rehnquist Court’s sensitivity to Title VII cases and, in particular, . . . discrimination against women. . . . [W]hile conservative federal courts . . . [have] interpreted the anti-discrimination statutes narrowly, the Supreme Court has taken a nuanced approach that clearly favors the longstanding and more widely accepted anti-discrimination rules and the protected classes of Title VII over . . . other anti-discrimination statutes.”).

8. *See, e.g.*, Anita Silvers, Michael E. Waterstone & Michael Ashley Stein, *Disability and Employment Discrimination at the Rehnquist Court*, 75 Miss. L.J. 945, 946 (2006) (noting “[the] Court’s general pattern of favoring plaintiffs in race and sex . . . discrimination cases, while being decidedly pro-defendant in . . . disability-related claims”); *see also* Bucholtz, *supra* note 7.

9. Ramona L. Paetzold, *Supreme Court’s 2005–2006 Term Employment Law Cases: Do New Justices Imply New Directions?*, 10 Emp. Rts. & Emp. Pol’y J. 303, 348–49 (2006).

10. *E.g.*, *Desert Palace, Inc.*, 539 U.S. at 98 (2003) (Thomas, J.) (“[T]he starting point for our analysis is the statutory text. . . . [Where] . . . the words of the statute are unambiguous, the “judicial inquiry is complete.”” (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (Scalia, J.) (“[M]ale-on-male sexual harassment . . . was assuredly not the principal evil Congress was concerned with. . . . But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

observed, statutory construction rules rarely yield clear answers,<sup>11</sup> and as Cass Sunstein more recently noted, for the “hard statutory questions” on the Supreme Court’s discretionary docket, “policy arguments . . . often play a central role, even in a period in which ‘textualism’ has seemed on the ascendency.”<sup>12</sup>

This Article does not tackle the broad question of when the Court should and should not consider policy arguments. Instead, it argues that in its employment jurisprudence, the Court has used policy arguments badly—seemingly unaware of inconsistencies and contradictions among its decisions. Part I documents the unacknowledged tension between Court-endorsed policies, most strikingly,

*Policy 1: Employees must try internal dispute resolution (i.e., complain to company officials) before suing or lose their claims.*

*Policy 2: Employees must sue promptly after the discrimination occurs or lose their claims.*

Each policy might make sense independently, but the whole of the Court’s jurisprudence is more incoherent than the sum of its parts. Some discrimination plaintiffs (in harassment cases) lose by *suing too quickly* without trying internal resolution (under Policy 1), but others (in pay disparity claims) lose by *delaying suit* to pursue internal resolution (under Policy 2). There is inconsistency not only among cases, but even within the same cases: a plaintiff claiming that the same sexist supervisor harassed her *and* paid her less would face competing demands to file promptly and to delay filing. Worsening the inconsistency, a case on retaliation against public employee speech declared yet another policy in tension with Policy 1’s mandate of internal resolution efforts:

*Policy 3: Certain public employee complaints are protected if made externally, but not internally.*

The Court has given no rationale for requiring internal complaints about harassment, only prompt lawsuits for pay disparities; if anything, the reverse would make more sense. Staleness of delayed lawsuits poses more difficulty in harassment cases (which often rely on personal recollections of disputed events) than in pay disparity cases (which often are based on objective data). Internal resolution also seems easier for pay disparities

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11. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950); see *infra* Part II.A.1.

12. Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 Yale L.J. 2580, 2592–93 (2006); see, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (Thomas & Scalia, JJ.) (holding that where a retaliation statute’s protection of “employees” was “ambiguous as to whether it includes former employees,” the statute must be deemed to include them for “consistency with a primary purpose of antiretaliation provisions: . . . access to statutory remedial mechanisms. . . . [I]t would be destructive of this purpose . . . for an employer to be able to retaliate with impunity[,] . . . [which] support[s] the inclusive interpretation . . .”).

(which often are well documented and redressable by one or two officials) than harassment (which may entail changing ingrained daily patterns of conversation, demeanor, and behavior).

Following Part I's effort to document the rise of these competing policies, Part II begins by putting this jurisprudential inconsistency into a broader context, noting how it parallels inconsistency in courts' use of stare decisis and statutory construction canons. Part II then attempts to explain the Court's anomalous mix of pro-plaintiff and pro-defendant decisions. Some have argued that the latter cases evidence a Court abandoning its commitment to fighting discrimination—but if so, what explains the Court's significant string of pro-plaintiff decisions on important aspects of plaintiffs' burdens of proof?

Part II offers an explanation of how the Court has come to this incoherent state. The one common thread in the Court's employment jurisprudence—ruling against some plaintiffs for suing too quickly (Policy 1) but others for suing too slowly (Policy 2)—is that the Court has wavered, not in its commitment to fighting discrimination, but in its commitment to fighting discrimination *with litigation*. This observation draws support from a recent historical analysis finding that “hostility to litigation” is the “organizing theme” of the modern Court's jurisprudence in virtually all areas—including in employment law, where the Court lets employers' arbitration policies preclude employment lawsuits.<sup>13</sup> In sum, the Court retains some commitment to antidiscrimination, but it will allow only those lawsuits meeting the “Goldilocks” standard—filed not too quickly, not too slowly—and only when no other dispute resolution option is on the table.

While this Article attempts to explain the Court's inconsistent jurisprudence, it does not seek to justify that jurisprudence. To the contrary, Part III notes two troubling aspects of the Court's embrace of anti-litigation policies. First, the Court's adoption of multiple policies places inconsistent demands on employees trying to do what the law commands and preserve their claims. With this inconsistency, the law fails Holmes's standard that legal duties and legal rights should facilitate “prediction” of the consequences of one's behavior.<sup>14</sup>

Second, while the Court's pro-plaintiff decisions show that it has not entirely abandoned its antidiscrimination commitment, the Court's anti-litigation policies all significantly harm that commitment. The anti-litigation policies noted above (Policies 1 and 2) are in conflict with each other but share a key similarity: each is contrary to the oldest policy argument in employment discrimination jurisprudence—what might be called “Policy Zero” in this Article's terminology.

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13. See Siegel, *supra* note 1, at 1139–43.

14. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897), reprinted in 110 Harv. L. Rev. 991, 992 (1997) (“[A] legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court[,] and so of a legal right . . .”).



*Policy Zero: Fight discrimination aggressively by construing remedial discrimination statutes broadly.*

This tension explains the Court's mixed bag of outcomes: the antidiscrimination goal (Policy Zero) continues to yield pro-plaintiff outcomes—except in cases implicating one of the anti-litigation policies (Policies 1 and 2), which trump Policy Zero. But the harm that the Court's anti-litigation policies are doing to Policy Zero is real, and, as Part III shows, in stark contrast to the consistently broad approach courts once took to interpreting Title VII.

Finally, Part IV suggests ways that lower courts can mitigate the inconsistency of the Supreme Court's jurisprudence. First, courts should exempt “dual-claim” plaintiffs—those claiming both harassment and a more tangible action such as pay or promotion discrimination—from the *Faragher/Ellerth* requirement of pre-litigation dispute resolution, to assure that such plaintiffs do not face inconsistent demands to sue promptly and to delay suit to pursue internal resolution. Second, courts should more broadly construe exceptions to that *Faragher/Ellerth* requirement, which most courts have wrongly construed as a per se rule rather than as one of reasonableness under the circumstances. Third, to mitigate the statute of limitations strictness of *Morgan* and *Ledbetter*, courts should recognize a “discovery rule” that starts the limitations period running not as soon as the discrimination starts, but only once the employee discovered, or reasonably should have discovered, the discrimination. With these exceptions, courts could mitigate the potential harshness of the Court's requirements on discrimination plaintiffs and thereby minimize the extent to which those requirements are in tension with each other.

## I. COMPETING POLICIES SERVED BY DISCRIMINATION JURISPRUDENCE

### A. *Policy 1: Employees Must Try Internal Dispute Resolution Before Suing or Lose Their Claims* (*Faragher/Ellerth on Employer and Employee Efforts*)

An employee may be precluded from suing to challenge otherwise actionable harassment if she has not attempted to resolve the problem internally—by complaining to her employer before filing a discrimination charge.<sup>15</sup> The Supreme Court so held in two 1998 companion cases, *Faragher v. City of Boca Raton*<sup>16</sup> and *Burlington Industries v. Ellerth*.<sup>17</sup> What has since been dubbed “the *Faragher/Ellerth* defense” is a two-part

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15. Filing an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) is a prerequisite to a Title VII charge of discrimination, 42 U.S.C. § 2000e-5(e)(1) (2000), so when this Article refers to employees “filing suit” within the limitations period, it should be understood to mean commencing the process with the required EEOC charge.

16. 524 U.S. 775 (1998).

17. 524 U.S. 742 (1998).

test determining when employers are liable for supervisors' harassment of subordinates: the employer is vicariously liable unless it proves "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>18</sup>

Under this test, the employee's internal complaint is often the dispositive factor in determining employer liability when supervisors harass subordinates. Although some employees who fail to complain can still recover—for example, if the employer failed to undertake the requisite antiharassment efforts (part "(a)" of the two-part test)<sup>19</sup> or if the employer had actual notice of the harassment that obviated any need for the employee to report the problem.<sup>20</sup> But since *Faragher* and *Ellerth*, virtually all large or otherwise well-lawyered companies have adopted sufficient policies and procedures to meet their burden in the two-part test, especially given courts' willingness to rule on summary judgment that, as a matter of law, the employer's harassment prevention efforts were sufficient.<sup>21</sup> Thus,

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18. *Faragher*, 524 U.S. at 807.

