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Nothing Inevitable About Discriminatory Hiring: Lewis v. City of Chicago and a Return to the Text of Title VII

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NOTHING INEVITABLE ABOUT DISCRIMINATORY HIRING: *LEWIS V. CITY OF CHICAGO* AND A RETURN TO THE TEXT OF TITLE VII

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Hot on the heels of the landmark case *Ricci v. DeStefano*,[1] the U.S. Supreme Court heard *Lewis v. City of Chicago*,[2] another case dealing with Title VII of the Civil Rights Act of 1964 ("Title VII").[3] The controversy again revolved around the hiring practices of a municipal fire department and its administration of an allegedly discriminatory test.[4] Whereas the petitioners in *Ricci* successfully argued that the *abandonment* of an objective employment test with racially disparate results violated Title VII,[5] the petitioners in *Lewis* alleged the City of Chicago's *use* of such a test violated Title VII.[6] Perhaps surprisingly, especially to those regarding the Supreme Court as conservative in its Title VII decisions, the *Lewis* Court not only granted petitioners' writ of certiorari but also unanimously held in their favor.

The ruling in *Lewis* addressed a relatively narrow issue: whether the implementation *and each subsequent use* of a discriminatory hiring practice constitute actionable practices on which to base a

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1. 129 S. Ct. 2658 (2009).
2. 130 S. Ct. 2191 (2010).
3. 42 U.S.C. § 2000e to 2000e-17 (2006).
4. *Lewis*, 130 S. Ct. at 2195.
5. *Ricci*, 129 S. Ct. at 2661.
6. *Lewis*, 130 S. Ct. at 2196.

disparate-impact complaint.[7] But more broadly, by granting certiorari and finding for petitioners on that issue, the Court tempered its negative attitude toward Title VII discrimination claims.

This Comment explains the Supreme Court's ruling and its ramifications, and offers insight into a controversy in which the Court, through an opinion by Justice Scalia, unanimously overruled the U.S. Court of Appeals for the Seventh Circuit opinion written by Judge Posner. Part I explains the factual and legal background of the case. Part II outlines the Supreme Court's reversal, and Part III discusses the policy and rationale behind it. Finally, Part IV addresses the future implications of the decision and provides some possible reasons for this strong reversal of the Seventh Circuit.

I. BACKGROUND

The plaintiffs in *Lewis* brought suit in the U.S. District Court for the Northern District of Illinois alleging that the City of Chicago (the "City") had administered a test to firefighter applicants that created a disparate impact along racial lines in violation of Title VII.[8] The trial court found for the plaintiffs on the merits, but the Seventh Circuit overturned the decision on procedural grounds.[9]

A. The Facts

In July 1995, the City administered an exam to approximately 26,000 firefighter applicants.[10] Starting in May 1996, the City relied on the results of this exam in selecting candidates to continue the hiring and training process.[11] The City labeled applicants who scored at least 89 points "well qualified" and randomly drew candidates from this pool from 1996 to 2001.[12] Those candidates could then proceed to the next hiring phases—physical tests, background screening, and so on.[13]

The City categorized as "qualified" those applicants scoring

7. *Id.* at 2193–94.

8. Lewis v. City of Chi., No. 98 C 5596, 2005 WL 693618 (N.D. Ill. Mar. 22, 2005), *rev'd*, 528 F.3d 488 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2191 (2010).

9. 528 F.3d 488 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2191 (2010).

10. *Lewis*, 130 S. Ct. at 2195.

11. *Id.* at 2196.

12. *Id.* at 2195–96; *Lewis*, 2005 WL 693618, at *2.

