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## Creating New Law or Restoring the Old - Retroactivity and the Americans with Disabilities Amendments Act of 2008: A Comment on EEOC v Autozone

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## ARTICLES

### **CREATING NEW LAW OR RESTORING THE OLD? – RETROACTIVITY AND THE AMERICANS WITH DISABILITIES AMENDMENTS ACT OF 2008: A COMMENT ON *EEOC V. AUTOZONE***

FREDERICK J. MELKEY\*

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# I. INTRODUCTION

## A. *The Seventh Circuit applies the 2008 ADA Amendments Act in the 2005 EEOC v. AutoZone Case*

Prior to the enactment of the 2008 Americans with Disabilities Amendments Act<sup>1</sup> (ADAAA), one popular means of defeating a claim of discrimination was to challenge a plaintiff’s coverage under the original Americans with Disabilities Act (ADA) of 1990.<sup>2</sup> This proved very effective, as demonstrated in a 2006 Americans Civil Liberties Union (ACLU) study that “plaintiffs have lost more than 97% of ADA employment discrimination claims, more than under any other civil rights statute – and the majority of these cases are being lost because courts determine plaintiffs are not disabled.”<sup>3</sup> The ADA had lost much of its expected force in the courts where the statute’s definition of an “individual with a disability”<sup>4</sup> had become a tripwire for plaintiffs, who must first meet this definition in order to claim ADA protection.<sup>5</sup> It became “[p]articularly vexing for plaintiffs . . . to show as a threshold matter that they have, or are regarded as having,

1. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (to be codified at 42 U.S.C. § 12101).

2. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et. seq. (2006).

3. American Civil Liberties Union, *ADA RESTORATION ACT (S. 1881/H.R. 3195): A Civil Rights Promise to Fulfill*, [http://www.aclu.org/images/asset\\_upload\\_file833\\_33633.pdf](http://www.aclu.org/images/asset_upload_file833_33633.pdf) (last visited Mar. 17, 2011).

4. 42 U.S.C. § 12102(1) (2006).

5. Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 994–95 (2008).

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‘an impairment’ that substantially limits a ‘major life activity.’”<sup>6</sup> The ADA jurisprudence had given litigation under the statute a “surreal tinge.”<sup>7</sup> “For example, an employee suffering from schizophrenia, who was refused employment after the employer told her she was ‘physically and mentally incapable of having a job,’ loses her case because she cannot prove that she was regarded as having a mental impairment.”<sup>8</sup> Likewise, “the claim of an employee with end-stage kidney failure, who was denied accommodation for dialysis treatment, becomes a contest over whether ‘eliminating waste from the body’ is a major life activity.”<sup>9</sup> The net result was that by construing the term “disability” so narrowly, the ADA became unable to provide meaningful protection to individuals with disabilities, essentially erasing the ADA’s employment-related discrimination provisions.<sup>10</sup>

The ADAAA was a legislative response to almost two decades of judicial narrowing,<sup>11</sup> as it specifically abrogates several Supreme Court rulings.<sup>12</sup> The ADAAA is expected to increase the number of

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6. *Id.* at 995.

7. *Id.*

8. *Id.* (citing *Hayes v. Phila. Water Dep’t*, No. 03-6013, 2005 U.S. Dist. LEXIS 41852, at \*31-32 (E.D. Pa. Mar. 31, 2005) (granting summary judgment for an employer where employer did not know of the plaintiff’s specific disorder)).

9. *Id.* (citing *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 382-83 (3d Cir. 2004) (holding kidney failure to be disabling because eliminating waste from one’s body is a major life activity)).

10. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 6-7 (2007) (“Similarly, the Court has undermined the ADA’s anti-subordination approach by construing the term “disability” so narrowly that the statute is unable to provide meaningful protection to individuals with disabilities who face employment-related discrimination. Under the guise of the statutory tool of “plain meaning,” the Court has transformed Congress’s first finding—that it intends to cover *at least* 43 million Americans<sup>21</sup>—to mean that Congress intends to cover *no more* than 43 million Americans. In fact, the approach chosen by the Court only results in about 13.5 million Americans receiving statutory coverage, with those individuals typically being so disabled that they are not qualified to work even with reasonable accommodations. This narrow interpretation, which contradicts the plain statutory language of the ADA, essentially erases the statute’s employment discrimination provisions.”) (footnotes omitted).

