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LEGISLATING BY PROXY: DID PRESIDENT OBAMA AMEND THE TEXAS LABOR CODE WHEN HE SIGNED THE LILLY LEDBETTER FAIR PAY ACT?

By: Charles Hill

ABSTRACT

Does the Texas Labor Code permit Congress to amend Texas law by proxy? Specifically, does the Texas Commission on Human Rights Act automatically incorporate Title VII amendments? This is the question posed to Texas courts and federal courts interpreting the limitations period for filing employment discrimination claims with the Texas Workforce Commission. Despite almost two decades of court precedent interpreting Texas's equal employment opportunity law, the answer is anything but clear. With the passage of the Lilly Ledbetter Fair Pay Act, Texas courts must decide whether the law automatically incorporates the federal act or not. Given Title VII's deference to state law, the answer might seem simple. But, relying on the Texas Labor Code's correlative policy statement, when interpreting vagaries in Texas equal employment opportunity law, Texas courts have historically looked to federal case law interpreting Title VII for guidance. Does this practice mean that the Texas Labor Code must now automatically incorporate the Lilly Ledbetter Fair Pay Act because federal case law will now include it? This is the dilemma facing Texas courts.

This Comment will discuss how courts, including some outside of Texas, have handled this question. Using these court opinions, this Comment will show why the Texas Labor Code does not support automatic incorporation.

Additionally, this Comment recommends a legislative solution. By amending the correlative policy statement that Texas courts have used as justification for seeking guidance from federal case law, the Texas legislature can easily head off future automatic incorporation questions, sparing judicial resources and adding stability to Texas's equal employment opportunity law.

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I. INTRODUCTION

Despite almost two decades of Texas court opinions interpreting the Texas Commission on Human Rights Act ("Chapter 21"), Texas courts face a novel dilemma. In 2009, Congress enacted the Lilly Ledbetter Fair Pay Act ("Ledbetter Act") modifying Title VII of the Civil Rights Act of 1964 ("Title VII"). Because the Ledbetter Act creates a disparity between Title VII and Chapter 21, Texas courts have historically looked to federal case law when interpreting Title VII and Chapter 21, but Texas courts are split on the question of when a discriminatory employment practice occurs. This split exists because Texas courts have historically looked to federal case law interpreting Chapter 21 provisions analogous to those found in Title VII. Because of a new disparity involving one of the most critical provisions—the limitations period for filing a claim with the Texas Workforce Commission—Texas courts must decide whether to automatically incorporate the new Title VII language into Chapter 21 or to allow the two statutes to diverge.

This Comment will explore the ramifications of this question. Starting with the history of the two acts and their policies, reviewing case law from other states, and concluding with the cases for and against automatic incorporation, this Comment will show that automatic incorporation is not what the Texas legislature intended.

Finally, this Comment offers a solution to the Texas legislature to resolve future automatic incorporation questions.

II. A BRIEF HISTORY OF CIVIL RIGHTS LEGISLATION

While civil rights enactments predating the Civil Rights Act of 1964 provided some protection from employment discrimination, they were far from adequate.[1] As the Commission on Civil Rights reported in 1961, minorities were still suffering greatly from employment discrimination.[2] In 1963, during ever increasing civil unrest, President Ken-

1. *See generally* U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT REPORT 153–57 (1961).
2. *Id.*

nedy again asked Congress to solve the employment discrimination problem with comprehensive fair employment legislation.[3] Congress eventually responded by passing the Civil Rights Act of 1964—the most sweeping civil rights act passed since Reconstruction.[4] Title VII of the act provides employees protection from discriminatory employment practices.[5]

A. *States' Role in Implementing Civil Rights Policies*

Rather than preempting existing state and local anti-discrimination laws, and consistent with a desire to garner cooperation from state officials, Congress provided a limited preemption statement in section 7 of Title VII.[6] Specifically, Congress stated that state laws would be "preserved and relied on for effective enforcement of the proposed Federal statute."[7] Additionally, Congress intended state laws to provide primary remedies to aggrieved parties, reserving remedies under Title VII for later action.[8] Consistent with this intent, the Equal Employment Opportunity Commission ("EEOC") is required to defer to state authority, where it exists, before taking action on discrimination charges.[9] Thus, state Equal Employment Opportunity ("EEO") law plays a critical role in implementing Title VII's anti-discrimination policies.

B. *State Civil Rights Statutory Schemes*

Every state has some form of civil rights statute. These laws take different forms that may or may not follow the language found in Title VII.[10] The most common form, which most closely follows Title VII, is the Fair Employment Practice ("FEP") law.[11] These laws regulate both private and public entities by proscribing certain types of discrimination.[12] Specifically, the heart of FEP law is promoting equal employment opportunity.[13] As a result, FEP law typically outlaws employment discrimination based on such factors as race, religion, na-

3. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 432-33 (1966).

4. Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241, (codified as amended at 42 U.S.C. §§ 1981–2000h-6 (2006)); MERRICK T. ROSSEIN, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 1:1 (2010), *available at* Westlaw EMPLL.

5. ROSSEIN, *supra* note 4, §1:1.

6. § 2000e-7; Arthur E. Bonfield, *Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U. L. REV. 907, 910 (1967).

7. S. Rep. No. 88-872, at 14 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2368.

8. *See id.*; § 2000e-5(c) (requiring prior state proceedings before filing suit under Title VII).

9. § 2000e-5(d).

10. WESTLAW, 4 EMPLOYMENT DISCRIMINATION COORDINATOR ANALYSIS OF STATE LAW § 1:2 (2010), *available at* Westlaw EDC ANASTATE.

11. *Id.*

12. *Id.* § 1:3.

13. Bonfield, *supra* note 6, at 918.

tional origin, and gender.[14] In addition to FEP law, many states also have laws relating to more specific types of discrimination, such as age and disability.[15]

C. *The Texas Commission on Human Rights Act (Chapter 21)*

In 1983, the 68th Texas legislature passed the Texas Commission on Human Rights Act, recodified as Chapter 21, in order to protect employees against discrimination.[16] Chapter 21 is a FEP law because it provides broad protection for employees working for private and public entities.[17] Among Chapter 21's purposes, it claims to execute the "policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments" and to execute the "policies embodied in Title I of the Americans with Disabilities Act of 1990 and its subsequent amendments."[18] Using these correlative policy statements as a guide, Texas courts have looked to federal opinions regarding Title VII and Title I when interpreting Chapter 21 provisions analogous to those in Title VII and Title I.[19] However, as discussed below, the Ledbetter Act stretches these policy statements beyond their logical limits.