19. See, e.g., *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371 (10th Cir. 1998) (reversing judgment for defendant because plaintiff had not been made aware of defendant's official harassment policy); *Hollis v. City of Buffalo*, 28 F. Supp. 2d 812 (W.D.N.Y. 1998) (finding for plaintiff where defendant had no harassment policy, made no real response to plaintiff's complaint, and did not mandate harassment training); *Brandrup v. Starkey*, 30 F. Supp. 2d 1279, 1289 (D. Or. 1998) (denying defendant summary judgment where plaintiff was not made aware of defendant's harassment policy, and defendant's human resources officer's response to the complaint "contravene[d] the spirit, if not the terms" of the policy by telling plaintiff to complain to her supervisor, the harasser); *Nuri v. PRC, Inc.*, 13 F. Supp. 2d 1296 (M.D. Ala. 1998) (denying defendant judgment as a matter of law, despite defendant's comprehensive, vigorously enforced harassment policy, because the distribution of the policy was incomplete and did not elaborate the policy sufficiently).

20. See, e.g., *Fall v. Ind. Univ. Bd. of Trs.*, 12 F. Supp. 2d 870, 883 (N.D. Ind. 1998) ("[T]hat the University had both actual and constructive notice of Cohen's history of sexual harassment means that summary judgment must be denied [under] *Burlington* and *Faragher* . . .").

21. See, e.g., *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (affirming partial summary judgment, holding that an employer satisfied its duty even though plaintiff complained to an official who "was not only ineffective in dealing with Thompson's harassment, but . . . himself was a sexual harasser. . . . [Her] failure to report . . . [to] other individuals listed in the sexual harassment policy was unreasonable"); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 268 (4th Cir. 2001) (affirming summary judgment, holding that an employer satisfied its duty with a written policy discussed at orientation, despite "evidence . . . [that] employees had trouble recalling the details . . . [and] did not understand [it]"); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (rejecting, in defense of the district court's grant of judgment as a matter of law, the argument "that because ARECO never did anything more than distribute its anti-harassment policy, it did not exercise reasonable care . . . . Distribution of an anti-harassment policy provides 'compelling proof' that the company exercised reasonable care . . . . The only way to rebut . . . is to show that the 'employer adopted or administered an anti-harassment policy in bad faith or that the policy was otherwise defective or dysfunctional.'" (citations omitted)); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (affirming summary judgment and rejecting the argument that the "policy fails to guarantee confidentiality and non-retaliation," because such features are not "mandatory."); *Shaw v. Autozone, Inc.*, 180

employees regularly lose hostile work environment claims, no matter how bad the harassment, when they fail to report harassment to company officials before suing<sup>22</sup> or even delay just a few months before making an internal complaint.<sup>23</sup>

The reason the Court deemed it appropriate to risk penalizing deserving harassment victims who do not complain internally is the importance of the policy of “promot[ing] conciliation rather than litigation in the Title VII context”:

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer’s effort to create such procedures, it would . . . promote conciliation rather than litigation . . . and the EEOC’s policy of encouraging the development of grievance procedures.<sup>24</sup>

The importance the Court places on internal complaints cannot be overemphasized. When the Court rejects claims under the *Faragher/Ellerth* defense because the victim failed to complain about the harassment internally, it allows illegal harassment to go unremedied.

Thus, *Faragher* and *Ellerth* reflect a Court deeply committed to the policy that employees should not file suit until after attempting resolution through the employer’s internal complaint process. Yet the Court has subverted its own policy with other rulings under the same discrimination statute—rulings requiring employees to sue first, ask questions later.

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F.3d 806, 812 (7th Cir. 1999) (affirming summary judgment and holding that an employer satisfied its duty since “the policy did not succeed in this case, but the law does not require success—it only requires that an employer act reasonably to prevent sexual harassment”).

22. *Barrett*, 240 F.3d at 267–68 (“Barrett’s first explanation . . . [is] that she feared . . . she could not report Ramsey’s behavior to . . . Zeigler, because Zeigler and Ramsey were good friends[.] . . . [and] could not report Ramsey to any . . . managers because they all reported to Zeigler. . . . [F]ail[ing] to utilize the company’s complaint procedure ‘will normally suffice’ . . . . We cannot accept . . . that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends. Crediting this view would impose an impermissible burden on any company . . . .”); *Leopold*, 239 F.3d at 246 (affirming summary judgment: “Leopold asserts that she and her fellow employees did not complain about their supervisor’s behavior because ‘we were too scared.’ . . . A credible fear must be based on more than the employee’s subjective belief. Evidence must be produced . . . that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response . . .”).

23. See, e.g., *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1290–91 (11th Cir. 2003) (affirming a grant of summary judgment to defendant, holding that an employee failed her duty to complain until three months after harassment started, despite the employee’s arguments about fear of retaliation: “[A]bsent a credible threat of retaliation, Walton’s subjective fears of reprisal[.] . . . standing alone, do not excuse [her] failure to report a supervisor’s harassment”); *Matvia*, 259 F.3d at 270 (affirming a grant of summary judgment to defendant, holding that an employee failed her duty by not complaining until a particularly bad incident roughly three months after the harassment started).

24. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (citations omitted); see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (“It would . . . implement clear statutory policy and complement the Government’s Title VII enforcement efforts to recognize the employer’s affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.”).

B. *Policy 2: Employees Must Sue Promptly After  
Discrimination Starts or Lose Their Claims*  
(Morgan/Ledbetter Statute of Limitations Restrictions)

While Title VII declares fighting discrimination a policy imperative, it implicitly limits its pursuit of that policy by adopting a remarkably short statute of limitations of just 180 or 300 days.<sup>25</sup> But, as with many clear-sounding laws, a codified statute of limitations does not resolve all cases. For most employment discrimination, such as a rejection of an employee's application, the limitations issue is simple: the rejection occurred at a particular time, and the limitations "clock" starts running then, even though the effects of the discrimination continue into the future.<sup>26</sup> But consider a daily campaign of sexual harassment: must the employee sue 180 days from when it starts, or is the harassment more of a "continuing violation" that an employee can challenge as long as it continues?

The Supreme Court in *National Railroad Passenger Corp. v. Morgan*<sup>27</sup> allowed hostile work environment harassment to be challenged more than 180 to 300 days after it started—but narrowed the "continuing violation" of most circuits by declaring the doctrine inapplicable to any other forms of discrimination, such as pay disparity and failure-to-promote claims.<sup>28</sup> *Morgan* rejected the appellate courts' "various approaches" to allowing lawsuits to cover "acts that fall outside of the statutory time period for filing charges" as continuing violations.<sup>29</sup> Rather, the Court adopted a rule of "strict adherence" to the statutory deadline.<sup>30</sup> The Court concluded that the shortness of the Title VII statutory deadline mandates a policy of requiring "prompt" filing by plaintiffs.<sup>31</sup> This conclusion was an adventurous logical leap, given that one could view Title VII's short statutory deadlines as requiring *more* leniency in applying that deadline. Is not leniency less necessary with lenient deadlines, and more necessary with tight deadlines?

*Morgan's* blanket exclusion of non-harassment claims from the continuing violations doctrine has drawn criticism because it "requires all cases to be divided into 'discrete' and . . . 'environment' violations. But . . .

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25. The Court has stated,

In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002).

26. *Id.* at 117–18.

27. *Id.*

28. *Morgan* left open, but did not address, the possibility that the continuing violations doctrine might apply more broadly in class action claims. *Id.* at 115 n.9.

29. *Id.* at 108.

30. *Id.* at 108 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (internal quotation marks omitted)).

31. *Id.* at 109 ("[B]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." (quoting *Mohasco Corp.*, 447 U.S. at 825)).

the world is more complicated.”<sup>32</sup> Consider a cashier seeking promotion to assistant manager at a company with many local branches, each with several assistant manager positions, and an informal promotion procedure that involves just expressing interest in promotion to one’s regional manager. Once the cashier makes her interest known, promotion denials may recur regularly and frequently, just as some harassment consists of once-a-month, or even less frequent, severe recurring events.<sup>33</sup> Yet under *Morgan*, the continuing violations doctrine can apply to harassment claims but not to continuous denials of promotion such as the above cashier example. This example illustrates how much weight the Court places on a policy of being “strict” in requiring “prompt” filing by plaintiffs.

The Court went one step further in *Ledbetter v. Goodyear Tire & Rubber Co.*, declaring that even where an employer unlawfully pays a woman less because of her gender, she cannot sue unless she files within 180 days of the *start* of the pay discrimination.<sup>34</sup> Accordingly, the Court vacated Lilly Ledbetter’s verdict against Goodyear for paying her less because of her gender for her entire nineteen-year career, and judgment was entered for Goodyear. The weight of prior authority had been “that every paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act,” so long-standing pay discrimination was actionable, with the limitations period setting limits on the plaintiff’s recovery:

Any paycheck given within the statute of limitations period . . . [is] actionable, even if based on a discriminatory pay scale set up outside of the statutory period. But, a claimant could only recover damages related to those paychecks actually delivered during the . . . limitations period.<sup>35</sup>

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32. Michael J. Zimmer et al., *Cases and Materials on Employment Discrimination* 854 (6th ed. 2003).