11. See *infra* Part III.E.

12. ADA Amendments Act of 2008 § 2(b)(2), 122 Stat. at 3553 (rejecting the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures); *Id.* at § 2(b)(3) (rejecting the Supreme Court’s reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973); *Id.* at § 2(b)(4) (rejecting the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in the definition of disability under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of

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people covered under the statute, and move cases past the threshold issue of coverage to the more substantive issues of discrimination.<sup>13</sup> Some commentators argue that there are already indications that the ADAAA is having the desired impact as Equal Employment Opportunity Commission (EEOC) charges<sup>14</sup> and lawsuits commenced in federal district court<sup>15</sup> have risen markedly since the ADAAA be-

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central importance to most people's daily lives); *Id.* at § 2(b)(5) (conveying congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis).

13. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendment Acts of 2008*, 103 Nw. U. L. REV. COLLOQUY 217, 228 (2008) <http://www.law.northwestern.edu/lawreview/colloquy/2008/44/>. ("By amending the ADA's definition of disability, Congress has assured that more individuals will qualify as having disabilities. As a result, more cases in the future will turn on the question of whether the plaintiff's requested accommodation was reasonable.").

14. Memorandum from Jeffrey Norris on the 2010 ADA Enforcement Data impacts of the ADA Amendments Act in expanding coverage to the Equal Employment Discrimination Advisory Council (Feb. 18, 2011) *available at* [http://www.eeac.org/web/memos/memo\\_detail.asp?ID=4010](http://www.eeac.org/web/memos/memo_detail.asp?ID=4010) ("From an analysis of recently released detailed ADA enforcement data provided by the Equal Employment Opportunity Commission (EEOC) and covering Fiscal Year 2010 (October 1, 2009 – September 30, 2010), it seems pretty clear that enactment of the ADAAA has accomplished the goal of significantly expanding ADA protection for individuals claiming workplace discrimination on the basis of disability. Indeed, ADA charges filed with the EEOC increased 17.3% last year, the highest percentage increase out of all discrimination charge categories tracked by the agency.") (on file with author). *See also* Shanti Atkins, *Retaliation and Race Top Just-Released EEOC Charge Statistics*, ELT (Jan. 11, 2011), <http://www.elt.com/blog/archive/2011/01/11/retaliation-and-race-top-just-released-eeoc-charge-statistics/> ("This increase has been fueled by the down economy, increased enforcement efforts by the Obama Administration and employee-friendly revisions to EEO laws (such as the Americans With Disabilities Act Amendment Act of 2008 (ADAAA), which makes it much easier to assert viable claims of disability discrimination") (emphasis added). *See also* ADA Charge Data by Impairment/Bases – Receipts FY 1997 - FY 2010, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm>.

15. Memorandum from Jeffrey Norris on Employment Discrimination Lawsuits filed in Federal Court Up 5.5% in 2010; FLSA Cases Up 12.4% to the Equal Employment Advisory Council (Mar. 18, 2011) *available at* [http://www.eeac.org/web/memos/memo\\_detail.asp?ID=4034](http://www.eeac.org/web/memos/memo_detail.asp?ID=4034) ("[T]he A[dministrative] O[ffices] of the United States Courts began breaking out ADA lawsuits as part of the employment discrimination category in F[iscal] Y[ear] 2005. . . . The 1,522 ADA Discrimination lawsuits filed in FY 2010 jumped 27% as compared to FY 2009, and have nearly tripled since 2005.") (on file with author). *See also* *Employers Beware: ADA Claims On The Rise Now And Into The Foreseeable Future*, Hunton & Williams (Oct. 27, 2011), <http://www.huntonlaborblog.com/2010/07/articles/ada-title-iii-and-state-disabl/employers-beware-ada-claims-on-the-rise-now-and-into-the-foreseeable-future/> ("As was predicted following the passage of the ADA Amendments Act of 2008 (ADAAA), which went into effect in January 2009, there has been a subsequent surge in the filing of lawsuits under the Americans with Disabilities Act (ADA). Lawsuits brought under the ADA now comprise the highest percentage of claims filed by former employees.") *See also* Art Gutman, *EEOC Files Lawsuits Against Five Companies, OFCCP Blog Spot* (Sept. 20, 2011), <http://ofccp.blogspot.com/2011/09/eeoc-files-ada-lawsuits-against-five.html>.