III. The Ledbetter Act Presents a Novel Problem for Texas Courts

In 2009, Congress passed the Ledbetter Act, which modified section 706 of Title VII—codified as 42 U.S.C. § 2000e-5—and clarified that a discriminatory act occurs with each paycheck resulting from a discriminatory decision.[20] Before this amendment, § 2000e-5(e) provided no guidance as to when a discriminatory act occurred.[21] Additionally, § 21.202(a) of the Texas Labor Code contains language virtually identical to the pre-Ledbetter Act version of § 2000e-5(e)(1).[22] Because the two sections no longer contain similar language, Texas courts must now determine whether to consider federal case law when interpreting section 21.202(a). If so, then the Ledbetter Act, codified in § 2000e-5(e)(3)(A),[23] is effectively incorporated automatically into the Texas

14. *Id.* at 907–08.

15. Westlaw, *supra* note 10.

16. *See* Texas Commission on Human Rights Act, Act of June 25, 1983, 68th Leg., 1st C.S., ch. 7, 1983 Tex. Gen. Laws 37, 37-57, *recodified by* Act of May 12, 1993, 73rd Leg ., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 991–1004 (current version at Tex. Lab. Code Ann. §§ 21.001–.306 (West 2006 & Supp. 2010)).

17. *See* Tex. Lab. Code Ann. §§ 21.001–.306 (West 2006 & Supp. 2010).

18. *Id.* § 21.001(1), (3).

19. Quantum Chem. Corp. v. Toennies, 47 S.W. 3d 473, 476 (Tex. 2001).

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

21. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 4, 86 Stat. 103, 104 (1972).

22. *Compare* Equal Employment Opportunity Act § 4 *amended* by Lilly Ledbetter Fair Pay Act § 3, *with* Tex. Lab. Code Ann. § 21.202(a) (West 2006).

23. 42 U.S.C.A. § 2000e-5(e)(3)(A) (West Supp. 2011).

Labor Code. While it is not unprecedented for congressional amendments to create discrepancies between the two statutes, this is the first time litigation has forced Texas courts to determine whether the Texas statute automatically incorporates the congressional amendment.

A. Ledbetter v. Goodyear Tire & Rubber Co.

The impetus for the Ledbetter Act was the United States Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.*[24] *Ledbetter* involved a suit over gender-based pay discrimination.[25] Lilly Ledbetter was employed by Goodyear Tire & Rubber ("Goodyear") for nineteen years. After Ledbetter's retirement in 1998, she sued Goodyear under Title VII claiming that her supervisors discriminated against her by giving her poor employment evaluations and smaller raises due to her gender.[26] Ledbetter claimed that she received poor evaluations based on discrimination many years before her retirement and that these poor evaluations resulted in depressed pay for the duration of her employment with Goodyear.[27] Thus, she claimed each paycheck containing an unjustly depressed amount constituted a continuing violation stemming from the discriminatory evaluations.[28]

Under the prevailing Title VII interpretation, however, the Court subjected Ledbetter's claim to scrutiny based on a discrete act rather than a continuing violation.[29] The Court explained, "[T]he statutory term 'employment practice' generally refers to 'a discrete act or single "occurrence"' that takes place at a particular point in time."[30] Whereas a continuing violation requires a facially discriminatory structure that results in disparate treatment through individual subsequent acts—such as issuing paychecks from a racially discriminatory pay structure.[31] The Court then held that, absent a discriminatory pay structure, a claimant could only file a Title VII claim for discrete acts occurring within the statutory timeframe.[32] Consequently, the Court found that Title VII's 180-day filing requirement barred Ledbetter's claim because the alleged discriminatory evaluations occurred many years before her complaint.[33]

This distinction between discrete acts and continuing violations is particularly relevant in discriminatory pay cases like Ledbetter's because the discriminatory act, poor performance evaluation, may not

24. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).
25. *Id.* at 621.
26. *Id.* at 621–22.
27. *Id.* at 622.
28. *Id.* at 624.
29. *Id.* at 621.
30. *Id.* at 628 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110–11 (2002)).
31. *Id.* at 634.
32. *Id.* at 636–37.
33. *Id.* at 637.

result in readily discernable discrimination. In other words, the victim may not realize discrimination occurred because the resulting raise did not differ enough from the norm to raise suspicion. In such cases, the victim may not realize the discrimination until many months or years have passed. Because § 2000e-5(e) requires a claimant to file a claim within 180 days of the discriminatory act, the victim's suit may be barred by the time he or she discovers the discrimination.

This is exactly what happened to Ledbetter. Since Goodyear's discriminatory practices occurred over the span of several years, Ledbetter did not realize she had a claim until she retired many years later.[34] However, Goodyear's discriminatory practices had gone on for several years.[35] The 180-day filing requirement limited Ledbetter to acts that occurred within the last 180 days of her employment, which did not cover the discriminatory evaluation.[36] The Court held that Goodyear's discriminatory acts occurred at the time of the poor evaluations, not at the time Ledbetter received the paychecks.[37] Stating that a Title VII claim requires discriminatory intent in the act in question, the Court rejected Ledbetter's argument that the discriminatory act continued with each paycheck resulting from the discriminatory evaluation.[38] Thus, the Court affirmed the appellate court's reversal of the trial court's award.[39]

Justice Ginsberg, in her dissent, admonished the majority for its application of the discrete acts doctrine and the resulting narrow reading of Title VII protections.[40] Justice Ginsberg then declared that "[o]nce again, the ball is in Congress' court . . . to correct this Court's parsimonious reading of Title VII."[41]

B. *The Ledbetter Act Overrules* Ledbetter v. Goodyear Tire & Rubber Co.

Congress did not wait long to respond to Justice Ginsburg's overture. Just two weeks after the Court rendered its opinion in *Ledbetter*, Congress opened hearings on an amendment to Title VII.[42] On July 31, 2007, The Lilly Ledbetter Fair Pay Act of 2007 passed the House of Representatives.[43] The bill, however, did not fare so well in the

34. *Id.* at 621–22.
35. *Id.* at 621.
36. *Id.* at 632.
37. *Id.* at 628–29.
38. *Id.*
39. *Id.* at 643.
40. *Id.* at 660–61 (Ginsburg, J., dissenting).
41. *Id.* at 661.
42. *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear *Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 1 (2007) (statement of Hon. George Miller, Chairman, Comm. on Educ. & Labor).
43. Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. § 6 (2007).

Senate. On April 23, 2008, after failing to obtain cloture, the bill was effectively dead.[44] Immediately following the failed cloture vote, Sen. Kennedy noted that this was an "early skirmish" and the battle to pass the bill would continue.[45]

The battle continued in 2009 when Congress resurrected the bill.[46] This time, the bill passed both houses and the President signed the bill into law on January 29, 2009.[47] The law amended section 706(e) of Title VII, adding that a discriminatory act occurs with each paycheck when a:

> discriminatory compensation 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, resulting in whole or in part from such a decision or other practice.[48]

Not only does this new language clarify when a discriminatory act occurs, it also directly overrules the holding in *Ledbetter*. This, however, is not its only effect. The Ledbetter Act has also affected interpretation of state EEO laws.