33. *E.g.*, *Schwapp v. Town of Avon*, 118 F.3d 106, 112 (2d Cir. 1997) (denying defendant summary judgment: “Schwapp has recounted ten racially-hostile incidents . . . during his 20-month tenure . . . . He also has recounted two other incidents . . . [of] bigotry . . . toward other minority groups. Most importantly, LeMay, Schwapp’s supervisor, advised Schwapp that . . . ‘at one time all the crimes in Avon were committed by blacks,’ and . . . Schwapp had to accept the fact that he was working with racists and not be ‘so sensitive’”).

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

35. *Forsyth v. Fed’n Emp. & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) (“A salary structure that was discriminating before the statute of limitations passed is not cured of that illegality after that time passed, and can form the basis of a suit if a paycheck resulting from such a discriminatory pay scale is delivered during the statutory period.”); *accord* *Wedow v. City of Kansas City*, 442 F.3d 661, 671 (8th Cir. 2006) (describing that, as held in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), “each week’s paycheck that delivers less on a discriminatory basis is a separate Title VII violation”); *Shea v. Rice*, 409 F.3d 448, 455 (D.C. Cir. 2005) (holding same: “Shea’s allegation is . . . [that a] discriminatory system, by its ‘continued application,’ ‘currently treats similarly situated employees differently’” (citations omitted)); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1010 (10th Cir. 2002) (“[E]ach race-based discriminatory salary payment constitutes a fresh violation of Title VII.”). Numerous other circuits had gone further, holding pay discrimination to be a “continuing violation.” See Brief for the Petitioner, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (No. 05-1074), 29 n.16, 31 n.17 (collecting cases). But even

Circuits applying this rule relied on *Bazemore v. Friday*,<sup>36</sup> in which the Supreme Court held actionable even pay disparities that started before Title VII's effective date (i.e., even if the initial pay decision is too long ago to be actionable).<sup>37</sup>

In *Ledbetter*, however, the Court declared that ongoing pay disparities were not a series of discriminatory acts (the "every paycheck" rule), but rather an initial pay decision with mere ongoing effects. *Ledbetter* distinguished *Bazemore* by reading it narrowly as addressing only the employer that "intentionally retains" a discriminatory pay structure.<sup>38</sup> Consequently, ongoing pay discrimination is immune from suit if an employee failed to challenge it in the first 180 days.

*Ledbetter* paralleled, and used some of the same quotations as *Morgan*'s policy rationales for strictly construing limitations periods. *Ledbetter* began its main policy discussion with a familiar old saw:

Statutes of limitations serve a policy of repose . . . . "[I]t is unjust to fail to put the adversary on notice to defend within a specified period of time . . . . '[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.'"<sup>39</sup>

But, after reciting those broad principles, *Ledbetter* proceeded onto much of the same policy ground plowed by *Morgan*, noting that the filing deadline

"protect[s] employers from the burden of defending claims arising from employment decisions that are long past." Certainly, the 180-day . . . deadline . . . is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing . . . ." This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.<sup>40</sup>

While *Ledbetter*'s policy arguments are in some sense a straightforward repeat of *Morgan*, *Ledbetter* went further in asserting that requiring prompt lawsuit filings encouraged "voluntary conciliation and cooperation"<sup>41</sup>—even though *Faragher* and *Ellerth* asserted an exactly opposite policy argument: that delaying suit (by requiring internal efforts first) was the way to promote conciliation rather than litigation. Thus, bewilderingly, the Court deems the policy of "conciliation" best served sometimes by delaying

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before *Ledbetter*, *Morgan* seemed to abrogate those cases allowing plaintiffs to challenge an entire pay disparity as a "continuing violation."

36. *Bazemore*, 478 U.S. 385.

37. *Id.* at 395–96 (reversing ruling "that the pre-Act discriminatory difference in salaries did not have to be eliminated" because "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to [Title VII's] effective date").

38. *Ledbetter*, 127 S. Ct. at 2173.

39. *Id.* at 2170 (citations omitted).

40. *Id.* at 2170–71 (citations omitted).

41. *Id.* at 2171.

suit (*Faragher/ Ellerth*) but sometimes by suing promptly (*Ledbetter*); more broadly, the Court is of two minds on these two interrelated matters:

- (1) Should plaintiffs file promptly (as *Morgan* and *Ledbetter* require) or delay filing to pursue internal dispute resolution efforts (as *Faragher/ Ellerth* require)?
- (2) Is the policy of resolving Title VII cases through voluntary efforts better served by requiring plaintiffs to file promptly (as *Ledbetter* says it is) or to delay filing to pursue internal dispute resolution efforts (as *Faragher/ Ellerth* say it is)?

The answer to these questions is “delay filing” for employees claiming their supervisors are harassing them because of their gender, but the answer is “file promptly” for employees claiming their supervisors are underpaying them because of their gender—because pursuing internal resolution does not toll, and thus risks missing, the short statutory deadline.<sup>42</sup>

The above-discussed cases offer no explanation for treating differently these two forms of ongoing discrimination by supervisors—no explanation of why harassment claims require pre-litigation internal resolution efforts whereas pay disparity claims must be filed in court promptly without awaiting such internal efforts. If pre-litigation internal dispute resolution is so important that it justifies dismissing the otherwise meritorious claims of plaintiffs who fail to undertake such efforts, then it would seem important across the board, for all kinds of discrimination claims. The same goes for prompt filing of claims.

If anything, the exact reverse of what the Court has declared makes more sense, for two reasons. First, internal complaints would seem more promising for remedying pay discrimination (which often can be documented readily and redressed at the will of one or two officials) than harassment (which often requires changing day-to-day patterns of conversation, demeanor, and behavior). Second, concern about “stale claims,” the justification for requiring prompt filing of pay disparity claims, would seem far less a problem for pay disparity claims (where the evidence often consists of well-documented facts and figures) than as to harassment (where the evidence usually is oral testimony about personal recollections of workplace incidents). Thus, if the Court were to think critically about which sorts of claims should be promptly filed and which should be delayed pending internal dispute resolution efforts, it might well conclude the opposite of what it has held. Yet the Court has not undertaken any such big-picture analysis, instead addressing each type of claim independently, not indicating why its rulings differ so starkly among forms of discrimination.

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42. “[T]he time for filing with the EEOC is not tolled during the pendency of a grievance proceeding.” Zimmer at al., *supra* note 32, at 855 (collecting and discussing cases).

*C. Policy 3: Certain Public Employee Complaints Are Protected If Made Externally but Not Internally (Garcetti Limits on Public Employee Protests)*

Finally, another policy the Court recently declared is in tension with the *Faragher/ Ellerth* policy of requiring internal before external complaint. It is well established that the First Amendment ordinarily bars retaliation against public employees who speak out on matters of public concern.<sup>43</sup> In *Garcetti v. Ceballos*, however, the Court declared a bright-line distinction among such speech claims.<sup>44</sup> Public employees are not protected if their speech was “pursuant to their official duties”<sup>45</sup> (like Assistant District Attorney Richard Ceballos’s internal memo on improper search warrants<sup>46</sup>), but may be protected if the employee “spoke as a citizen” on the matter.<sup>47</sup> The threshold question, the Court held, is

whether the employee spoke as a citizen on a matter of public concern. . . . So long as employees are speaking as citizens[,] . . . they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. . . . [However,] when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.<sup>48</sup>

Ceballos’s complaint about misconduct was unprotected because it was an on-the-job memo, but the same sort of complaint might have been protected had it been a more public complaint, like a newspaper letter to the editor: “Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper . . . .”<sup>49</sup>

Thus, it appears that the Court has “fashion[ed] a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors,” as Justice John Paul Stevens noted in a dissent calling such an incentive “perverse.”<sup>50</sup> Denying protection to such internal complaints created tension with Court precedent in two ways. First, and most directly, it seemed contrary to a prior case in which the Court unanimously protected a teacher’s internal complaint to her principal about

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43. *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

44. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

45. *Id.* at 1960.

46. *Id.* at 1954 (“Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it.”).

47. *Id.* at 1958.

48. *Id.* at 1958, 1960.

49. *Id.* at 1961.

50. *Id.* at 1963 (Stevens, J., dissenting).



school hiring practices.<sup>51</sup> *Garcetti* thus was a striking abrogation of precedent given that Justice Anthony Kennedy, the author of *Garcetti*, once had penned the famous phrase, “Liberty finds no refuge in a jurisprudence of doubt.”<sup>52</sup>

Second, the incentive *Garcetti* created to complain publicly rather than internally is exactly contrary to the *Faragher/Ellerth* pro-internal-complaint structure—even though Justice Kennedy authored the majority opinions in both *Garcetti* and *Ellerth*. Thus, there not only is tension between the Court’s *Morgan/Ledbetter* “file promptly” policy and its *Faragher/Ellerth* “delay filing to resolve matters internally” policies; there also is tension between the latter policy and *Garcetti*’s disincentive to resolve matters internally at all.