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came effective on January 1, 2009.<sup>16</sup> Others such as the EEOC disagree and view the increased activity as more likely related to a higher incidence of termination of individuals with disabilities during the recent economic downturns.<sup>17</sup> Nonetheless, the efficacy of the ADAAA is uncertain until new cases are decided, or there is equalization of employment rates between people with disabilities and those without disabilities.<sup>18</sup>

So where does this leave people with disabilities who experienced discrimination after the ADA first became effective in 1990, but before the effective date of the ADAAA nearly two decades later in 2009? Since the ADAAA specifically overturned Supreme Court precedents misinterpreting the ADA,<sup>19</sup> should it be given some form of retroactive effect? Although not all circuits have ruled on the question of retroactivity for the ADAAA, those that have addressed the matter have held that the ADAAA is *not* retroactive.<sup>20</sup>

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16. ADA Amendments Act of 2008 § 8, 122 Stat. at 3559 (“This Act and the amendments made by this Act shall become effective on January 1, 2009.”).

17. Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 16878, 16995–96 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056>. (“Nevertheless, we note that although charge data indicate an increase in ADA charges over the period of time since the Amendments Act became effective, this increase may be attributable to factors unrelated to the change in the ADA definition of disability. For example, government research has found a higher incidence of termination of individuals with disabilities than those without disabilities during economic downturns. Kaye, H. Steven, ‘The Impact of the 2007–09 Recession on Workers with Disabilities,’ Monthly Labor Review Online (U.S. Dept. of Labor Bureau of Labor Statistics, Oct. 2010, Vol. 133, No. 10), <http://www.bls.gov/opub/mlr/2010/10/art2exc.htm> (last visited Mar. 1, 2010). We also note that ADA charges were steadily rising over a period of years even prior to enactment of the ADA Amendments Act. To the extent that factors other than the Amendments Act explain or partially explain the increase in ADA charges since the Act took effect, the increase in charges would not be attributable to the Amendments Act or the final regulations.”).

18. See *infra* part III.A for a discussion of the disparity in employment rates for people with disabilities as compared to those without disabilities.

19. See also cases cited in note 12 and accompanying text.

20. *Mckivitz v. Township of Stowe*, No. 08-1247, 769 F. Supp. 2d 803, 836 n.15 (W.D. Pa., 2010) (“The ADA Amendments Act of 2008, which became effective on January 1, 2009, broadened the category of individuals entitled to statutory protection under the ADA and the Rehabilitation Act. Pub. L. No. 110-325, §§ 3-8; 122 Stat. 3553, 3554-3559 (2008). The United States Court of Appeals for the Third Circuit has not determined whether the changes made by the ADA Amendments Act should be applied retroactively. *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 501, n. 5 (3d Cir.2010). Several other federal appellate courts have concluded that the ADA Amendments Act should not be given retroactive effect. *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir.2009); *Thornton v. United Parcel Service, Inc.*, 587 F.3d 27, 35, n. 3 (1st Cir.2009); *Frederickson v. United Parcel Service Co.*, 581 F.3d 516, 521, n. 1 (7th Cir.2009); *Lytes v. DC Water & Sewer Authority*, 572 F.3d 936, 942 (D.C.Cir.2009); *Millholland v. Sumner County Board of Education*, 569 F.3d 562, 565 (6th Cir.2009); *EEOC v. Agro Distribution LLC*, 555 F.3d 462, 469, n. 8 (5th Cir.2009). Accordingly, the Court will evaluate the Plaintiffs’ claims pursuant to the standards that were applicable as of February 21, 2008, when the Board issued its decision denying the Plaintiffs’ implicit request for a variance.”).