C. *The Ledbetter Act's Influence on State EEO Law Decisions*

Because of the close relationship between state EEO laws and Title VII, several state and federal courts have struggled to define the Ledbetter Act's effect on state EEO laws. With all but three states having some kind of FEP law,[49] the Ledbetter Act's effects are potentially great. Some recent holdings illustrate this issue.

In *Siri v. Princeton Club of New York*, a New York appellate court declared that the Ledbetter Act did not affect its analysis.[50] In *Siri*, the plaintiffs accused the defendant of discrimination in work assignments that resulted in discriminatory pay.[51] The defendant argued that the plaintiffs' claims were time-barred based on *Ledbetter*.[52] While the court remanded the case, holding that the lower court's grant of summary judgment was premature, it specifically stated that the Ledbetter Act did not apply.[53]

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44. 154 Cong. Rec. S3288 (2008).
45. *Id.*
46. Lilly Ledbetter Fair Pay Act of 2009, H.R. 11, 111th Cong. (2009).
47. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, 7 (2009).
48. *Id.* at sec. 3, 123 Stat. at 5–6.
49. WESTLAW, *supra* note 10.
50. Siri v. Princeton Club of N.Y., 874 N.Y.S.2d 408, 410 n.1 (N.Y. App. Div. 2009).
51. *Id.* at 409.
52. *Id.*
53. *Id.* at 410.

Curiously, a year later, a New York trial court held in *Finkel v. New York City Housing Authority* that the Ledbetter Act *does* apply to claims under New York State Human Rights Law ("NYSHRL").[54] Finkel sued his employer, the New York City Housing Authority, for handicap discrimination after it dismissed him for inability to perform essential job duties.[55] Finkel claimed that the housing authority discriminated against him by refusing to make reasonable modifications to accommodate his handicap.[56] The court cited *Siri* for the proposition that the Ledbetter Act controls the limitations period for certain discrimination claims other than pay.[57] The court reasoned further that applying the Ledbetter Act to claims under the NYSHRL was appropriate given that state courts always followed federal analysis when adjudicating claims under the NYSHRL.[58] While noting that res judicata barred the claims in this case, the court implied that the Ledbetter Act would apply to claims under the NYSHRL.[59] As seen previously, however, the *Siri* court stated that the Ledbetter Act did *not* apply to its analysis.[60] This result highlights the chaotic effects the Ledbetter Act has wrought on state courts.

As discussed later in this Comment, the *Siri* court's reliance on historical use of federal case law as a basis for incorporating the Ledbetter Act into the NYSHRL is the same theme used in early Texas cases faced with this same question. Notably, these same courts also make no mention of the fact that following persuasive case precedent differs greatly from automatically incorporating statutory amendments. Rather, these courts simply see the latter as a logical extension of the former.

In contrast, the federal district court for the Eastern District of New York held in *Russell v. County of Nassau* that the Ledbetter Act does *not* apply to claims under the NYSHRL.[61] In *Russell*, a county human resources director sued the county over missed raises and denied entry to a professional advancement program.[62] Russell filed suit under various federal statutes, including Title VII and the NYSHRL.[63] While noting that the Ledbetter Act applied to Russell's Title VII claims, the court stated that it did not apply to the other federal claims

54. *See* Finkel v. N.Y. City Hous. Auth., No. 108091/10, 2010 WL 4530228, at *12 (N.Y. Sup. Ct. Oct. 21, 2010).

55. *Id.* at *5.

56. *Id.* at *3, *4.

57. *Id.* at *11.

58. *See id.* at *12 (explaining that "courts applying state law have applied the Supreme Court's *Ledbetter* analysis and have since assumed that analysis under the Act applies to state cases").

59. *Id.* at *12, *15.

60. Siri v. Princeton Club of N.Y., 874 N.Y.S.2d 408, 409 n.1 (App. Div. 2009).

61. Russell v. Cnty. of Nassau, 696 F. Supp. 2d 213, 230 (E.D.N.Y. 2010).

62. *Id.* at 225.

63. *Id.* at 219.

or the NYSHRL claim.[64] Rather, the court stated that these claims are "governed by the Supreme Court's analysis in *Ledbetter*."[65] In narrowly construing the Ledbetter Act, the court stated that the Ledbetter Act "did not amend Title VI, § 1981, § 1983 or § 1985. . . . Nor has the New York legislature enacted a statute similar to the Ledbetter Act."[66]

It is worth noting that the language of the NYSHRL outlining the limitations period for discrimination claims is similar to Chapter 21.[67] Both acts merely provide a time for filing—one year in New York and 180 days in Texas—and provide a non-descript event from which that time is calculated—the occurrence of an "alleged unlawful discriminatory act" in New York and "alleged unlawful employment practice" in Texas.[68] Thus, as discussed later, it is not surprising that state and federal district courts in Texas have rendered conflicting opinions similar to those in New York.

In *State ex rel. North Dakota Department of Labor v. Matrix Properties Corp.*, the North Dakota Supreme Court considered the Ledbetter Act's treatment of limitations periods as policy in a discriminatory-housing suit.[69] In dismissing the Ledbetter Act in this context, the court noted that it is the province of the legislature to determine whether the policies laid down in the Ledbetter Act should apply to suits under the North Dakota Housing Discrimination Act.[70] In response to the majority opinion, Justice Kapsner wrote a scathing dissent in which she praised the Ledbetter Act's rationale and admonished the majority for applying the "flawed reasoning of *Garcia* [*v. Brockway*], which incorporated the incorrect reasoning of *Ledbetter*."[71] Justice Kapsner reasoned that the Ledbetter Act, while addressing only pay discrimination, should apply to all limitations period analyses in discrimination suits.[72] This dissent shows the lengths to which the Ledbetter Act has invaded state jurisprudence—even affecting limitations period analysis in non-pay discrimination cases.

In contrast to the cases from New York and North Dakota in which the courts declined to apply the Ledbetter Act, the federal district court for the Middle District of Pennsylvania held in *Schengrund v. Pennsylvania State University* that the Ledbetter Act applies to deci-

64. *Id.* at 230.

65. *Id.*

66. *Id.*

67. *Compare* N.Y. EXEC. LAW § 297(5) (Consol. 2005), *with* TEX. LAB. CODE ANN. § 21.202(a) (West 2006).

68. N.Y. EXEC. LAW § 297(5); TEX. LAB. CODE ANN. § 21.202(a).

69. State *ex rel.* N.D. Dep't of Labor v. Matrix Props. Corp., 770 N.W.2d 290 (N.D. 2009).

70. *Id.* at 297.

71. *Id.* at 289–99 (citing Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008)).