## II. UNACKNOWLEDGED TENSION AND INCONSISTENCY AMONG POLICIES

### A. *Tension Among Court-Declared Policies: A Broader Perspective on Bad Handling of Competing Policies*

To review, there is unacknowledged tension among three lines of the Court’s employment jurisprudence. First, the Court’s harassment case law declares that internal dispute resolution is so important that plaintiffs must delay filing their lawsuits until they have exhausted internal efforts (Policy 1, *Faragher/Ellerth*). Second, the Court has declared that other employment discrimination plaintiffs must sue promptly after the discrimination starts, not delay for any reason (Policy 2, *Morgan/Ledbetter*). Finally, for public employees, internally filed complaints—the sort *Faragher* and *Ellerth* declare so important—may be less protected than external, public complaints (Policy 3, *Garcetti*). The Court not only fails to note this tension but even asserts in *Ledbetter* that its conflicting rationales are in perfect harmony, insisting oddly that requiring prompt lawsuit filing serves the policy of encouraging “voluntary conciliation and cooperation.”<sup>53</sup>

In short, employment discrimination has become an area of the Court’s jurisprudence in which the policy arguments call to mind not “the often-repeated metaphor that law is a “seamless web,”<sup>54</sup> but a crazy quilt in which each patch has nothing in common with the next one. Unfortunately, this sort of inconsistent use of arguments has a long history, with two areas providing especially apt comparisons: (1) indeterminate “canons of

51. *Givhan v. W. Line Consol. School Dist.*, 439 U.S. 410, 414 & n.3 (1979).

52. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (Kennedy, O’Connor & Souter, JJ.).

53. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 (2007).

54. Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 Mich. L. Rev. 1175, 1220 (2006) (quoting Frederic William Maitland, *A Prologue to a History of English Law*, 53 L. Q. Rev. 13, 13 (1898) (“Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web.”)).

statutory construction,” as famously deconstructed by Karl Llewellyn—discussed below in Part II.A.1—and (2) “manipulative” use of stare decisis by the Supreme Court, including in certain of the Court’s recent constitutional jurisprudence—discussed below in Part II.A.2.

### 1. Statutory Construction Canons: Inconsistency Due to Indeterminacy

The Supreme Court’s inconsistent use of policy arguments is reminiscent of Karl Llewellyn’s demolition of the formerly “accepted convention” that judges interpret statutes using a set of rules, or “canons”—a convention premised on the idea that “only one single correct meaning could exist.”<sup>55</sup> In reality, “there are two opposing canons on almost every point,” Llewellyn famously wrote regarding the major canons in use;<sup>56</sup> for example, the canon that “[a] statute cannot go beyond its text” is contrary to the canon that “[t]o effect its purpose a statute may be implemented beyond its text.”<sup>57</sup> Similarly, “[e]xpression of one thing excludes another” is contravened by “[t]he language may fairly comprehend many different cases where some only are expressly mentioned by way of example.”<sup>58</sup>

Because statutory construction canons are so indeterminate, Llewellyn concluded, policy arguments are a necessary part of statutory interpretation: “Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon”—most prominently, by what “[t]he good sense of the situation” warranted, so long as it was a “tenable” interpretation of the text.<sup>59</sup> Despite the inevitable counterarguments that Llewellyn “greatly overstated” his point,<sup>60</sup> Llewellyn’s analysis, in just “twelve quick pages . . . largely persuaded two generations of academics that the canons of construction were not to be taken seriously.”<sup>61</sup>

While Llewellyn saw policy arguments as the alternative to too-indeterminate canons of construction, this Article notes that in recent years, policy arguments have proven similarly indeterminate in the Court’s employment jurisprudence. This observation fits into a longer line of observations of indeterminacy in legal argument, most notably by critical legal studies scholars such as Duncan Kennedy: “The arguer can pick and

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55. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950).

56. *Id.* at 401.

57. *Id.* at 401 (citing cases and treatises on each canon).

58. *Id.* at 405 (citing cases and treatises on each canon).

59. *Id.* at 401 (emphasis omitted).

60. See, e.g., John F. Manning, *Legal Realism & the Canons’ Revival*, 5 Green Bag 2d 283, 284 (2002) (noting that “[m]odern textualists, who tend to be formalist in orientation, understandably favor the use of canons, particularly the traditional linguistic canons”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 452 (1989) (“[Llewellyn’s] claim of indeterminacy and mutual contradiction was greatly overstated . . . . The canons of construction continue to be a prominent feature in the federal and state courts.”).

61. Manning, *supra* note 60, at 283.

choose from a truly enormous repertoire of typical policy arguments and modify what he finds to fit the case at hand. The arguments come in matched contrary pairs, like certainty vs. flexibility, security vs. freedom of action . . . .”<sup>62</sup>

“Indeterminacy” arguments draw criticism as being exaggerated,<sup>63</sup> and this Article takes no position on that broad critique. Rather, this Article aims to document that the problem of indeterminacy is particularly evident and significant with regard to one area of law, the employment discrimination statutes—arguably the most prominent federal statutes courts interpret, given that one of every seven or eight federal cases is an employment discrimination case.<sup>64</sup> This is not to disagree with Llewellyn as to the need for policy considerations—after all, this Article’s analysis of policy arguments is a descendant of Llewellyn’s analysis of statutory construction canons. Yet while Llewellyn may be right that the canons’ shortcomings necessitate resort to policy arguments, those policy arguments may offer little more clarity than the canons Llewellyn disdained.

## 2. Stare Decisis: Inconsistency from a Lack of Clear Criteria

A similar problem of indeterminacy arises in the Court’s less-than-consistent use of the doctrine of stare decisis, that precedents generally, but not always,<sup>65</sup> should be upheld and applied in future cases. “Antebellum Americans embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges,”<sup>66</sup> but critics say that stare decisis has not accomplished that end.

62. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan. L. Rev. 51, 53 (1989) (noting “[t]he indeterminacy of legalistic analysis of [42 U.S.C.] § 1983 . . . policy arguments . . . are more like incantations of magic formulae than descriptions of consequences in the real world”); Anthony D’Amato, *Judicial Legislation*, 1 Cardozo L. Rev. 63, 91 (1979) (“[W]hen one side asserts that a decision in its favor would be more socially desirable, may not the other side similarly raise its own claim of rights to . . . social policy?”); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518, 534 (1986).

63. See, e.g., Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. Rev. 1, 29–30 (1990) (“Few, if any, writers have asserted the most extreme thesis about indeterminacy—that no legal questions have determinate answers—in clear terms, and almost no one may actually believe that thesis, but establishing *why* that thesis is absurd is helpful. . . . [T]he law often has determinate answers to possible legal questions.”); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 494–95 (1987) (“[I]t is pure nonsense to say that legal doctrine is completely indeterminate even with respect to very hard cases. Even in the hardest hard case, legal doctrine limits the court’s options.”).

64. Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 Mo. L. Rev. 365, 369 & n.27 (2004) (noting that “[e]mployment and labor litigation has ballooned to a significant percentage of the federal court docket”—roughly 12 to 14 percent of all federal litigation—and has also substantially increased in many state courts”).

65. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”).

66. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 8 (2001).

Mark Tushnet has argued that as a tool for constraining judges' options, *stare decisis* is ineffectual because "with a relatively extensive body of precedent and with well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past decisions. Conversely, however, it will also always be possible to show how today's decision is inconsistent with the precedents."<sup>67</sup> One way to stave off indeterminacy could be to enforce limits on the "craft" of characterizing precedents creatively, but, Tushnet notes, "it turns out that the limits of craft are so broad that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants. The craft interpretation thus fails to constrain the results that a reasonably skilled judge can reach . . . ."<sup>68</sup>

It is uncontroversial that advocates always try to argue around unfavorable precedents, but it bears note that the Justices themselves engage in selective use of precedent, citing those that support, but reversing those that oppose, their preferred positions. A full catalogue of Justices' inconsistency in granting and denying *stare decisis* effect to precedents is beyond the scope of this Article; this author has discussed elsewhere how the Court's Establishment Clause and abortion jurisprudence feature inconsistent citations to and rejections of precedents.<sup>69</sup>

One especially salient recent example is how Justice Kennedy is widely accused of results-oriented misuse of *stare decisis*. Justice Kennedy voted to uphold *Roe v. Wade*<sup>70</sup> in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>71</sup> but then voted to overturn *Bowers v. Hardwick*<sup>72</sup> in *Lawrence v. Texas*<sup>73</sup> even though, as Justice Antonin Scalia argued, the *stare decisis* criteria that *Casey* announced,<sup>74</sup> such as a principle of not overruling a controversial decision "under fire," leave *Roe* no more of a solid precedent than *Bowers*.<sup>75</sup> From the other side of the ideological fence,

67. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 818 (1983); see also Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 Minn. L. Rev. 473, 529 (1984) ("All subsequent cases are subject to characterization as cases of first impression . . .").

68. *Id.* at 819.

69. Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. Pitt. L. Rev. 295, 328–41 (2005).

70. 410 U.S. 113 (1973).

71. 505 U.S. 833 (1992).

72. 478 U.S. 186 (1986).

73. 539 U.S. 558 (2003).

74. 505 U.S. at 854–69.

75. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

Today's opinions in support of [*Bowers*'s] reversal do not bother to distinguish . . . the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey*. There, when *stare decisis* meant preservation of judicially invented abortion rights, the widespread criticism of *Roe* was strong reason to *reaffirm* it: . . . "[T]o overrule under fire . . . would subvert the Court's legitimacy . . ." Today, however, the widespread opposition to *Bowers*, a decision resolving an issue as "intensely divisive" as the issue in *Roe*, is offered as a reason in favor of *overruling* it.