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One individual with a disability that experienced discrimination between the enactment of ADA and ADAAA is John Shepherd. He worked for AutoZone from 1996 to 2004, most recently as a parts sales manager.<sup>21</sup> In this role, his duties included “working closely with customers and engaging in ‘manual tasks’ such as routine cleaning and maintenance of the store, stocking shelves, and moving merchandise.”<sup>22</sup> The daily tasks were assigned to employees randomly by a computer program, though the store manager maintained discretion to reassign tasks.<sup>23</sup> Shepherd suffered from a back condition that would cause severe debilitating pain when he performed tasks that required twisting, which limited his ability to complete certain assignments on the job.<sup>24</sup> Shepherd’s impairment led to him taking a series of medical leaves from 2001 to 2003, returning to work several times with medical restrictions related to mopping or buffing the floors.<sup>25</sup> In 2004, Shepherd’s doctor authorized his return to work from a medical leave with increased medical restrictions, including “a lift limit of ten to nineteen pounds, a limitation on time spent standing, and a prohibition on upper body twisting.”<sup>26</sup> AutoZone did not allow Shepherd to return to work with these restrictions, instead placing him on involuntary medical leave.<sup>27</sup> In 2005, AutoZone terminated Shepherd’s employment pursuant to AutoZone’s long-term disability policy after keeping him on medical leave involuntarily for more than a year.<sup>28</sup>

In 2007, the EEOC filed charges under the ADA on behalf of John Shepherd against AutoZone for allegedly discriminatory acts that occurred before Congress passed and President Bush signed the 2008 amendments.<sup>29</sup> “In its motion for summary judgment, *AutoZone* argued that Shepherd was not a ‘qualified individual with a disability’ from March 2003 through September 12, 2003.”<sup>30</sup> Though *AutoZone* acknowledged that Shepherd suffered from an impairment throughout the relevant time, it contended that Shepherd’s impairment did not

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21. EEOC v. AutoZone, Inc., 630 F.3d 635, 636 (7th Cir. 2010).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 636–38.

26. *Id.* at 638.

27. *Id.*

28. *Id.* at 636.

29. Complaint and Demand for Jury Trial, EEOC v. AutoZone, Inc., No. 07-CV-01154, 2007 WL 3359188 (C.D. Ill. June 13, 2007). (“This is an action under Titles I and V of the Americans with Disabilities Act of 1990 (the “ADA”), 42 U.S.C. § 12101 *et seq.*, to correct unlawful employment practices on the bases of disability and retaliation and failure to provide reasonable accommodations, and to provide appropriate relief to John P. Shepherd III (“Shepherd”), a qualified individual with a disability, back and neck impairments, who was adversely affected by such practices.”).

30. *AutoZone*, 630 F.3d at 639.

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constitute a “disability” as defined by the ADA.<sup>31</sup> The district court granted summary judgment for AutoZone on this claim, “finding that the EEOC had not shown that Shepherd had a disability within the meaning of the ADA as is required to demonstrate a failure to accommodate.”<sup>32</sup> The district court found that “Shepherd was not *substantially limited* in the *major life activity of caring for himself* prior to September 2003 and, as a result, could not be considered disabled under the ADA.”<sup>33</sup>

Although both parties acknowledged that Shepherd had an impairment and received disability benefits from the Social Security Administration,<sup>34</sup> he could not pass the threshold for being disabled under the ADA.<sup>35</sup> Shepherd was caught in what some commentators have coined as the “Goldilocks dilemma,” which is described by Bradley A. Areheart as:

By having to fit into a very narrow construction of disability, claimants are often found either “too disabled” or “not disabled enough” to qualify for the protections of the ADA. Very few are “disabled just right.” Restrictive interpretations of the ADA have thus engendered a situation in which many cases are decided solely by looking at the characteristics of the plaintiff. The definition of disability may thus create the absurd result of a person being disabled enough to be fired from a job, but not disabled enough to challenge the firing.<sup>36</sup>

The EEOC, unsatisfied with the result, filed a timely appeal to the Seventh Circuit.<sup>37</sup>

Since the ADAAA was enacted to put an end to the “Goldilocks Dilemma” by broadening the definition of persons with a disability,<sup>38</sup> it would be very beneficial to the EEOC’s case if the ADAAA were

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31. *Id.*

32. *Id.* at 637.

33. *Id.* at 638 (emphasis added).

34. EEOC v. AutoZone Inc., No. 07-1154, 2009 WL 464574, at \*4 (C.D. Ill. Feb. 23, 2009). (The “EEOC’s interest in pursuing perpetrators of discrimination is much broader than simply obtaining relief for the victim of that discrimination.”) Shepherd himself is not a party to the suit; it is being brought by the EEOC. See also Press Release, EEOC, Disabled Person’s Application for Social Security Benefits No Bar to EEOC Suit, Judge Rules (Feb. 23, 2009) available at <http://www.eeoc.gov/eeoc/newsroom/release/2-23-09a.cmf> (He applied for and received disability benefits from the Social Security Administration (SSA)).

35. *Autozone*, 630 F.3d at 645. See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 801 (1999) (The purposes and definitions of a person with a disability are different under the Social Security Disability and Insurance (SSDI) program and the ADA.) (holding that an ADA plaintiff is not judicially estopped from the apparent contradiction that arises out of an earlier SSDI total disability claim about her ability to perform the job with reasonable accommodation, but rather must proffer a sufficient explanation).

36. Bradley A. Areheart, *When Disability Isn’t “Just Right”: The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma*, 83 IND. L.J. 181, 209 (2008) (footnotes omitted).

37. *AutoZone*, 630 F.3d at 636.

38. See also cases and colloquy in notes 12-13, and accompanying text.



retroactive. A three judge panel in the Seventh Circuit had previously ruled that the ADAAA is not retroactive in *Fredricksen v. United Parcel Service*.<sup>39</sup> Judge Hamilton, writing for a different three judge panel, took a novel approach in *EEOC v. AutoZone* to find that Shepherd is a person with a disability. Although he explicitly states that the ADAAA cannot be applied in *EEOC v. AutoZone*, he does utilize the *legislative history* of the ADAAA to breathe new life into the original ADA.

Judge Hamilton's approach was to first acknowledge Seventh Circuit precedent in a footnote by stating:

After this case was filed, Congress made significant changes to the ADA that took effect January 1, 2009. See ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553. Because Congress did not express its intent for these changes to apply retroactively, see *Fredricksen*, 581 F.3d at 521, we cite, quote, and apply the ADA as it stood before the amendments.<sup>40</sup>

However, later in the opinion he cites the legislative history from the 2008 ADAAA to give meaning to the term "major life activity" in the original 1990 ADA by stating:

Our application [of the ADA to Shepherd's "major life activity" of self care] is consistent with the purpose of the ADA to "provide a clear and comprehensive national mandate" to combat disability discrimination. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 329; see also ADA Amendments Act of 2008 § 1(b), 122 Stat. at 3554 (*elaborating on a broad scope of protection intended by Congress to be available under the original Act*); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 495, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (Stevens, J., *dissenting*) (noting that the ADA was meant to serve a remedial purpose). *The specific inclusion of "caring for oneself" in the 2008 Amendments' list of major life activities further supports this interpretation.* See ADA Amendments Act of 2008 § 4(a), 122 Stat. at 3555, amending 42 U.S.C. § 12102.<sup>41</sup>

There are three key items to note in this passage. First, Judge Hamilton uses the explanatory parenthetical to establish that Congress in enacting the ADAAA was "elaborating on a broad scope of protection intended by Congress to be available *under the original Act*."<sup>42</sup> Second, he states that the "specific inclusion of 'caring for oneself' in the 2008 Amendments' list of major life activities further supports this

39. *Fredricksen v. United Parcel Service, Co.*, 581 F.3d 516, 521 n.1 (7th Cir. 2009) ("Significant changes to the ADA took effect on January 1, 2009, after this appeal was filed. Congress did not express its intent for these changes to apply retroactively, and so we look to the law in place prior to the amendments.") (citations omitted).