72. *Id.*

sions involving the Pennsylvania Human Relations Act ("PHRA").[73] As the court noted, the Third Circuit had always applied the rule articulated in the Ledbetter Act to discriminatory pay cases.[74] As the court said, "the only inconsistency [in understanding Title VII before and after the Ledbetter Act] was the Supreme Court's ruling in Ledbetter."[75] Thus, the Ledbetter Act did not so much change the court's interpretation of the PHRA as reinstate it.

Similarly, California courts are likely to interpret the Ledbetter Act as a return to their interpretation of the California Fair Employment and Housing Act ("FEHA"). The court in *McCaskey v. California State Automobile Ass'n* stated that California courts have always interpreted Title VII differently from the federal courts.[76] Touting California's independence from federal interpretations, the *McCaskey* court cited the California Supreme Court opinion in *Romano v. Rockwell International, Inc.* as the seminal case for interpreting the FEHA limitations period.[77]

Romano dealt with wrongful termination, retaliation, and age discrimination.[78] The *Romano* court faced the question of whether the FEHA limitations period started to run when Romano received notification of the termination or when his employer actually terminated his employment.[79] Citing policy reasons such as avoiding premature claims and fostering conciliation efforts, the court held that the unlawful employment practice in wrongful termination cases occurs on discharge, not on notice of discharge.[80] While the *Romano* holding relates only to termination cases, it is reasonable to assume that California courts would follow the same analysis for discriminatory pay cases because the same policy arguments would apply.

The limitations provision of the FEHA is similar to that found in the NYSHRL and Chapter 21.[81] Aside from exceptions for equitable tolling, all three statutes refer only to a nebulous "occurrence" of an unlawful practice. Despite this similarity, courts are deeply divided on the term's meaning. As mentioned previously, Texas is not immune from this confusion. In fact, Chapter 21 contains a policy statement that only adds fuel to the fire.

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73. Schengrund v. Pa. State Univ., 705 F. Supp. 2d 425, 438 (M.D. Pa. 2009).

74. *Id.*

75. *Id.* (citing Mikula v. Allegheny Cnty., 583 F.3d 181, 185–86 (3d Cir. 2009) (supporting premise that the Ledbetter Act only reinstated the pre-*Ledbetter* law).

76. McCaskey v. Cal. State Auto. Ass'n, 118 Cal. Rptr. 3d 34, 58 (Ct. App. 2010), *rev. denied* (Feb. 16, 2011).

77. *Id.*

78. Romano v. Rockwell Int'l, Inc., 926 P.2d 1114, 1121 (Cal. 1996).

79. *Id.* at 1116.

80. *Id.* at 1123.

81. *Compare* CAL. GOV'T CODE § 12960(d) (West 2005), *with* N.Y. EXEC. LAW § 297(5) (Consol. 2005), *and* TEX. LAB. CODE ANN. § 21.202(a) (West 2006).

D. *Testing the Boundaries of Chapter 21's Correlative Policy*

Section 21.001(1) of the Texas Labor Code provides that Chapter 21 executes "the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments . . . ."[82] Because of this correlative policy, the Ledbetter Act presents Texas courts with a dilemma: Do the courts read section 21.001(1) broadly and automatically incorporate the language of the Ledbetter Act into Chapter 21 or do the courts stand on Texas case law and permit Chapter 21 to diverge from Title VII? As seen in cases from New York to California, the answer is anything but clear.

Section 21.202(a) of the Texas Labor Code contains Chapter 21's limitations statement—equivalent to those in New York and California discussed above. Section 21.202(a) states that employment discrimination complaints must be filed no later than the 180th day after the "alleged unlawful employment practice occurred."[83] Before the Ledbetter Act, section 706(e) of Title VII contained nearly identical language.[84] Because there is no statutory guidance for courts to know when an unlawful employment practice "occurred," Texas courts, like those in most other states, historically sought guidance from federal case law.[85] In addition to using the policy statement in section 21.001 as an impetus for reviewing federal case law, several Texas courts have cited a lack of Texas case law on the subject as a reason to seek guidance from federal case law.[86]

Over the years, however, Texas courts rendered numerous opinions regarding Chapter 21. Among these is the Second Court of Appeals's opinion in *Cooper-Day v. RME Petroleum Co.*, which states that section 21.202(a) covers only "discrete acts" of discrimination unless evidence of an organized scheme warrants finding a continuing violation.[87] This case is one of the most significant Texas cases in light of the Ledbetter Act because the allegations, namely gender-based pay discrimination, resemble those made by Ledbetter against Goodyear. Consequently, *Cooper-Day*, as the Texas equivalent to *Ledbet-*

82. TEX. LAB. CODE ANN. § 21.001(1) (West 2006).

83. *Id.* § 21.202(a).

84. *Compare id.* (providing only that the limitations period begins to run from the date of the discriminatory occurrence), *with* 42 U.S.C. § 2000e-5(e)(1) (2006) (similarly providing no definition of "occurred").

85. *See* Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490, 493 (Tex. 1996) (citing the United States Supreme Court holding in Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980), that a limitations period begins to run when the employee is notified of the discriminatory decision).

86. Staller v. Serv. Corp. Int'l, No. 04-06-00212-CV, 2006 WL 3018039, at *1 n.1 (Tex. App—San Antonio Oct. 25, 2006, no pet.) (mem. op.); Texas Parks & Wildlife Dep't v. Dearing, 150 S.W.3d 452, 460 (Tex. App.—Austin 2004, pet. denied); Austin State Hosp. v. Kitchen, 903 S.W.2d 83, 87–88 (Tex. App.—Austin 1995, no writ).

87. Cooper-Day v. RME Petroleum Co., 121 S.W.3d 78, 87 (Tex. App.—Fort Worth 2003, pet. denied).

ter, has provided fodder for several opinions interpreting the post-Ledbetter Act Chapter 21.

Cooper-Day dealt with constructive discharge and gender discrimination.[88] Cooper-Day worked as a landman for RME Petroleum.[89] Over the course of her employment, she experienced increasing responsibilities and stress.[90] Despite receiving pay increases, she felt that her pay was not commensurate with her responsibilities or with the pay her male counterparts received.[91] Cooper-Day filed suit for gender discrimination after she resigned, but beyond the 180-day statutory period.[92] The *Cooper-Day* court cited the Texas Supreme Court's holding in *Specialty Retailers, Inc. v. DeMoranville* as the primary Texas case employing the *Ricks* rule, from the United States Supreme Court case *Delaware State College v. Ricks*.[93] The *Ricks* rule states the limitations period in employment discrimination cases begins at the time of the discriminatory act, not the time at which the act's consequences become most painful.[94] Thus, the court held that the limitations period ran not from the date of Cooper-Day's resignation but from the date on which she was "aware of the intolerable working conditions causing her alleged constructive discharge."[95] Consequently, her suit for constructive discharge was time-barred.[96]

Expounding further on Cooper-Day's claim that each discriminatory paycheck constituted a continuing violation, the court stated that the continuing violation theory is only applicable when there is "an organized scheme leading to and including a present violation."[97] This analysis echoes the United States Supreme Court's analysis in *Bazemore v. Friday*, namely that a facially discriminatory pay structure is necessary to view each paycheck as a discrete discriminatory act.[98] Because Cooper-Day was subjected to discrete discriminatory raises, rather than a facially discriminatory pay scheme, the continuing violation theory was inapplicable.[99] Pre-*Ledbetter*, *Cooper-Day* clarified that the Chapter 21 limitations period runs from the time a discriminatory decision is made and reiterated the requirements for a continuing violation.