Justice Kennedy drew much the same criticism for voting in 2007's *Gonzalez v. Carhart*<sup>76</sup> to allow a federal abortion statute virtually identical to a state statute the Court had disallowed in 2000's *Stenberg v. Carhart*.<sup>77</sup> Defenders of *Stenberg* viewed *Gonzales* as creating "undisguised conflict with *Stenberg*," even "refus[ing] to take *Casey* and *Stenberg* seriously."<sup>78</sup> Even a fervent critic of *Stenberg* and *Roe* noted that it was "not on the most persuasive of reasoning" that *Gonzales* distinguished *Stenberg*, and thus that *Gonzales* provides yet another example of how "stare decisis does not truly constrain departures from prior decisions."<sup>79</sup>

### 3. Effective and Ineffective Efforts to Deal with Indeterminacy

This Article does not nihilistically and naively criticize all potential arguments that may feature some indeterminacy. Courts could, and sometimes do, use canons of statutory construction and stare decisis in a principled, helpful way. As to stare decisis, the plurality opinion of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>80</sup> gave neutral criteria for determining when a precedent should or should not be overturned,<sup>81</sup> and there are numerous examples of Justices applying stare decisis in a non-results-oriented way, upholding precedents with which they disagreed.<sup>82</sup> As to statutory construction, canons are not inevitably

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*Id.* (citation omitted).

76. 127 S. Ct. 1610 (2007).

77. 530 U.S. 914 (2000).

78. *Gonzales*, 127 S. Ct. at 1641, 1646 (Ginsburg, J., dissenting).

79. Posting of Michael Stokes Paulsen to Balkanization, <http://balkin.blogspot.com/2007/04/pernicious-doctrine-of-stare-decisis.html> (Apr. 18, 2007, 13:27).

80. 505 U.S. 833 (1992).

81. *Id.* at 854–69.

82. For example, Justice Potter Stewart dissented from the declaration of a right to privacy in *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965), but then joined the majority in *Roe v. Wade*, 410 U.S. 113, 168 (1973), declaring that he "now accept[s]" *Griswold*, the basis of *Roe*'s protection of a woman's right to have an abortion, *Roe*, 410 U.S. at 168 (Stewart, J., concurring) ("[T]he *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment . . . , and I now accept it as such."). Similarly, Justice John Paul Stevens categorically stated that it was on stare decisis grounds that he voted to uphold a precedent he would have voted against as an original matter:

*Jones v. Alfred H. Mayer Co.* . . . unequivocally held that § 1 of the Civil Rights Act of 1866 prohibits private racial discrimination. There is no doubt in my mind that that construction of the statute would have amazed the legislators who voted for it. . . . Were we writing on a clean slate, I would therefore vote to reverse.

But *Jones* has been decided and is now an important part of the fabric of our law. . . .

. . . .

. . . For the Court now to overrule *Jones* . . . would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to *Jones*.

Runyon v. McCrary, 427 U.S. 160, 189–92 (1976) (Stevens, J., concurring) (citation omitted).

unhelpfully indeterminate<sup>83</sup> and, moreover, cannot really be avoided; judges applying vague statutes must resort to some rule or principle of interpretation, which is essentially what "canons" are.<sup>84</sup>

Thus, even if critics of statutory construction canons and of stare decisis are correct that judges often fail to note their many contradictions, that observation is not necessarily an argument against all use of canons and stare decisis. Rather, the observation might just support an argument for better use of those doctrines. Further, while some could argue for rejecting stare decisis entirely,<sup>85</sup> there is no realistic way to avoid policy considerations<sup>86</sup> or rules for statutory construction.<sup>87</sup>

In short, where a certain tool of adjudication is unavoidable but is often used badly, it is important to fully acknowledge the possible contradictions—so that the Court can avoid issuing rulings, such as those in its employment jurisprudence, that make inconsistent demands (e.g., file suit promptly; delay suit for internal efforts). The Court's failure to acknowledge the inconsistencies in its employment jurisprudence has left its decision making no more principled than under the pre-Llewellyn canons of statutory construction or under the worst aspects of the Court's use of stare decisis.

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83. See *supra* note 59 and accompanying text.

84. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 452 (1989) (noting that Karl Llewellyn advised ruling on "*the sense of the situation*" and "mak[ing] sense . . . of our law" but "did not recognize that quite particular—and defensible—conceptions of 'sense' . . . might themselves be reflected in canons of construction. Llewellyn, like many of the realists, attempted to liberate legal thought from flawed structures . . . but structures are inevitably present" (internal quotation marks omitted)).

85. See, e.g., James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. Rev. 345, 376 (1986) ("Stare decisis has long been seen as one of the great neutral principles of legal analysis. In truth, it is nothing but the rhetorical ally of those in favor of yesterday's decisions. The world of constitutional adjudication would be well-served by a rejection of this doctrine.").

86. The best arguments for relying on policy considerations typically come in the context of specific examples of policy arguments proving necessary to resolve statutory conflict and ambiguity. See, e.g., Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Action under a Structuralist Approach*, 1997 U. Ill. L. Rev. 71, 109 ("It is therefore inevitable that policy arguments play a critical definitional role in the securities fraud context because the vague language utilized by Section 10(b) and Rule 10b-5, and the broad purpose of Congress, can be construed to support a host of alternative definitions of the elements of the plaintiff's case."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 21 (2000) ("Because existing statutes offer no explicit guidance on how to reconcile class actions and arbitration, courts and legislators inevitably will turn to policy arguments as they attempt to resolve the clash between these competing procedural devices.").

87. See *supra* notes 60, 84 and accompanying text (discussing Sunstein's views on the inevitability of statutory construction canons).

B. *Abandonment of the Antidiscrimination Policy as a Possible, but Unlikely, Explanation*

One commonality among both Policy 1 (“internal first,” *Faragher/ Ellerth*) and Policy 2 (“sue quickly,” *Morgan/ Ledbetter*) is that each is in tension with the oldest of Title VII policies—what might, in this Article’s typology, be termed “Policy Zero”: that courts should construe antidiscrimination laws broadly to fight discrimination vigorously.<sup>88</sup> In letting even clear illegality go unremedied—such as the almost two decades of proven pay discrimination by Goodyear in *Ledbetter*—the Court has decided to let other policies trump the long-established policy of broadly construing the discrimination laws to maximize their effectiveness.<sup>89</sup>

Yet it would be too easy, and inaccurate, to conclude that the Court simply has abandoned its earlier commitment to a policy of fighting discrimination aggressively. Notwithstanding the Court’s restrictive holdings on limitations periods in *Morgan* and *Ledbetter*, and on public employee rights in *Garcetti*, the Court has remained supportive of basic antidiscrimination policy. In just the first several years of this decade, the Court has issued three 9–0 decisions reversing too-restrictive circuit holdings on the fundamental of what constitutes sufficient evidence of discrimination:

- In *Reeves v. Sanderson Plumbing Products, Inc.*, it rejected the “pretext-plus” rule of several circuits—the rule that plaintiffs could not establish discrimination simply by disproving defendant’s proffered reason for a termination.<sup>90</sup>
- In *Desert Palace v. Costa*, it reversed holdings that only plaintiffs with “direct” (rather than circumstantial) evidence can enjoy the 1991 Civil Rights Act’s provision that plaintiffs must prove only that discrimination was one “motivating factor” (not the sole or but-for cause) for an employment decision.<sup>91</sup>
- In *Ash v. Tyson Foods*, it held that the following are evidence of discrimination supporting a plaintiff’s verdict: (1) a possibly ambiguous racial term (calling an African-American employee “boy”); and (2) evidence that a worker was more qualified than other candidates, even where the difference is not “so apparent as virtually to jump off the page and slap you in the face”—the standard of several circuits.<sup>92</sup>
- In *Burlington North Santa Fe Railway Co. v. White*, the Court resolved a three-way circuit split as to how severe employer

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88. See *infra* Part III.B (discussing and documenting courts’ adherence to “Policy Zero”).

89. See *infra* Part III.B.

90. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–49 (2000).

91. *Desert Palace v. Costa*, 539 U.S. 90, 90 (2003).

92. *Ash v. Tyson Foods*, 546 U.S. 454, 456–57 (2006).

retaliation must be to support a lawsuit, choosing the most permissive standard—that any act of retaliation that would deter a reasonable employee is actionable, even if that retaliatory act is not a “materially adverse” change to “employment” terms and conditions.<sup>93</sup>

Thus, *Faragher/Ellerth*, *Morgan/Ledbetter*, and *Garcetti* do not simply reflect a Court rejecting the policy of fighting discrimination; a Court rejecting that policy would not have issued *Reeves*, *Desert Palace*, *Burlington Northern*, and *Ash*. Rather, *Faragher/Ellerth*, *Morgan/Ledbetter*, and *Garcetti* reflect a Court that, while still committed to fighting discrimination, has come to place roughly comparable weight on other policies—internal complaints (Policy 1) and quick lawsuits (Policy 2)—in tension with that basic antidiscrimination policy.

C. *Explaining the Court’s Policy Inconsistency with “Hostility to Litigation as an Organizing Theme”*

To recap, the Court seems to have maintained its policy of fighting discrimination but has adopted countervailing policy preferences relating to when and how employment discrimination lawsuits are properly filed. These countervailing policies take the form of skepticism about the propriety of some types of lawsuits: some lawsuits should lose because the plaintiffs failed to file the proper internal complaint first; other lawsuits should lose because the plaintiff delayed too long before filing.