40. *AutoZone*, 630 F.3d at 639 n.2.

41. *Id.* at 640 (emphasis added).

42. *Id.* (emphasis added).

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interpretation.”<sup>43</sup> These two statements utilize the legislative history from 2008 to help clarify congressional intent from nearly two decades earlier. Finally, he cites the *dissent* in *Sutton v. United Air Lines*<sup>44</sup> to support his conclusion. *Sutton* is one of the cases that was still good law in 2003 when Shepherd was fired from his job and in 2007 when the EEOC filed a case on his behalf.<sup>45</sup> The majority’s holding in *Sutton* was expressly abrogated by the 2008 ADAAA.<sup>46</sup> By ignoring the majority opinion in *Sutton* and utilizing legislative history of the ADAAA in *EEOC v. AutoZone*, Judge Hamilton effectively gives a measure of retroactive effect to ADAAA.

On a second matter in the case concerning the meaning of the phrase “substantially limited,” Judge Hamilton performs a similar maneuver:

The ADA Amendments Act of 2008 superseded *Williams* by expressly rejecting the Court’s narrow interpretation of the terms “substantially limits” and “major life activity” in favor of a broader interpretation. *Part of Congress’s purpose in enacting the Amendments was to make clear its intent that the determination of whether an individual has a disability under the ADA “should not demand extensive analysis.”* ADA Amendments Act of 2008 § 2(b)(5), 122 Stat. at 3554. Of particular note, Congress stated that *the term “substantially limits” should be interpreted broadly to provide wide coverage. See id. § 2(a)(1), 122 Stat. at 3553.* As we have said, because there is no indication that Congress intended the ADA Amendments to have retroactive effect, we rely on the ADA as it existed at the time of the relevant events, and on the case law, including *Williams*, interpreting that version of the statute and implementing regulations. We reach our conclusion that the EEOC has raised a genuine question for trial even without *the clarifying language in the Amendments, which only underscores our conclusion.*<sup>47</sup>

In citing, but not following *Williams*, Judge Hamilton once again discusses a case that was “good law” at the time of the events and filing of *AutoZone*, but later abrogated by the ADAAA. He once again utilizes the legislative history of the ADAAA to determine the original meaning of the ADA by remarking that “the clarifying language in the Amendments . . . only underscores our conclusion.”<sup>48</sup>

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43. *Id.* (emphasis added).

44. *Id.*; *Sutton*, 527 U.S. at 495.

45. ADA Amendments Act of 2008 § 2, 122 Stat. 3553 (“(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect”).

46. *See also* cases cited in note 12, and accompanying text.

47. *AutoZone*, 630 F.3d at 641 n.3. (emphasis added).

48. *Id.*

Although Judge Hamilton ostensibly used pre-ADAAA law to decide *AutoZone*, he liberally referenced the ADAAA and its legislative history in reaching his conclusions. The remainder of this article analyzes the legal and policy implications of this approach.