13. *Lewis*, 130 S. Ct. at 2195.

between 65 and 88, and informed them in good faith that their applications would be kept on file but that their chances of being hired were low because of the large number of applications.[14] By 2001, however, the City had exhausted the supply of well-qualified applicants and started drawing from the qualified pool.[15] Despite scoring in the 65- to 88-point range, the applicants from the Chicago Fire Academy's class of 2003 were no less qualified than the earlier classes with test scores of 89 or above.[16]

B. The Complaint

In March 1997, Crawford Smith and five other African American applicants who fell into the qualified group—and had consequently not been hired—alleged that the 1995 test produced an unjustified adverse impact on African American applicants in violation of Title VII.[17] Before the plaintiffs could sue in federal court, however, the Act required them to file a complaint with the Equal Employment Opportunity Commission (EEOC) and obtain right-to-sue letters.[18] In this case, the statute of limitations period for such a filing was 300 days "after the alleged unlawful employment practice occurred."[19] Thus, determining whether the plaintiffs' complaint was timely required "identify[ing] precisely the 'unlawful employment practice'" that caused their injury.[20]

In September 1998, the plaintiffs sued in district court.[21] The City sought summary judgment, arguing that the plaintiffs had failed to file their EEOC complaint within the 300-day limitations period.[22] The court denied the defendant's motion, holding that the limitations period had not begun to run because the City's refusal to process the

14. *Id.* at 2195–96.

15. *Lewis*, 2005 WL 693618, at *2.

16. *Id.*

17. *Id.* at *1.

18. *See Lewis*, 130 S. Ct. at 2196.

19. 42 U.S.C. § 2000e-5(e)(1) (2006). In certain circumstances the limitations period is 180 days; but if, as here, the state in which the complaint is filed has an administrative agency with the authority to remedy Title VII wrongs, the period is 300 days. *Id.*; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at 3, *Lewis*, 130 S. Ct. 2191 (No. 08-974) (explaining the determination of which limitations period applies).

20. *Lewis*, 130 S. Ct. at 2197 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980)).

21. *Lewis*, No. 98C5596, 2000 WL 690313, at *2 (N.D. Ill. May 25, 2000).

22. *Id.* at *4.

plaintiffs' applications constituted a "continuing violation."[23] Under this theory, the defendant's acts were treated as one "'systemic' continuing violation"[24] stemming from the employer's "express, openly espoused policy that [was] alleged to be discriminatory."[25] The plaintiffs' EEOC claim was thus timely, and the case proceeded to trial on the merits.

At trial, it was undisputed that the City's examination had produced a severe adverse impact on African American applicants.[26] Although there was no difference between white and African American firefighters in performance, only 2.2 percent of African American applicants were deemed well qualified compared to 12.6 percent of white applicants.[27] As the court put it, "In other words, the City's decision to select only those applicants who scored 89 and above meant that white applicants were five times more likely than African-Americans to advance to the next stage of the hiring process."[28] Furthermore, the trial stood against a backdrop of commentary in the press describing the Chicago Fire Department's "long history of institutional racism" and allegations that the test was *intentionally* being used as a way to screen minorities.[29] Whether Chicago's social environment influenced the court's decision is beyond speculation, but the fuse had been lit on a potential powder keg of racial tension in the city.

The district court found for the plaintiffs.[30] Because the disparate impact of the test was undisputed, the burden was on the City to show that its use of the test was "job related for the position in question" and "consistent with business necessity."[31] The crux of this analysis was whether the test results adequately correlated to each applicant's prospective abilities as a firefighter—that is, whether applicants scoring at least 89 on the test would become better firefighters than those scoring 88 or below.[32]

23. *Id.*
24. *Id.* (quoting Selan v. Kiley, 969 F.2d 560, 565 n.5 (7th Cir. 1992)).
25. *Id.* (quoting *Selan*, 969 F.2d at 565).
26. *Lewis*, 2005 WL 693618, at *2.
27. *Id.*
28. *Id.*
29. Celeste Garrett, Editorial, *The Fire Rages On*, CHI. SUN-TIMES, Jan. 12, 1997, at 35.
30. *Lewis*, 2005 WL 693618, at *1.
31. *Id.* at *8 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000)).
32. *Id.*

According to its designer's testimony, the test had a margin of error of thirteen points—meaning that the City's cutoff score of 89 points was too high to distinguish between qualified and unqualified candidates.[33] The court expressed serious concerns about whether the examination could reliably measure the cognitive skills that it was designed to test at all, and the City failed to prove its predictive value and validity.[34] The City's "business necessity" defense thus failed.[35]