In light of the newly conceived differences between Title VII and Chapter 21, and the abundance of Texas case law interpreting section

88. *Id.* at 83.
89. *Id.* at 81.
90. *Id.*
91. *Id.*
92. *Id.* at 85.
93. *Id.* at 83 (citing Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490, 492–93 (Tex. 1996) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980))).
94. *Id.*; *Ricks*, 449 U.S. at 258.
95. *Cooper-Day*, 121 S.W.3d at 85.
96. *Id.* at 88.
97. *Id.* at 87.
98. Bazemore v. Friday, 478 U.S. 385, 395–97 (1986).
99. *Cooper-Day*, 121 S.W.3d at 87.

21.202(a), including *Cooper-Day*, Texas courts must decide whether to incorporate the Ledbetter Act into the Texas Labor Code. Presently, only two of Texas's fourteen intermediate appellate courts have made that decision.

1. A Case for Automatic Incorporation

Proponents of automatic incorporation rely on Chapter 21's correlative policy statement and the resulting Texas court practice of reviewing federal case law interpreting analogous Title VII provisions. Proponents claim that Chapter 21 automatically incorporates the Ledbetter Act because Chapter 21 purports to execute the policies of Title VII and *subsequent amendments*. Because the Ledbetter Act amends Title VII, proponents claim that Chapter 21's correlative policy mandates incorporation. Further, because Texas courts use federal case law when interpreting Chapter 21, proponents claim that once a federal case declares the Ledbetter Act incorporated, subsequent Texas cases will follow suit. This approach stems mainly from the first federal opinion interpreting section 21.202 following passage of the Ledbetter Act. Since the Ledbetter Act was signed in January 2009, only two state courts and two federal district courts have rendered opinions on its incorporation into Chapter 21.[100]

a. Federal Case Law

The earliest case, *Klebe v. University of Texas System*, was also the first to advocate for automatic incorporation.[101] Originally filed in a Texas district court, the case was appealed to the Third Court of Appeals ("*Klebe I*").[102] After the Third Court affirmed the trial court's dismissal of the case, Klebe filed in the federal district court for the Western District of Texas ("*Klebe II*"). Faced with the automatic incorporation question, the *Klebe II* court justified automatic incorporation on two grounds. First, Texas courts seek guidance from federal precedent, and federal law now includes the Ledbetter Act.[103] Second, Chapter 21's correlative policy statement compels incorporation of the Ledbetter Act as an amendment to Title VII.[104]

100. *See* Tarrant Reg'l Water Dist. v. Villanueva, 331 S.W.3d 125 (Tex. App.—Fort Worth 2010, pet. filed); Prairie View A & M Univ. v. Chatha, 317 S.W.3d 402 (Tex. App.—Houston [1st Dist.] 2010, pet. granted); Lohn v. Morgan Stanley DW, Inc., 652 F. Supp. 2d 812 (S.D. Tex. 2009); Klebe v. Univ. of Tex. Sys. (Klebe II), 649 F. Supp. 2d 568 (W.D. Tex. 2009). This Comment does not address *Lohn* because it follows the *Klebe II* court's reasoning and adds no additional analysis to the automatic incorporation question.

101. *Klebe II*, 649 F. Supp. 2d at 571.

102. Klebe v. Univ. of Tex. Sys. (Klebe I), No. 03-05-00527-CV, 2007 WL 2214344 (Tex. App.—Austin July 31, 2007, no pet.) (mem. op.).

103. *Klebe II*, 649 F. Supp. 2d at 570.

104. *Id.* at 571.

The specific question in *Klebe II* was whether the Ledbetter Act revived the plaintiff's Chapter 21-based age discrimination claim, which both the federal district court for the Western District of Texas and the Third Court of Appeals previously declared time-barred.[105] Klebe, a tenured professor at the University of Texas Health Science Center at San Antonio, originally filed suit in a Texas district court claiming he was the victim of age discrimination.[106] Because Klebe originally filed suit before the Ledbetter Act, the Third Court held on appeal that Klebe's age discrimination claim was time-barred because he filed his suit more than 180 days after he became aware of the discriminatory salary reduction.[107] The court arrived at this holding by relying on *Specialty Retailers*, which states that the limitations period runs not from the date on which the discriminatory act's results come to fruition, but from the date on which the discriminatory act occurred.[108]

Subsequently, in *Klebe II*, the federal court held that the Ledbetter Act revived Klebe's claim.[109] Attempting to bring Chapter 21 in line with the Ledbetter Act, the court reviewed Texas courts' use of federal court precedent when interpreting analogous Chapter 21 provisions and Chapter 21's correlative policy statement.[110]

By comparing the Texas Supreme Court's reasoning in *Specialty Retailers* with that of the United States Supreme Court in *Ledbetter*, the court found a parallel path that undermined the Third Court's holding in *Klebe I*.[111] The court explained that both *Specialty Retailers* and *Ledbetter* relied on the holding in *Ricks* to define when a discriminatory act occurs.[112] In *Klebe I*, the Third Court followed the rule from *Specialty Retailers*.[113] Thus, the court reasoned that because the Ledbetter Act overruled *Ledbetter* and rendered *Ricks* invalid, *Klebe I* was "undermined" as well.[114] In drawing this conclusion, however, the court offers little explanation as to how the Ledbetter Act renders *Ricks* invalid.

The Ledbetter Act only clarified the law as to discriminatory acts affecting compensation.[115] But because *Ricks* involved discriminatory termination[116] rather than discriminatory compensation, it is not clear

105. *Id.* at 569; *Klebe I*, 2007 WL 2214344 at *4.
106. *Klebe I*, 2007 WL 2214344 at *1.
107. *Id.* at *4.
108. *Id.* at *3 (citing Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490, 492 (Tex. 1996) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980))).
109. *Klebe II*, 649 F. Supp. 2d at 571.
110. *Id.* at 570–71.
111. *Id.* at 570.
112. *Id.*
113. *Id.*
114. *Id.*
115. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, secs. 3, 4, 123 Stat. 5, 5–6.
116. Del. State Coll. v. Ricks, 449 U.S. 250, 252–54 (1980).

that the Ledbetter Act rendered *Ricks* invalid. Ricks, unlike Ledbetter, was specifically notified that his employment with Delaware State College was terminated.[117] Ricks even signed a "terminal" contract.[118] In contrast, Ledbetter had no knowledge that Goodyear had discriminated against her when she received the evaluation of which she complained.[119] In fact, the dissent in *Ledbetter* distinguished pay disparities from termination as an act "'easy to identify' as discriminatory."[120] This was the very issue that Congress intended to address with the Ledbetter Act.[121] Consequently, it is far from clear that the Ledbetter Act has rendered Texas court precedent following *Ricks* invalid.