### B. *Retroactivity in the Law Generally*

Justice Rutledge wrote in 1946 that “[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate.”<sup>49</sup> One of the earliest expressions of this principal of statutory construction by the Supreme Court in civil cases was in the 1806 case of *U.S. v. Heth* where Justice Johnson wrote that “[u]nless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.”<sup>50</sup> At the same time, the court in *Heth* refused to apply the ex post facto clause of the U.S. Constitution to civil cases, reserving it for application to criminal cases.<sup>51</sup> This presumption against the retroactivity of civil laws has been repeated more recently by the Supreme Court in *Bowen v. Georgetown University Hospital* when Justice Kennedy wrote “[r]etroactivity is not favored in the law.”<sup>52</sup> “Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”<sup>53</sup> Justice Scalia, in a concurring opinion, wrote in part to describe the difference between “primary” retroactivity (altering the *past* legal consequences of past actions), from “secondary” retroactivity in a new rule that has exclusively future effect (taxation on future trust income), but can unquestionably affect past transactions (rendering the previously established trusts less desirable in the future).<sup>54</sup> The approach taken in *AutoZone*, although not technically a retroactive application of the law, resulted in the ADAAA having primary retroactive effect.

49. *Claridge Apartments Co. v. Comm’r*, 323 U.S. 141, 164 (1944) (reviewing the retrospective tax implications of the Bankruptcy Act).

50. *U.S. v. Heth*, 7 U.S. 399, 408 (1806).

51. *Id.* at 399 (“It cannot be deemed an unconstitutional act as being ex post facto, because the prohibition of the constitution extends to criminal cases only.”) (citing *Calder v. Bull*, 3 U.S. 386 (1798)).

52. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding statutory grants of rulemaking authority will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by express terms) (citations omitted above) (collecting cases including *Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622, 11 L.Ed.2d 576 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164, 65 S.Ct. 172, 185, 89 L.Ed. 139 (1944); *Miller v. United States*, 294 U.S. 435, 439, 55 S.Ct. 440, 441-442, 79 L.Ed. 977 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-163, 48 S.Ct. 236, 237, 72 L.Ed. 509 (1928)).

53. *Id.*

54. *Id.* at 218 (Scalia, A., concurring).

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Temporally, there are four types of retroactivity that can arise when a new common law rule is established or statute enacted.<sup>55</sup> The New Jersey Supreme Court summarizes them succinctly:

[1] The Court may decide to apply the new rule purely prospectively, applying it only to cases in which the operative facts arise after the new rule has been announced. [2] Alternatively, the Court may apply the new rule in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth. [3] A third option is to give the new rule “pipeline retroactivity,” rendering it applicable in all future cases, the case in which the rule is announced, and any cases still on direct appeal. [4] Finally, the Court may give the new rule complete retroactive effect, applying it to all cases, including those in which final judgments have been entered and all other avenues of appeal have been exhausted.<sup>56</sup>

The approach in *AutoZone* most closely resembles the third type — pipeline retroactivity.

The Supreme Court has been receptive to pipeline retroactivity in civil cases such as *Plaut v. Spendthrift Farm*.<sup>57</sup> Congress had legislatively overturned a decision<sup>58</sup> defining the statute of limitations period for certain fraud claims under Rule 10b-5 of the Securities and Exchange Commission.<sup>59</sup> Although the *Plaut* Court held that separation of powers principals prevented Congress from resurrecting a federal civil suit in which a final judgment had been entered,<sup>60</sup> the *Plaut* Court was receptive to Congress changing the law for pending cases.<sup>61</sup> Justice Scalia, writing for the majority, expressed the Courts position on pipeline retroactivity:

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.<sup>62</sup>

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55. *State v. Knight*, 678 A.2d 642 (N.J. 1996) (citations omitted) (articulating and applying a three factor test for determining when rules of criminal procedure should be applied retroactively).

56. *Id.* at 650-51.

57. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

58. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

59. *Plaut*, 514 U.S. at 213.

60. *Id.* at 240 (“We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution’s separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment.”).

61. *Id.* at 227.

62. *Id.* (citing *United States v. Schooner Peggy*, 1 Cranch 103 (1801) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); see *infra* Part II.C for a discussion of *Landgraf*).