The thematic inconsistency between these two policy preferences (file quickly and delay filing pending internal processes) is discussed above; this part notes the common thread uniting the two: both reflect a skepticism of the propriety of litigation as a form of dispute resolution. In the Court’s view, even if a violation of law occurred, litigation is improper if it cuts off preferable forms of dispute resolution like companies’ internal complaint procedures (*Faragher/Ellerth*) or if it requires litigating “stale” events too far in the past (*Morgan/Ledbetter*). Once the Court gets to the allegations, it is perfectly fair to plaintiffs, as its decisions relaxing plaintiffs’ burdens of proof show—but the Court is reluctant to allow litigation of those allegations until it is convinced everything was entirely proper about how and when the lawsuit was filed.

This explanation parallels a broader recent critique of the Court’s jurisprudence by historian and law professor Andrew Siegel<sup>94</sup>—that “[i]n case after case and in wildly divergent areas of the law, the Rehnquist Court has expressed a profound hostility to litigation” based on its “skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice.”<sup>95</sup> While others have posited federalism or political conservatism as primary goals of the Court, Siegel documents how, for example, the Court is quite anti-federalist (i.e., it

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93. *Burlington N. Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2407 (2006).

94. Siegel, *supra* note 1, at 1097.

95. *Id.* at 1107–08.



preserves strong federal power over states) in allowing federal health and safety laws to preempt progressive state-law tort litigation—because, as Siegel explains, the Court cares more about limiting litigation than about preserving state autonomy.<sup>96</sup> Further, the same Court that limited Congress's once-unlimited Commerce Clause power by disallowing federal gun control<sup>97</sup> and women's rights laws<sup>98</sup> has allowed federal laws curtailing state-court litigation that deeply intrude on state sovereignty.<sup>99</sup>

Beyond offering this evidence that hostility to litigation trumps other of the Court's priorities, Siegel documents how the language of various Court decisions betrays a highly negative view of litigation. Decisions limiting punitive damages refer to a perception that damages awards have “run wild”;<sup>100</sup> decisions disallowing lawsuits against state governments portray “a Kafkaesque universe in which the defenseless state is ‘hauled’ into Court or ‘thrust’ by ‘fiat’ and ‘against its will’ into ‘disfavored status’ and ‘subject to the power of private citizens’”<sup>101</sup>—language from Court decisions that, Siegel notes, pervasively portrays litigation as “mire and unseemliness,”<sup>102</sup> not a legitimate method of dispute resolution.

Hostility to the litigation process itself seems the best explanation of how the same Court could be so willing to disallow employment lawsuits for supposed timing and procedural failures (*Faragher/Ellerth*, *Morgan/Ledbetter*), but, when it deems a lawsuit to be properly filed, so willing to allow the plaintiff leeway as to burdens of proof and evidence. That is, the Court is quick to accept any plausible argument that a lawsuit was filed too late (*Morgan/Ledbetter*), or too hastily at the expense of a superior internal dispute resolution process (*Faragher/Ellerth*). The latter preference, for private dispute resolution, is further illustrated by cases upholding employer policies that bind employees to arbitrate, rather than take to court, any discrimination claims.<sup>103</sup> In contrast, if a case does not present any such timing argument, the Court gives plaintiffs a fair shake (*Reeves*, *Desert Palace*, *Ash*, and *Burlington Northern*).

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96. *Id.* at 1168–69 (“[The] Court has invalidated . . . state tort law that would have permitted lawsuits seeking compensation from HMOs for violation of their ‘duty of care’ to their policyholders, from manufacturers of faulty medical devices for using fraud to obtain approval of the devices, from car manufacturers for failing to install optimal safety devices, and from cigarette manufacturers for failing to warn about the consequences of smoking.” (citations omitted)).

97. *United States v. Lopez*, 514 U.S. 549 (1995).

98. *United States v. Morrison*, 529 U.S. 598 (2000).

99. Siegel, *supra* note 1, at 1172–73 (discussing *Pierce County v. Guillen*, 537 U.S. 129 (2003)).

100. *Id.* at 1147 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

101. *Id.* at 1162 (collecting language from Court's sovereign immunity decisions).

102. *Id.* at 1161.

103. *Id.* at 1139–42 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

### III. EXPLANATION IS NOT JUSTIFICATION: TWO PROBLEMS WITH PURPORTING TO FIGHT DISCRIMINATION WHILE FIGHTING LITIGATION

This Article has attempted to explain how the Court sometimes seems too pro-plaintiff but sometimes seems too pro-defendant: it sees its role as fighting discrimination but also as fighting excessive litigation. Whatever the merits of this story as an explanation, it is not necessarily a justification of the Court's jurisprudence; to explain is not to justify.

While this Article's primary purpose is to explain the inconsistencies in the Court's jurisprudence, it bears mention that this jurisprudence is problematic in two key respects. First, the inconsistent requirements of the Court's anti-litigation jurisprudence leave the requirements of antidiscrimination law unintuitive, and therefore unpredictable and unfair, to employees, as Part III.A discusses. Second, and perhaps most troubling, the Court's anti-litigation doctrines undercut its long-established efforts to construe the discrimination laws broadly so as to fight discrimination, as Part III.B discusses.

#### A. *The Unfairness and Unpredictability of Unintuitive Requirements*

We cannot expect laypeople to follow the law when the claims of some are subject to one policy, while the claims of others are subject to a contrary policy. A woman claiming harassment must delay suit filing to pursue internal efforts; but a woman claiming pay discrimination must sue without delay, such that delaying suit to pursue internal efforts easily could destroy her claim. Worse, it may be the same woman with both such complaints about a sexist supervisor, leaving her with unintuitively different rules for her two claims of sex discrimination by the same supervisor. If the law were consistent in what it demanded from employees (e.g., if "must sue promptly" were the rule for all forms of discrimination), then even among nonlawyers, those demands might become part of the conventional wisdom, or at least might be easy for some to find with basic Internet research.

But when the Court imposes opposite demands based on subtle differences in the form of discrimination, we cannot expect employees to intuit, or learn without retaining lawyers, the legal rules about when they must or must not delay suit to pursue internal dispute resolution. While some (but certainly not all) laypeople could research statutes of limitations or other basic rules (e.g., pre-litigation Equal Employment Opportunity Commission filing requirements), laypeople cannot be expected to research how the complex nuances of continuing violations doctrine, for example, vary among kinds of discrimination.

If well-intentioned, thoughtful employees fall prey to procedural hurdles they cannot be expected to intuit or discover, then meritorious claims are being dismissed without purpose, i.e., without effectively incentivizing employees to engage in the preferred behavior. This subverts a fundamental purpose of any system of law. As Justice Oliver Wendell Holmes noted over a century ago, the law exists largely to declare the

consequences of good and bad behavior to induce the former and deter the latter: “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.”<sup>104</sup> Today, “the path of the law” in employment discrimination is exactly the sort of unpredictable maze of unintuitive requirements Holmes would have disdained.

### B. *The Tension Between Fighting Discrimination and Fighting Litigation*

While the Court’s significant string of pro-plaintiff decisions shows that it has not entirely abandoned its commitment to fighting discrimination, its aggressive pursuit of anti-litigation policies has done significant harm to that antidiscrimination commitment. The anti-litigation policies discussed in this Article have been termed Policies 1, 2, and 3, and while those three are in tension with each other, all three share one key commonality. They each contravene the oldest of the policy arguments in employment discrimination:

Policy Zero: Fight discrimination aggressively by construing remedial discrimination statutes broadly.

This tension explains the Court’s mixed bag of outcomes: Policy Zero remains and continues to yield pro-plaintiff outcomes—except in cases implicating one of the more specific recently declared policies (Policies 1 and 2), which trump Policy Zero and yield the pro-defense decisions we have seen.

In an earlier era, the Court declared that broad construction of remedial employment discrimination statutes was the proper approach and the main answer to how courts should choose among possible statutory interpretations:

As Congress itself has indicated, a ‘broad approach’ to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.<sup>105</sup>

Two points are especially noteworthy about the Court’s commitment to Policy Zero. First, the Court’s focus on “avoid[ing] interpretations of Title VII that deprive victims of discrimination of a remedy” contrasts sharply with its current anti-litigation litany of procedural hurdles, such as construing continuing violations doctrine narrowly and imposing common-law-created internal complaint requirements not actually appearing in the statute.

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104. Holmes, *supra* note 14, at 458, *reprinted in* 110 Harv. L. Rev. 991, 992 (1997).

105. *County of Wash. v. Gunther*, 452 U.S. 161, 178 (1981) (allowing a Title VII pay disparity challenge even though men’s and women’s jobs were not “equal work,” and noting that “[o]ur interpretation . . . draws additional support from the remedial purposes of Title VII and the Equal Pay Act” (quoting S. Rep. No. 88-867, at 12 (1964))).