Finally, even if the City had met its burden of demonstrating the examination's business necessity, the plaintiffs would still have prevailed on the basis that a less-discriminatory alternative was available.[36] That is, the City could have used the method it had adopted after exhausting the supply of well-qualified applicants: it could have selected randomly from the applicants scoring at least 65 points without any detriment to the quality of the firefighters produced, as illustrated by the quality of the Academy's 2003 class of firefighters versus earlier graduating classes.[37]

C. The City Appeals

Having been defeated on the merits, the City appealed to the Seventh Circuit, again arguing that the plaintiffs did not bring their complaints to the EEOC in a timely manner.[38] The plaintiffs had filed with the EEOC on March 21, 1997, around 417 to 419 days after they had received notice of their test results.[39] The district court judge had ruled that the suit was timely because it was brought within 300 days of the City' *beginning to hire* well-qualified applicants.[40] But the Seventh Circuit held that the district court had erred on this issue.

On appeal, the plaintiffs again argued that the City's application of its hiring policy constituted a "continuing violation."[41] The Seventh Circuit rejected this argument, holding instead that a "continuing violation" is one in which a "series of acts by a

33. *See id.* at *4–5.
34. *Id.* at *9–12.
35. *Id.* at *9.
36. *Id.* at *14.
37. *Id.*; *see supra* note 16 and accompanying text.
38. Lewis v. City of Chi., 528 F.3d 488, 490 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2191 (2010).
39. *Id.*
40. *Id.*
41. *Id.* at 492.

prospective defendant blossoms into a wrongful injury on which a suit can be based" and is thus more aptly described as "cumulative" rather than "continuing."[42] According to the Seventh Circuit, the plaintiffs had been injured when they received notice of their qualified status in 1995—a discrete moment in time, and beyond the limitations period.[43]

The Seventh Circuit relied on a string of cases, including *Ledbetter v. Goodyear Tire & Rubber Co.*[44] In *Ledbetter*, the Supreme Court affirmed the Eleventh Circuit's finding that the plaintiff's Title VII complaint was untimely.[45] Lilly Ledbetter alleged that Goodyear had given her poor performance reviews because of her gender and that those reviews resulted in, among other things, lower pay.[46] The Court held that "[b]ecause a pay-setting decision is a 'discrete act,' it follows that the period for filing an EEOC charge begins when the act occurs."[47] That is, the *decision* to pay Ledbetter less was actionable, but the paychecks themselves were merely the inevitable consequence of that decision. Thus, her subsequent paychecks did not renew the limitations period or provide discrete causes of action. The Seventh Circuit's reliance on *Ledbetter* is notable because the Supreme Court's holding there triggered a legislative response: the Lilly Ledbetter Fair Pay Act of 2009[48] ("Ledbetter Act"), which superseded *Ledbetter* by specifically allowing actions based on *each payment* of wages, benefits, or other compensation.[49]

The Seventh Circuit also cited *Delaware State College v. Ricks*,[50] in which a college professor was terminated at the end of a

42. *Id.* at 493.

43. *Id.*

44. 550 U.S. 618 (2007).

45. *Id.* at 621.

46. *Id.* at 622.

47. *Id.* at 621.

48. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

49. 42 U.S.C. § 2000e-5(e)(3)(A) (2006 & Supp. 2010); *see* Russell v. County of Nassau, 696 F. Supp. 2d 213, 226–27 (E.D.N.Y. 2010) (explaining the Ledbetter Act). The Ledbetter Act also allows recovery of back pay for up to two years preceding the filing of the charge when the basis for the complaint is similar or related to unlawful practices occurring outside the time for filing a charge. 42 U.S.C. § 2000e-5(e)(3)(B). Thus, the Seventh Circuit relied on superseded case law, rendering its decision ripe for reversal.