Beyond the Ledbetter Act's effect on Texas court precedent, the federal court in *Klebe II* also found support for automatic incorporation in Chapter 21 itself.[122] Specifically, the court held that because Chapter 21's correlative policy statement includes "subsequent amendments" to Title VII, Texas courts would consider the Ledbetter Act when interpreting section 21.202.[123] Dismissing the many differences between Chapter 21 and Title VII, the court focused on the fact that the Third Court, in *Klebe I*, looked to federal case law to determine when a discriminatory act occurred.[124] The court reasoned that because the Ledbetter Act is a "subsequent amendment" to Title VII that clarifies when discriminatory acts occur and federal courts have subsequently applied the Ledbetter Act to Title VII cases, Texas courts looking to federal cases would naturally incorporate the Ledbetter Act to discrimination cases under Chapter 21.[125] In arriving at this conclusion, the court states that Texas courts look to federal case law when the Texas statute lacks definition.[126] Because Chapter 21 provides no definition for the term "occurred," the court reasoned that the newly amended federal law provides the needed definition.[127]

The *Klebe II* court's reasoning is dangerous for two reasons. First, by noting that Texas courts seek guidance from federal case law when interpreting Chapter 21 and then rendering an interpretation of Chap-

117. *Id.*
118. *Id.* at 253–54.
119. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsberg J., dissenting).
120. *Id.*
121. *Justice Denied? The Implications of the Supreme Court's* Ledbetter v. Goodyear *Employment Discrimination Decision: Hearing Before the H. Comm. on Educ. & Labor*, 110th Cong. 1–2 (2007) (statement of Hon. George Miller, Chairman, Comm. On Educ. & Labor).
122. Klebe v. Univ. of Tex. Sys., 649 F. Supp. 2d 568, 571 (W.D. Tex. 2009) (Klebe II).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

ter 21, the court establishes a circular reference to its own opinion in order to justify its opinion. In doing so, the court ignores the fact that Texas courts seek guidance from federal case law interpreting Title VII, not Chapter 21.[128] Second, the court incorrectly claims the lack of statutory definition as the reason Texas courts look to federal case law. As stated previously, however, Texas courts seek federal guidance when Texas precedent is lacking, not simply when Chapter 21 lacks specificity. Following the *Klebe II* court's reasoning would mean that Texas courts would eschew Texas precedent and always seek federal guidance when faced with a statutory ambiguity. Such an approach would grant more power to federal district courts' interpretation of Texas law than that of the Texas Supreme Court.

b. State Case Law

Prairie View A & M University v. Chatha was the first Texas court opinion in support of automatic incorporation.[129] Chatha was a professor with Prairie View A & M University who claimed pay discrimination on the basis of race and national origin.[130] Addressing the issue of whether Chatha's claim was timely under section 21.202, the court had to determine whether Chapter 21 automatically incorporated the Ledbetter Act.[131] Citing Chapter 21's correlative policy and the practice of reviewing federal case law, the court held that Chapter 21 incorporates the Ledbetter Act.[132] Stating that it was following the practice of reviewing federal case law, the court then cited *Klebe II* for the proposition that "Texas state court *would* apply the terms of the Ledbetter Act to a suit under the Texas Act."[133] This is notable because Texas precedent only calls for Texas courts to review federal case law interpreting analogous *Title VII* provisions, not federal case law expounding on what Texas courts are likely to do.[134] Additionally, the court dismissed the doctrine of *expressio unius est exlusio alterius*, as cited in Prairie View's brief.[135]

Prairie View noted that section 21.122(b) *requires* Texas courts to apply "judicial interpretation of the Age Discrimination in Employment Act of 1967 and its subsequent amendments."[136] Applying the

128. NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (Tex. 1999) (stating that Texas courts "look to analogous federal precedent for guidance" then proceeding to discuss federal court interpretation of Title VII).

129. *See* Prairie View A & M Univ. v. Chatha, 317 S.W.3d 402 (Tex. App.—Houston [1st Dist.] 2010, pet. granted).

130. *Id.* at 404.

131. *Id.* at 405.

132. *Id.* at 407–08.

133. *Id.* at 408 (emphasis added).

134. *See* NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (Tex. 1999).

135. *Chatha*, 317 S.W.3d at 408. *Expressio unius est exclusio alterius* is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

136. *Chatha*, 317 S.W.3d at 408.

expressio unius doctrine, Prairie View argued that the legislature must have intended Chapter 21 to automatically incorporate Title VII amendments only for age discrimination because section 21.001(a) does not contain a similar requirement.[137] The court declined to follow Prairie View's argument, holding that Chapter 21's correlative policy provides sufficient clarity to override any ambiguity found in section 21.202(a).[138] Curiously, however, the court did not address the correlative policy's ambiguous statement concerning Title VII policies. Specifically, the court failed to address what it means to "provide for the execution of the *policies* of Title VII."[139] Rather, the court held that this policy statement clearly directs Texas courts to automatically incorporate all Title VII amendments.

As *Klebe II* and *Chatha* show, proponents of automatic incorporation give significant weight to Chapter 21's correlative policy statement. In fact, the weight given this policy begs the question whether Texas courts have any discretion at all regarding the impact of Title VII amendments on Chapter 21.