Second, the strength of the Court's commitment to Policy Zero is so great that it trumped not only other policies, but even "literal construction." "[L]iteral construction" of Title VII, which categorically banned all race discrimination, "is misplaced" in an argument against race-conscious affirmative action, the Court held in a landmark case, because of the broader purpose of the statute:

The very statutory words intended . . . "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish . . . racial segregation and hierarchy.<sup>106</sup>

Declarations that pursuing antidiscrimination policy trumped "strict construction" was a regular feature of the Title VII appellate case law over the years,<sup>107</sup> a policy argument grounded in the Court's broader jurisprudence of construing all sorts of remedial statutes "in a manner that provides 'the broadest possible scope'"<sup>108</sup> from voting rights<sup>109</sup> to antitrust statutes.<sup>110</sup> Given the deep roots of the policy of broadly construing remedial statutes, it is striking that the Court's Title VII jurisprudence has, while not abandoning the policy, declared it subsidiary to newer anti-litigation policies.

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106. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201, 204 (1979) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

107. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus . . . [is] against the biracial child."). The *Tetro* court stated,

"Title VII . . . [is] a clear mandate from Congress that no longer will the United States tolerate . . . discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics."

*Id.* (quoting *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that Title VII prohibits discrimination based on an employee's association or marriage with an African-American)).

108. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

109. *See, e.g., id.* at 403 ("Congress enacted the Voting Rights Act . . . for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.' . . . [T]he Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." (citations omitted)).

110. *See, e.g., Abbott Labs. v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 11-12 (1976) ("[T]he antitrust laws, and Robinson-Patman in particular, are to be construed liberally and . . . exceptions . . . construed strictly. . . . Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' Because the Act is remedial, it is to be construed broadly to effectuate its purposes." (citations omitted)).

#### IV. HOW DISTRICT AND APPELLATE COURTS CAN MITIGATE THE INCONSISTENCY OF THE SUPREME COURT'S DIRECTIVES

What should the lower federal courts do about this inconsistency among Supreme Court decisions? At first glance, the answer is “nothing.” Lower courts simply must follow Supreme Court rulings to the letter; they must dismiss the claims of discrimination plaintiffs who delay suing to pursue internal remedies (per *Ledbetter* and *Morgan*) and dismiss the claims of harassment plaintiffs who do not delay suing to pursue internal remedies (per *Faragher/Ellerth*). But the Court's inconsistency with the policies underlying these rules is relevant to lower court decision making in two ways: (a) “dual-claim” plaintiffs alleging both harassment and another form of discrimination; and (b) exceptions to the *Faragher/Ellerth* internal reporting requirement and to the strictness of *Morgan* and *Ledbetter* with Title VII's short limitations period.

##### A. *Exempting “Dual-Claim” Plaintiffs from the Faragher/Ellerth Requirement of Pre-litigation Internal Dispute Resolution*

First, there is the troubling matter of “dual-claim” plaintiffs, those claiming both harassment and a more tangible form of discrimination such as a pay disparity or a denial of a promotion. It is entirely common for an employee to allege that the same sexist supervisor both harassed her and paid her less, or denied her a promotion, because of her gender.<sup>111</sup> Placing opposite demands on harassment plaintiffs and pay disparity or promotion plaintiffs does not work when the same person has a dual claim. If a dual-claim employee were to delay a suit to pursue internal remedies, she would preserve her harassment claim—by doing what *Faragher* and *Ellerth* command—but jeopardize her pay/promotion claim—by not filing promptly as *Ledbetter* and *Morgan* command. Yet, if she instead sued promptly to preserve her pay or promotion claim, she would jeopardize her harassment claim.

Some employees will have lucky timing, filing an internal complaint promptly and having it resolved by human resources in time to sue within the several-month limitations period. But many employees, unable to thread the needle so finely, will find themselves put in an impossible position by the Court's inconsistent demands on discrimination plaintiffs. Alternatively, some employees can try to comply with both lines of case law with sequential filings—e.g., suing on their pay discrimination claim

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111. See, e.g., *Boumechdi v. Plastag Holdings, LLC*, 489 F.3d 781, 785–86 (7th Cir. 2007) (reversing dismissal of plaintiff's claims of sex harassment and sex-based pay disparity); *Bonner v. Guccione*, 178 F.3d 581, 583 (2d Cir. 1999) (affirming a finding of liability for plaintiff on claims of sex harassment and sex-based pay disparity); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 377 (11th Cir. 1995) (ruling on an interlocutory appeal in a case featuring claims of sex harassment and sex-based pay disparity); *Chancey v. Sw. Fla. Water Mgmt. Dist.*, 965 F. Supp. 36, 38–39 (M.D. Fla. 1997) (denying summary judgment on plaintiff's claims of sex harassment and gender-based pay disparity); *Moye v. Fleming Co., Inc.*, 924 F. Supp. 1119, 1123 (M.D. Ala. 1996) (same).

while merely pursuing internal resolution of their harassment claim. But disaggregating the same plaintiff's two discrimination claims is inefficient; also, it is hard to see the employer pursuing a good faith harassment investigation for an employee already suing it for pay discrimination. In short, there is no good way for employees to navigate these dueling requirements without risking one of their claims, creating inefficient redundancy, or making unrealistic the prospect of a serious internal investigation.

By far the most feasible solution is that courts should exempt dual-claim plaintiffs from the *Faragher/Ellerth* requirement of a pre-litigation internal complaint. After all, *Faragher* and *Ellerth* do not establish a per se rule that all harassment plaintiffs must file internal complaints; rather, they target only plaintiffs who “unreasonably failed” to pursue the employer’s “preventive or corrective opportunities . . . or to avoid harm otherwise.”<sup>112</sup> For a dual-claim plaintiff, it is not unreasonable to refrain from pursuing pre-litigation dispute resolution by filing suit quickly to preserve her pay disparity or promotion claim. Accordingly, *Faragher* and *Ellerth* should not be read as requiring pre-litigation dispute resolution efforts by dual-claim plaintiffs.

*B. Preserving Broad Exceptions and Limitations to the Faragher/Ellerth Internal Complaint Requirement and the Morgan/Ledbetter Prompt Filing Requirement*

There are exceptions and limitations to the *Faragher/Ellerth* rule of pre-litigation dispute resolution, and possibly to the prompt filing rules of *Morgan* and *Ledbetter*—exceptions and limitations that courts should recognize and construe broadly. The only logical response to the Supreme Court’s endorsement of competing policy arguments is to construe narrowly the strictures of *Faragher/Ellerth* and *Morgan/Ledbetter* because the policies of each undercut the other, preventing either from being seen as overridingly important.

The key to construing *Faragher/Ellerth* and *Morgan/Ledbetter* narrowly is to construe broadly the exceptions and limitations to the rules they announce. There are two key exceptions and limitations relevant here:

- (1) under *Faragher/Ellerth*, recognizing that in certain circumstances, a “reasonable employee” would not report her supervisor’s harassment within the company; and
- (2) under *Morgan/Ledbetter*, recognizing that the limitations period often should start running not at the moment the discrimination starts, but at the later point when a reasonable employee would first be aware of the pay disparity or other discriminatory action.

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112. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (emphasis added).

1. *Faragher/Ellerth* Exceptions: The Occasional Reasonableness of Not Telling on One's Supervisor

As discussed above, *Faragher* and *Ellerth* provide that employees cannot sue for harassment if they “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>113</sup> Under this rule, most courts have dismissed claims by employees who did not report harassment to company officials<sup>114</sup> or even just delayed a few months before doing so.<sup>115</sup>

Courts have been unreceptive to essentially the entire range of reasons employees might not report harassment—“the discomfort and embarrassment associated with talking about the sexual conduct[,] . . . belie[f] that reporting would be futile—even when employees have some justification for that belief, such as information obtained from other employees[,] . . . [and] fears of retaliation.”<sup>116</sup> More broadly, “[c]ourts have been almost uniform in finding a harassed employee’s failure to formally report sexual harassment to the employer to be unreasonable. . . . [C]ourts may be treating failure to complain as *per se* unreasonable . . . .”<sup>117</sup>

Such a strict pre-litigation reporting requirement is questionable for two reasons. First, a rule that it is close to a *per se* requirement goes well beyond the reasonableness inquiry that *Faragher* and *Ellerth* envisioned—that “defendants will have to show that the plaintiffs *unreasonably* failed to report[,] . . . not merely that they failed to report it.”<sup>118</sup> Second, strictness with the requirement of pre-litigation pursuit of internal remedies is, as discussed above, in tension with the *Morgan/Ledbetter*-endorsed policy of encouraging prompt lawsuits without delay. Some tension between the *Faragher/Ellerth* policy (delaying suit to pursue internal resolution) and the *Morgan/Ledbetter* policy (prompt suit without delay) is inherent. But construing the *Faragher/Ellerth* requirement as a strict *per se* rule maximizes that tension, whereas it would minimize the tension to construe *Faragher/Ellerth* more leniently, as the sort of case-specific reasonableness test that *Faragher* and *Ellerth* envisioned in the first place.

Infusing more leniency into the *Faragher/Ellerth* reporting requirement would be not only advisable, but, for three reasons, is well within the bounds of the current case law. First, given the absence of any further

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113. *Id.* at 807.

114. *See supra* note 22 and accompanying text.

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

116. L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 Ind. L.J. 711, 724–25 (2007). For illustrative cases, *see supra* notes 22–23 and accompanying text.

117. *Id.* at 721 & n.48.

118. *Vandermeer v. Douglas County*, 15 F. Supp. 2d 970, 981 (D. Nev. 1998) (denying defendant summary judgment on *Faragher/Ellerth* defense: “Since the plaintiffs have argued that they had legitimate reasons for not reporting Stangle’s behavior, including a belief that his supervisors already knew about it, and had done nothing, it will be up to the trier of fact to determine whether or not the plaintiffs did act reasonably”).