50. 449 U.S. 250 (1980).

one-year employment contract that he had accepted after being denied tenure.[51] There, the Supreme Court reversed a Third Circuit decision that the statute of limitations did not begin to run until the teacher's termination; rather, the 300-day statute of limitations commenced when the professor had been denied tenure.[52] The Seventh Circuit applied the same rationale in *Lewis*: "The hiring only of applicants classified 'well qualified' was the automatic consequence of the test scores rather than the product of a fresh act of discrimination."[53] That is, the court found that the disparate impact had been produced by the *test scores*—which became known when the applicants received them—*not* the City's continued reliance on them.[54]

Accordingly, the Seventh Circuit held that the statute of limitations had started running when the plaintiffs received notice of their qualified status in 1995 and that the 300-day limitations period therefore barred their complaint.[55] Finally, the appellate court rejected the plaintiffs' equitable tolling argument and consequently reversed the district court's ruling with instructions to enter judgment for the City.[56]

II. THE SUPREME COURT DECISION

The plaintiffs in *Lewis* petitioned the U.S. Supreme Court for a writ of certiorari, asking whether a plaintiff must file an "EEOC charge within 300 days after the *announcement* of the practice, or . . . within 300 days after the employer's *use* of the discriminatory practice."[57] Respondent City presented the question as "[w]hether the limitations period on a Title VII . . . starts to run only when the list [of examination results] is adopted and announced, *or also later*,

51. Lewis v. City of Chi., 528 F.3d 488, 491 (7th Cir. 2008) (citing *Ricks*, 449 U.S. 250), *rev'd*, 130 S. Ct. 2191 (2010).

52. *Id.*

53. *Id.*

54. The Seventh Circuit additionally cited *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), as supporting the notion that "present effects of prior actions cannot lead to Title VII liability." *Lewis*, 528 F.3d at 491. But, as discussed *infra* Part II, the Supreme Court disagreed. Lewis v. City of Chi., 130 S. Ct. 2195, 2199 (2010).

55. *Lewis*, 528 F.3d at 491.

56. *Id.* at 493–94.

57. Petition for Writ of Certiorari at i, *Lewis*, 130 S. Ct. 2195 (No. 08-974) (emphasis added).

upon each use of the *same list*."[58]

The Court granted certiorari and unanimously overruled the Seventh Circuit in an opinion by Justice Scalia.[59] The Court held that a plaintiff who does not file a timely complaint challenging the *adoption* of a discriminatory practice may nevertheless assert a disparate-impact claim in a timely charge challenging the later *use* of that practice.[60] Thus, the Court rejected the respondents' framing of the issue—whether the repeated reliance on a discriminatory employment practice constitutes a "continuing violation"—and adopted the petitioners' question: whether the use of a previously implemented policy represents a *distinct cause* on which a plaintiff may base a disparate-impact complaint.[61] The Court found that it does.[62]

While Title VII did not originally expressly prohibit disparate-impact discrimination, the Court in *Griggs v. Duke Power Co.*[63] nevertheless found that Title VII's anti-discrimination provisions "proscib[ed] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[64] The legislature eventually crystallized this concept by passing the Civil Rights Act of 1991,[65] which added § 2000e-2(k) to the statute.[66] This section's language focuses on a defendant's use of "a particular employment practice" causing a disparate impact.[67] The *Lewis* Court pointed out that Title VII does not make explicit the meaning of "employment

58. Brief for Respondent in Opposition at i, *Lewis*, 130 S. Ct. 2195 (No. 09-974) (emphasis added).

59. *Lewis*, 130 S. Ct. at 2195.

60. *Id.* at 2197.

61. *Id.* at 2199.

62. *Id.*

63. 401 U.S. 424 (1971).

64. *Id.* at 2197 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

65. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C and 42 U.S.C.).