2. A Case against Automatic Incorporation

The main argument against automatic incorporation is twofold. First, neither Chapter 21's correlative policy nor its substantive language support automatic incorporation, and the correlative policy suffers no harm if the Ledbetter Act is not incorporated. Second, as demonstrated by the various amendments to Chapter 21 and the differences between Chapter 21 and its federal counterparts—Title VII and the ADA in particular—the two acts were not meant to be identical, and the legislature has demonstrated its ability to amend Chapter 21 to meet changes to the corresponding federal acts but has so far declined to amend Chapter 21 to incorporate the Ledbetter Act.

a. State Case Law

Thus far, only one Texas court, the Second Court of Appeals, has held that Chapter 21 does not automatically incorporate the Ledbetter Act.[140] In *Tarrant Regional Water District v. Villanueva*, the Second Court held that the correlative policy does not support automatic incorporation because it makes no reference to specific statutes, rules, or regulations, as required under section 312.008 of the Texas Government Code for incorporation of amendments.[141]

137. *Id.*

138. *Id.*

139. TEX. LAB. CODE ANN. § 21.001(1) (West 2006) (emphasis added).

140. Tarrant Reg'l Water Dist. v. Villanueva, 331 S.W.3d 125, 133 (Tex. App.—Fort Worth 2010, pet. filed).

141. *Id.*

Villanueva involved a gender discrimination suit.[142] Villanueva claimed that she was paid less than her male supervisor while performing the same duties.[143] On a plea to the jurisdiction, the Second Court had to determine whether the Ledbetter Act preserved Villanueva's Chapter 21 claim or whether her claim was time-barred.[144]

In order to determine whether Chapter 21 automatically incorporated the Ledbetter Act, the Second Court reviewed the statutory requirements for incorporation of amendments by reference. Section 312.008 of the Texas Government Code states that "[u]nless expressly provided otherwise, a reference to any portion of a statute, rule, or regulation applies to all reenactments, revisions, or amendments of the statute, rule, or regulation."[145] Applying this section to Chapter 21's correlative policy, the court found the policy statement, referring only to Title VII's *policy*, did not meet this section's requirements.[146] Furthermore, the court noted that the correlative policy retains its meaning even if the Ledbetter Act is not incorporated because the Ledbetter Act did not change Title VII's policies.[147] The court also noted various differences between Chapter 21 and its federal counterparts[148]—a fact discussed later in this Comment. As *Villanueva* shows, Chapter 21's correlative policy neither mandates automatic incorporation nor suffers from unincorporated Title VII amendments.

b. State and Federal Court Differences of Interpretation

Even where statutory language is similar, Texas courts do not always agree with federal court interpretation. In 1995, the Texas legislature added section 21.125 to Chapter 21.[149] This section is almost identical to Title VII, § 2000e-2(m).[150] In particular, both sections contain the following language: "[A]n unlawful employment practice is established when the [complainant] demonstrates that [a discriminatory factor] was *a motivating factor* for any employment practice

142. *Id.* at 127.

143. *Id.* at 128.

144. *Id.* (having threatened suit after receiving an inadequate pay raise, Villanueva did not actually file a complaint with the Texas Workforce Commission until after her dismissal seven months later).

145. TEX. GOV'T CODE ANN. § 312.008 (West 2010).

146. *Villanueva*, 331 S.W.3d at 133.

147. *Id.* (citing Title VII's policies of assuring "equality of employment opportunities;" eliminating "those discriminatory practices and devices that have fostered job environments stratified on the basis of race, color, religion, sex, or national origin;" and providing "'make-whole relief' via exhaustion of administrative remedies before judicial review of administrative action to those who have actually suffered from illegal discrimination" as Title VII policies).

148. *Id.* at 133–34.

149. Act of May 11, 1995, 74th Leg., R.S., ch. 76, § 9.05(a), sec. 21.125, 1995 Tex. Gen. Laws 624.

150. 42 U.S.C. § 2000e-2(m) (2006).

. . . ."[151] Despite this simple language, federal circuit courts are split on the provision's meaning.

In *Arismendez v. Nightingale Home Health Care, Inc*, the Fifth Circuit Court of Appeals analyzed the different burdens of proof found in this language.[152] Citing the Texas Supreme Court's analysis in *Quantum Chem. Corp. v. Toennies*,[153] the court noted that Texas had adopted a "motivating factor" standard.[154]

In *Quantum*, the Texas Supreme Court analyzed the circuit split over the question of whether § 2000e-2(m) required a "but for" test or a "motivating factor" test.[155] Noting that the split revolved around whether the case in question was a "pretext" case or a "mixed-motive" case, the court determined that the plain language of the statute applied to all cases.[156] In so holding, the court rejected federal court interpretation, saying, "In the absence of meaningful Supreme Court authority, we therefore enforce the statute's plain meaning."[157] Furthermore, the court stated that Congress could have easily provided a more limiting definition if it had so desired.[158]

The split discussed in *Quantum* exists to this day. As the Fifth Circuit Court of Appeals noted in *Arismendez*, it follows the "but for" test.[159] In contrast, at least two other circuits follow the "motivating factor" test.[160] *Quantum* shows that Texas courts are not required to follow federal Title VII precedent, even when the two statutes contain similar language.

c. *Legislative Action*

As further evidence that the legislature did not intend section 21.001's policy statement to include automatic incorporation, the legislature has expressly amended Chapter 21 over the years based on amendments to Title VII and the Americans with Disabilities Act

151. § 2000e-2(m) (emphasis added). *Compare* § 2000e-2(m) (listing race, color, religion, sex, or national origin), *with* TEX. LAB. CODE ANN. § 21.125 (West 2006) (listing: race, color, sex, national origin, religion, age, or disability).

152. Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602, 607 (5th Cir. 2007).

153. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473 (Tex. 2001).

154. *Arismendez*, 493 F.3d at 607.

155. *Quantum*, 47 S.W.3d at 476–80.

156. *Id.* at 479–80.

157. *Id.* at 480.

158. *Id.* at 479.

159. *Arismendez*, 493 F.3d at 607 (citing Pineda v. United Parcel Serv., Inc., 360 F.3d 483, 487 (5th Cir. 2004), for the proposition that a plaintiff must show that he or she would not have been terminated "but for" the employer's discriminatory purpose.).

160. *See* Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 121 (2d Cir. 1997); Harris v. Shelby Cnty. Bd. of Educ., 99 F.3d 1078, 1084-85 (11th Cir. 1996).

("ADA"). These are just a few examples of how the legislature has expressly incorporated federal statutory language into Chapter 21:

- In 2009, the legislature amended section 21.002 by adding a definition for "auxiliary aids and services" identical to that found in section 12103 of the ADA.[161] Before this amendment, Chapter 21 contained no definition for "auxiliary aids and services."[162]
- Also in 2009, the legislature amended section 21.002 by adding a definition for "major life activity."[163] The language chosen is virtually identical to the language contained in Congress's 2008 amendment to the ADA.[164]
- In 2008, Congress amended section § of the ADA to limit the circumstances under which an uncorrected vision test could be used for employment qualification.[165] In 2009, the legislature amended section 21.115 of Chapter 21 to contain similar language.[166]
- In 1995, the legislature amended Chapter 21 removing section 21.203 and replacing it with an alternative dispute resolution provision.[167] The language of this provision is virtually identical to that provided in § 12212 of the ADA.[168]

As these examples show, the legislature has amended Chapter 21 over the years to keep it in harmony with its federal counterparts. Through these amendments, the legislature demonstrates its preference for express incorporation. If not, why would the legislature bother to amend Chapter 21 so consistently with amendments to its federal counterparts?