Supreme Court pronouncements on how to interpret the *Faragher/Ellerth* requirement, the matter has remained entirely in the hands of the lower courts to interpret the requirement as they see fit.

Second, some of the earliest post-*Faragher/Ellerth* precedents held that whether “delay in reporting . . . was reasonable . . . is a question best left to the finder of fact.”<sup>119</sup> There is far less such authority, however, in the more recent appellate case law. Perhaps once courts gained enough experience with *Faragher/Ellerth*, they became more comfortable issuing “I know it when I see it” rulings evaluating the reasonableness of employee behavior as a matter of law, without leaving the factual questions to a jury. Ironically, when courts knew less about how to apply *Faragher* and *Ellerth*, they may have been making the right call more often—recognizing that evaluation of an employee’s duty to report is a fact-laden question of reasonableness. This early post-*Faragher/Ellerth* jurisprudence remains good law—the cases have not been reversed—and therefore provide authority for courts to deem the reasonableness of an employee’s plausibly justified failure to report a question of fact that precludes summary judgment on the *Faragher/Ellerth* defense.

Third, “recently, some courts have been more sympathetic to delays in reporting. While an employee must reasonably take advantage of employer policies, some courts have found employee delay in pursuing internal relief to be reasonable.”<sup>120</sup> This case law thus far has been limited to cases in which plaintiffs delayed reporting harassment a month or two; it has not extended to cases in which plaintiffs failed to report harassment at all. But it may be entirely reasonable and understandable behavior for a harassed employee to fail to report harassment, such as because of fear of retaliation or because of psychological inability to relive the harassment by telling officials of the company whose supervisor harassed her.<sup>121</sup> Courts easily could extend their “more sympathetic” perspective from delayed reporting cases to non-reporting cases.

In one notable early post-*Faragher/Ellerth* case, *Johnson v. West*,<sup>122</sup> the U.S. Court of Appeals for the Seventh Circuit appropriately applied both the second and third principles noted above—that reasonableness of

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119. *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (reversing a grant of summary judgment to an employer where “[plaintiff] Phillips alleges that Sonntag’s harassment began in March 1995; however, Phillips did not complain to Taco Bell until June 20, 1995, at which time she left a voice mail message”); *see also* *Greene v. Dalton*, 164 F.3d 671, 674–75 (D.C. Cir. 1999) (reversing a grant of summary judgment to an employer where the employee “waited more than a month” to file internal complaint, because of factual questions as to when it would have been reasonable to decide to report possibly escalating harassment).

120. Michael J. Zimmer et al., *supra* note 32, at 11 (2004 Supp.) (citing *Hardy v. Univ. of Ill. at Chicago*, 328 F.3d 361 (7th Cir. 2003) (finding an employee’s two-month delay before reporting harassment not to be unreasonable where the employee was on medical leave for one month and allegedly needed another month to make a full complaint with all relevant information)).

121. *See supra* note 116 and accompanying text.

122. 218 F.3d 725 (7th Cir. 2000).



employee non-reporting is a factual question and that the ordeal some harassed employees suffer might make it reasonable not to complain internally about a harasser supervisor. “[I]t is the [defendant’s] burden to show that Johnson acted unreasonably,”<sup>123</sup> the court noted, proceeding to explain why here, “a trier of fact could rationally come to either conclusion on the second element: that Johnson behaved reasonably, or that she did not,” even though it took plaintiff Johnson “nearly a year to report the harassment”:<sup>124</sup>

[H]er failure . . . may have stemmed from Williams’s threats and intimidation, which convinced Johnson (still at that point a probationary employee) that to take any action would come at the price of her job. Such a reaction may not be unreasonable. There was evidence that Williams threatened Johnson, verbally abused her, and even threw mail in her face. A trier of fact could find that Johnson was under severe emotional and psychological stress as a result of the harassment. Her co-workers observed that she appeared fearful and introverted when she was working for Williams; at one point, when Williams had her backed into a corner, she yelled “I’m going to scream!” Eventually, she consulted a therapist to help her through the hallucinations, substance abuse, and depression she suffered.

This presents a factual issue on the affirmative defense . . . .<sup>125</sup>

The above excerpt provides an excellent explanation of how to conduct the analysis of harassed employees’ behavior under *Faragher/Ellerth*. It is a question of fact: consider the employee’s level of job security (there, probationary), consider evidence of whether the harassment was threatening in nature, and consider evidence of how the harassment affected the employee’s emotional state (witness testimony on demeanor, evidence of professional treatment, and symptoms). Unfortunately, *Johnson v. West* is one of very few decisions to undertake such a thoughtful analysis of employee reasonableness under *Faragher/Ellerth*,<sup>126</sup> and no subsequent cases appear to have cited it for this analysis of employee reasonableness.

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123. *Id.* at 731–32.

124. *Id.* at 732.

125. *Id.* (citations omitted).

126. For a decision “getting it right” in a similar manner, see, for example, *George v. Liverpool Central School District*, No. 97-CV-1232, 2000 WL 1499342, at \*9 (N.D.N.Y. Sept. 29, 2000) (denying defendant summary judgment on *Faragher/Ellerth* defense where defendant’s harassment policy may not have been disseminated effectively and where “plaintiff’s excuse for not complaining is not merely a generic fear”). The court continued,

[P]laintiff effectively distinguishes between the status of a tenured versus non-tenured teacher. . . . Plaintiff claims she was aware that prior to tenure, a teacher should not speak out or make waves. This sentiment was confirmed by one of plaintiff’s colleagues . . . . [P]laintiff has raised an issue of fact as to whether her total failure to complain to Liverpool during the course of her employment was unreasonable.

*Id.*

## 2. Mitigating the Harshness of *Morgan/Ledbetter* with a Robust Discovery Rule

Both *Ledbetter* and *Morgan*, in establishing the strictness of Title VII limitations periods, “declined to address whether Title VII suits are amenable to a discovery rule”<sup>127</sup> that would start the limitations period only “when the injury reasonably should have been discovered,” rather than “when the injury occurs.”<sup>128</sup> There is little meaningful post-*Morgan*, post-*Ledbetter* case law on the discovery rule,<sup>129</sup> but having “declined to address” the question, *Ledbetter* and *Morgan* left intact the virtually unanimous federal appellate case law deeming the discovery rule applicable to Title VII claims.<sup>130</sup> A discovery rule is necessary, the U.S. Court of Appeals for the Fifth Circuit once explained, because good employees may be slow to conclude that they have suffered discrimination

A reasonably prudent employee, one who is reasonably ambitious, conscientious, and trusting, . . . will not necessarily conclude that her employer is an illegal discriminator on the basis of one conversation (based on hearsay) and one act that is at least arguably non-discriminatory. Without additional evidence, she is just as likely as not to give her employer the benefit of the doubt and, in so doing, strive to disconfirm her own suspicions.<sup>131</sup>

Despite their strictness with limitations periods, *Ledbetter* and *Morgan* do nothing to upset the logic of this case law supporting the existence of a discovery rule that would mitigate the harshness of a case like *Ledbetter*. Lily Ledbetter could not recover for nineteen years of proven pay discrimination because she did not sue within 180 days of its start, but a future Lily Ledbetter will know she must overcome the *Ledbetter* rule—and should be allowed to do so, upon showing that a reasonably diligent employee would not have known of the discrimination as soon as it started.

## CONCLUSION

This Article attempts to explain confusing incoherence among the Court’s employment jurisprudence. Documenting the contradictions in the Court’s decision making has an additional purpose: If the Court were more aware of the competing policies it has announced, it could do a better job of

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127. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2177 n.10 (2007) (citing *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7 (2002)).

128. *Morgan*, 536 U.S. at 114 n.7.

129. *E.g.*, *Darby v. Stout Road Assocs., Inc.*, No. 06-CV-5009, 2007 WL 1630139, at \*2 n.5 (E.D. Pa. June 4, 2007) (noting that both *Ledbetter* and *Morgan* left open the possibility of “discovery rule” tolling of limitations period, but not issuing a definitive holding under discovery rule).

130. W. Eric Pitts, *Thomas v. Eastman Kodak Co.: A New Twist on Determining the Accrual Date for Causes of Action in Employment Discrimination Cases*, 23 Am. J. Trial Advoc. 451, 454–55 (1999) (collecting authority from ten circuits recognizing the discovery rule).

131. *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1562 (5th Cir. 1985).

reconciling the tension among its policy determinations in this important field of law.

More specifically, if this Article is correct that “hostility to litigation” is the key policy driving the Court, then the Court should say so forthrightly, rather than pretending that its decisions each reflect Title VII policy while vacillating wildly between inconsistent policies of requiring prompt filing and requiring pre-filing dispute resolution efforts. More clarity in the Court’s decisions would make its jurisprudence more predictable and more susceptible to an honest debate over whether hostility to litigation is a desirable basis for judicial decision making. This Article notes ways in which hostility to litigation is troubling, at least when applied to remedial statutes such as Title VII; this vital debate would be easier to undertake were it not necessary for analysts first to differentiate the policies the Court says it serves (i.e., prompt filing or internal dispute resolution) from the policies it *actually* serves (i.e., hostility to litigation). Debate is good; honest debate is better.

## *Notes & Observations*