66. Id. § 105, 105 Stat. at 1074–75.

67. The added section provides:

> (1)(A) An unlawful employment practice based on *disparate impact* is established under this subchapter only if . . . (i) a complaining party demonstrates that a respondent *uses a particular employment practice* that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k) (2006) (emphasis added).

practice," but that it encompasses the injury in this case: the exclusion of applicants based on their test scores.[68] Thus, the central question was whether the *use* of the 89-point cutoff score could form the basis of a disparate impact claim; the Court said that it could.[69]

The City argued that § 2000e-2(k) does not address the accrual of disparate-impact claims and that § 2000e-5(e)(1) controls when the limitations period runs.[70] The Court addressed this, stating:

> That is true but irrelevant. Aside from the first round of selection in May 1996 . . . , the acts petitioners challenge—the City's use of its cutoff score in selecting candidates—occurred within the charging period. Accordingly, no one disputes that if petitioners could bring new claims based on those acts, their claims were timely. The issue, in other words, is not *when* petitioners' claims accrued, but *whether* they could accrue at all.[71]

The Court also rejected the City's argument that section 2000e-2(k) dictates only which party bears the burden of proof because section 2000e-2(k) states that "a claim 'is established' if an employer 'uses' an 'employment practice' that 'causes a disparate impact' on one of the enumerated bases."[72]

The Court then addressed the City's rationale (which the Seventh Circuit had adopted) that the only actionable discrimination occurred when the City categorized applicants according to their test scores.[73] Certainly, the decision to categorize applicants according to their cutoff scores represented an actionable injury, and because no timely complaint was made, the City was "entitled to treat that past act as lawful."[74]

But the Seventh Circuit erroneously held that the "automatic" consequences of that wrong could not lead to Title VII liability.[75] According to the Court, the Seventh Circuit had relied on cases establishing only that a Title VII plaintiff "must show a 'present

68. *Lewis*, 130 S. Ct. at 2198.

69. *Id.*

70. Brief for Respondent in Opposition, *supra* note 58, at 17–18.

71. *Lewis*, 130 S. Ct. at 2198.

72. *Id.* (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

73. *Id.* at 2198–99.

74. *Id.* at 2199 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

75. *Id.*

violation' within the limitations period."[76] The requirement that plaintiffs show a "present violation" depends on the basis of the cause of action—whether it is based on disparate *impact* (as in *Lewis*), or disparate *treatment* (as in *Lorance v. AT&T Technologies, Inc.*[77] and *United Air Lines, Inc. v. Evans*[78]). The reason the plaintiffs in *Ledbetter*, *Lorance*, *Ricks*, and *Evans* did not prevail based on "present effects of past discrimination" was that their claims required a showing of discriminatory intent, "which had not even been alleged."[79] But because a disparate-impact case does not require such a showing, the position of the plaintiffs in *Lewis* was not directly analogous to that of the plaintiffs in the disparate-treatment cases. The Court deferred to Congress on the issue of whether it is inappropriate that the statute can lead to differing results based on different theories of liability for essentially the same wrong.[80]

Finally, the Court remanded the case to the Seventh Circuit to resolve on the merits, given that litigation at trial had revolved around the plaintiffs' "continuing violation" theory, which they had since abandoned.[81] That is, the parties will no longer have to litigate over the *adoption and use* of the hiring practice as a single wrong but over whether the *use alone* of the eligibility categories caused a disparate impact.[82] Additionally, the Seventh Circuit will have to reassess the district court's award (based on acts occurring prior to the EEOC charging period).[83] But at least according to the Supreme Court, the plaintiffs have a cognizable claim.[84]

III. RULES AND RAMIFICATIONS—THE POLICY ARGUMENTS

The Supreme Court's holding in *Lewis* will affect both

76. *Id.*; *see* cases cited *supra* note 54.

77. 490 U.S. 900 (1989).

78. 431 U.S. 553 (1977).

79. *Lewis*, 130 S. Ct. at 2199. In *Ledbetter*, for example, plaintiff's complaint for pay discrimination was untimely because the paychecks she received within the charging period were merely the "continuing effects of the precharging period discrimination [and] did not make out a present violation." Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 625 (2007). When discriminatory intent is alleged, the statute of limitations serves to protect evidence related to such intent. *Id.* at 641.

80. *Lewis*, 130 S. Ct. at 2199–200.

81. *Id.* at 2200.