Additionally, if the Ledbetter Act were not incorporated into Chapter 21, it would not be the first time Chapter 21 deviated from Title VII. Section 2000e-5(f)(1) provides a ninety-day period for filing a civil action after receiving notice of the right to file, while section

161. *Compare* Pub. L. 110-325, § 4(b), Sept. 25, 2008, 122 Stat. 3556, *with* Act of May 13, 1993, 73d Leg., R.S., ch. 269, § 1, sec. 21.002, 1993 Tex. Gen. Laws 987, 993, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 337, § 1, sec. 21.002, 2009 Tex. Gen. Laws 868.

162. 42 U.S.C. § 12102 (2006).

163. Act of May 13, 1993, 73d Leg., R.S., ch. 269, § 1, sec. 21.002, 1993 Tex. Gen. Laws 987, 993 (amended 2009).

164. ADA Amendment Act of 2008, Pub. L. No. 110-325, sec. 3, § 4(a), 122 Stat. 3555 (2008) (codified as amended at 42 U.S.C.A. § 12102 (West Supp. 2011)).

165. Pub. L. No. 110-325, sec. 103, § 5(b), 122 Stat. 3557 (2008) (codified as amended at 42 U.S.C.A § 12113 (West Supp. 2011)).

166. Act of May 13, 1993, 73d Leg., R.S., ch. 269, § 1, sec. 21.115, 1993 Tex. Gen. Laws 987, 998, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 337, § 1, sec. 21.115, 2009 Tex. Gen. Laws 868, 870.

167. Act of May 13, 1993, 73d Leg., R.S., ch. 269, § 1, sec. 21.203, 1993 Tex. Gen. Laws 987, 1000, *amended by* Act of Apr. 21, 1995, 74th Leg., R.S., ch. 76, § 9.06, sec. 21.203, 1995 Tex. Gen. Laws 625.

168. ADA Amendment Act of 2008, Pub. L. No. 101-336, § 513, 104 Stat. 377 (codified at 442 U.S.C.A. § 12212 (West Supp. 2011)).

21.254 provides only a sixty-day period.[169] Also, § 2000e-5(g)(1) provides that back pay awards shall be reduced only by interim earnings or amounts earnable with reasonable diligence, while section 21.258 includes these amounts and workers' compensation and unemployment benefits.[170]

The legislature's intent for express incorporation is further evident by the disposition of recent bills proposing Ledbetter Act language. During the 81st Regular Session of the Texas Legislature, Texas State Senator Wendy Davis (D-Fort Worth) proposed to modify section 21.202(a) with language virtually identical to that found in the Ledbetter Act.[171] The bill, however, died in the Business & Commerce Committee.[172] Davis introduced the same bill in the 82nd Regular Session.[173] Again, the bill died in the Business & Commerce Committee.[174] While the legislature made clear its intent to amend Chapter 21 with prior amendments matching amendments to Title VII, thus far it has demonstrated no intent to do so with the Ledbetter Act.

While Chapter 21's correlative policy statement provides precious little insight into the legislature's intent for automatic incorporation, the legislative actions discussed above vividly demonstrate what the policy statement is lacking—the legislature's intent to expressly incorporate Title VII and Title I changes into the Texas Labor Code. By expressly amending the Labor Code with language borrowed from federal acts to allowing differences to persist and declining to act on the most recent bill based on the Ledbetter Act, the legislature has spoken against automatic incorporation.

3. Automatic Incorporation Is Inappropriate

As this historical review shows, section 21.001 does not support automatic incorporation. While the correlative policy justifies using federal case law to interpret analogous Chapter 21 provisions, section 21.202 is no longer analogous to its Title VII counterpart. Thus, federal case law is no longer useful for its interpretation. Additionally, Texas has developed sufficient state precedent to interpret this provision on its own. Add to this the history of express incorporation and the limits of section 21.001's policy statement come into focus. It stands for executing the policies embodied in Title VII and the ADA, not incorporating the exact language of Title VII and the ADA. Con-

169. *Compare* 42 U.S.C. § 2000e-5(f)(1) (2006), *with* TEX. LAB. CODE ANN. § 21.254 (West 2006).

170. *Compare* 42 U.S.C. § 2000e-5(g)(1) (2006), *with* TEX. LAB. CODE ANN. § 21.258 (West 2006).

171. S.B. 986, 81st Legis., Reg. Sess. (Tex. 2009).

172. *Id.*

173. S.B. 280, 82nd Legis., Reg. Sess. (Tex. 2011).

174. *Id.*

sequently, automatic incorporation of the Ledbetter Act would contravene the legislative intent of Chapter 21.

Therefore, a complainant alleging employment discrimination has 180 days from the date on which the unlawful employment practice occurred in which to file a claim with either the EEOC or the Texas Workforce Commission.[175] Moreover, the 180-day period starts when "the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition."[176] This is known as a "discrete act."[177]

In addition to this "discrete act" rule, Texas law also recognizes the "continuing violation" theory.[178] Under the *Huckabay* test, a plaintiff must show that an organized scheme exists such that no discrete occurrence would give rise to a cause of action.[179] If a plaintiff can show that such an organized scheme exists, she does not have to show that all of the discriminatory conduct occurred during the actionable period.[180]

IV. A Recommendation to the Texas Legislature

The legislature can and should remedy the dilemma faced by Texas courts today by amending the correlative policy statement to clearly express its intent with respect to automatic incorporation. As the policy stands, it adds no value to the statute. Clearly, Chapter 21 executes the policies of Title VII. One need only look at the statute's various employment discrimination provisions to see that it is Texas's FEP statute. Thus, the policy statement adds no value to the statute but provides only confusion as to the legislature's intent.[181] This confusion, at least in the case of post-Ledbetter Act litigation, has wasted judicial resources, prolonged litigation, and potentially denied relief to those affected by pay discrimination. Unless the legislature acts and clearly states its intent, this situation is likely to persist. Thus, the legislature should amend sections 21.001(1) and 21.001(3) with a clear statement of intent. Does Chapter 21 automatically incorporate Title VII and Title I amendments or not? To borrow a phrase from Justice Ginsburg, the ball is in the legislature's court.[182]

175. Cooper-Day v. RME Petroleum Co., 121 S.W.3d 78, 83 (Tex. App.—Fort Worth 2003, pet. denied).

176. *Id.*, Tarrant Reg'l Water Dist. v. Villanueva, 331 S.W.3d 125, 132 (Tex. App.—Fort Worth 2010, pet. filed).

177. *Cooper-Day*, 121 S.W.3d at 86.

178. *Id.* (citing Huckabay v. Moore, 142 F.3d 233, 238 (5th Cir. 1998)).

179. *Id.*

180. *Id.*

181. *Compare* Prairie View A & M Univ. v. Chatha, 317 S.W.3d 402, 407-08 (Tex. App.—Houston [1st Dist.] 2010, pet. granted), *with Villanueva*, 331 S.W. 3d at 133.

182. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).