82. *Id.*

83. *Id.*

84. *Id.*

employers and potential plaintiffs alike. The policy arguments against the Court's decision revolve around employers' interests and the principles behind statutes of limitation.[85] In *Ledbetter* the Court recognized that prompt complaints help protect evidence of intent.[86] Here, however, the City argued that "challenges to eligibility lists years after adoption and announcement present their own problems. They 'expose employers to a virtually open-ended period of liability'; 'create substantial uncertainty' about 'important staffing decisions based upon the list'; and call 'into question an organizational structure' in place for years, upsetting reliance interests."[87] At the same time, plaintiffs are arguably better positioned to avoid such problems, even with stricter limitations periods—"the careful plaintiff pursues claims in a timely fashion . . . and [has] 'little incentive to delay unreasonably in filing EEOC charges.'"[88]

Then–Solicitor General Elena Kagan—now an associate justice of the Supreme Court—refuted the City's policy argument:

> A rule that permits a claimant to challenge each use of an employment practice with an unlawful disparate impact is consistent with the policy objectives underlying Title VII's charge filing provision. . . . And the evidence typically used in disparate-impact cases, which focuses on statistical impact and validity, is unlikely to fade over time . . . .
>
> A contrary rule would allow an employer to continue using an unlawful selection device indefinitely, so long as no applicant filed an EEOC discrimination charge within 180 or 300 days of the announcement of the results. It would also require applicants to file discrimination charges even before they know whether and how the employer will use the examination results to make hiring decisions.[89]

85. Brief for Respondent in Opposition, *supra* note 58, at 19–20.

86. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 625–26 (2007).

87. Brief for Respondent in Opposition, *supra* note 58, at 20 (quoting Cox v. City of Memphis, 230 F.3d 199, 205 (6th Cir. 2000)).

88. Supplemental Brief for Respondent in Opposition at 10, *Lewis*, 130 S. Ct. 2195 (No. 08-974) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 19, at 29). Perhaps this theory—reminiscent of the "cheapest cost-avoider" economic theory in tort law—partially drove Judge Posner's decision for the Seventh Circuit.

89. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 19, at

Kagan's argument is consistent with the legislative response to *Ledbetter*. As mentioned in Part II, *supra*, Congress superseded *Ledbetter* by enacting the Lilly Ledbetter Fair Pay Act, which added the following to Title VII:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of [Title VII], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid . . . .[90]

Congress found that the *Ledbetter* decision undermined statutory protections against discrimination in compensation "by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[91] Given the Court's decision in *Lewis*, similar legislation will be unnecessary with respect to disparate-impact discrimination—unless Congress disagrees with the outcome of *Lewis*, of course. Whether the Court considered the Ledbetter Act in *Lewis* may be speculative, but it is not unreasonable to assume that the legislature's response to *Ledbetter* helped cement the Court's textualist interpretation of Title VII in *Lewis*, in contrast with the Seventh Circuit's economically and politically conservative approach.[92]

The Court thus rejected the City's policy arguments, siding instead with the petitioners and their amici.[93] Although the Court acknowledged that employers may face new disparate-impact claims for practices they have used for years, this problem is more than

10. The Court disagreed with part of this argument, however—some of the evidence, especially with regard to a defendant's "business necessity" defense, probably *will* fade with time. *See Lewis*, 130 S. Ct. at 2200.

90. 42 U.S.C. § 2000e-5(3)(A) (2006).

91. *Id.* § 2000e-5(2)(1).

92. *Compare Lewis*, 130 S. Ct. at 2198–220 (interpreting Title VII in accord with the analogous purpose of the Ledbetter Act), *with* Lewis v. City of Chi., 528 F.3d 488, 490–94 (7th Cir. 2008) (reaching an opposite conclusion without close scrutiny of Title VII's text), *rev'd*, 130 S. Ct. 2191 (2010).

93. *Lewis*, 130 S. Ct. at 2200.

offset by countervailing concerns:

> Under the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact. Equitable tolling or estoppel may allow some affected employees or applicants to sue, but many others will be left out in the cold. Moreover, the City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact.[94]

But in describing its role, the Court stated in a typically Scalian fashion:

> [I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. . . . If that effect was unintended, it is a problem for Congress, not one that federal courts can fix.[95]

In this way, Justice Scalia's oft-labeled "conservative" textualist approach actually led to the less-conservative result by appropriately protecting the looser standard on limitation-periods analyses in Title VII cases.[96] Consequently, employers must be on guard against not only discriminatory policies but also their continued practices.

IV. THE LAST WORD: *LEWIS*, *LEDBETTER*, AND *RICCI*

When an employer adopts a hiring policy that produces a disparate impact on protected classes of applicants, that employer has violated Title VII. Even if no one challenges the initial adoption of such a policy within the limitations period, the employer cannot continue to use the policy without worrying about committing additional violations. The Court's holding in *Lewis v. City of Chicago* clarifies that an employer cannot categorize a pool of

94. *Id.*

95. *Id.*

96. *See* William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 668–69 (1990) (citing Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 420–33 (1989)); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–36 (Amy Gutmann ed., 1997) (explaining Scalia's textualist approach to statutory interpretation generally).

applicants in a discriminatory way, wait for the statute of limitations to run out, and then hire from its preferred categories "with impunity."[97] That is, an employer cannot simply implement a discriminatory policy and "breathe easy" when it has gone 300 days unchallenged.[98] On the other hand, employees may wait for a discriminatory policy to ripen into an injurious practice without fear of being time barred from taking action against the employer.[99]

After the Court's holding in *Ricci*, this result may surprise some—in some ways, *Lewis* might be described as the reverse of *Ricci*. After all, in *Ricci*, the city of New Haven defended its decision to throw out racially disparate test results on Title VII grounds.[100] But the Court found that New Haven had actually violated the act by doing so without a "strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[101] The Court's decision in *Ricci* thus signaled a trend toward a more conservative interpretation of Title VII, and it has been cited as illustrating a judicial framework in which racial minorities are no longer considered the primary victims of employer discrimination.[102]

Perhaps Judge Posner's decision for the Seventh Circuit reflects just such a politically conservative viewpoint, or perhaps his decision was based on economic efficiency principles—treating potential plaintiffs as the cheapest cost avoiders in Title VII actions. But the conservative Justice Scalia, unanimously backed by the rest of the bench, came to the opposite result because *Lewis* and *Ricci* actually presented very different questions.

The issue in *Lewis* was ultimately one of strict statutory interpretation. The Seventh Circuit had relied more heavily on easily distinguishable cases than on the language of Title VII itself.[103] But Scalia stuck to his textualist ideology in writing the Court's opinion overturning the Seventh Circuit. Additionally, by the time *Lewis* reached the Court, *Ledbetter* had been superseded by an act of

97. *Lewis*, 130 S. Ct. at 2200.

98. *See id.* at 2193.

99. *See id.*

100. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

101. *Id.*

102. Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci: *Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 73, 82–83 (2010).

103. *See* Lewis v. City of Chi., 528 F.3d 488, 490–94 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2191 (2010).

Congress.[104] Although the Ledbetter Act does not apply to the facts presented in *Lewis*, it may nevertheless have influenced the Court's holding.

Thus, the Court's textualist approach clarified an area of disparate-impact doctrine that may have broad, though perhaps subtle, effects. Hopefully, the decision will increase certainty in future Title VII litigation while reducing the number of claims the EEOC has to process: potential plaintiffs in analogous situations may wait to fully assess their injuries before filing EEOC complaints, and their complaints should therefore be more concrete and precise. After all, an opposite holding may have incentivized the filing of unripe EEOC claims just to meet stricter statute of limitations standards, even without such claims being clearly defined or such injuries ascertained. On the other hand, employers will have to be constantly mindful of their employment policies and practices—even newly revisiting those they have used for years.

104. Lilly Ledbetter Fair Pay Act of 2009 § 3, 42 U.S.C. § 2000e-5(e)(2)–(3) (2006 & Supp. 2010).