C. *The EEOC's Position on the Retroactivity of the ADAAA*

Associate Legal Counsel for the EEOC, Peggy Mastroianni,<sup>63</sup> speaking on a symposium panel shortly after the enactment of the ADAAA, began her remarks by stating that “the ADA Amendments Act does not - in our view - change the ADA so much as it restores its original intent.”<sup>64</sup> While acknowledging the restorative effect of the ADAAA on the ADA, she concluded her remarks by eschewing pipeline retroactivity for the ADAAA by stating:

The last point I want to make is retroactivity. When great civil rights laws are passed, plaintiffs want them to apply retroactively. This happened under the last great civil rights law, the Civil Rights Act of 1991. Two cases on retroactivity went all the way to the Supreme Court - *Landgraf* and *Rivers*. They give us a framework for looking at retroactivity under the ADA Amendments Act and the message they tell us isn't a very hopeful one. It is that, first of all, there's a presumption against retroactivity unless there is clear congressional intent to support it. And of course, with the ADA Amendments Act, you have Congress making it effective three months after it is enacted, as opposed to, for example, the Lily Ledbetter law which is clearly retroactive. Congress is saying in the law that it's effective the day before the bad Ledbetter court decision.<sup>65</sup>

However, the legislative history of the Civil Rights Act of 1991 is clearly distinguishable from the ADAAA. Also, the situation in the two cases cited by Mastroianni, *Landgraf*<sup>66</sup> and *Rivers*,<sup>67</sup> are easily distinguishable from the situation in *AutoZone*, and that of many other individuals with disabilities facing the “Goldilocks Dilemma.”

As Justice Stephens articulated in *Landgraf*, the issue of absence of retroactivity was clearly a factor in passing the Civil Rights Act of 1991:

In 1990, a comprehensive civil rights bill passed both Houses of Congress. Although similar to the 1991 Act in many other respects, the 1990 bill differed in that it contained language expressly calling for application of many of its provisions, including the section providing for damages in cases of intentional employment discrimination, to

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63. During the course of writing this paper, Peggy Mastroianni was promoted to the position of Legal Counsel at the EEOC. In an internal memorandum on March 30, 2011, EEOC Chair Jacqueline Barrien announced the appointment, noting Mastroianni's distinguished career of over twenty years with the EEOC. Memorandum from Jacqueline A. Berrin, EEOC Chair, on the appointment of EEOC Legal Council to all EEOC Employees (Mar. 30, 2011) (on file with author).

64. Symposium, *Assisting Law Students with Disabilities in the 21st Century: A New Horizon?: What the ADA Amendments and Higher Education Acts Mean for Law Schools*, 18 AM. U. J. GENDER SOC. POL'Y & L. 13, 16 (2009).

65. *Id.* at 20–21 (footnotes omitted).

66. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

67. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

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cases arising before its (expected) enactment. The President vetoed the 1990 legislation, however, citing the bill's "unfair retroactivity rules" as one reason for his disapproval. Congress narrowly failed to override the veto. (66 to 34 Senate vote in favor of override).

....

The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill.<sup>68</sup>

The ADAAA did not take a similar path to enactment. Although the ADAAA was preceded by the failed attempt at reform in the ADA Restoration Act in 2006 and 2007, there was not an analogous debate and clear abandonment of retroactive attempt.<sup>69</sup>

Like the ADAAA, the Civil Rights Act of 1991 was also in response to Supreme Court decisions which Congress wished to expressly overturn.<sup>70</sup> However, "[a] number of important provisions in the Act . . . were not responses to Supreme Court decisions."<sup>71</sup> In *Landgraf*, the provision at issue was not amongst those that were in direct response to any Supreme Court decisions.<sup>72</sup> This is in contrast to *AutoZone* where the issues were directly related to two Supreme Court cases, which Congress expressly wished to abrogate.<sup>73</sup> Therefore, the decision in *Landgraf* should not be used in an ADA case interpreting the definition of a person with a disability such as *AutoZone*. When a statute *restores* rather than *expands* the law, the legislative history of the new statute should be considered relevant to determining the congressional intent when it enacted the original legislation.

In her remarks, Mastroianni does not foreclose all retroactive effects of the ADAAA, describing situations where a reasonable accom-

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68. *Landgraf*, 511 U.S. at 255-56.

69. See *infra* Parts III.D and III.E.

70. *Landgraf*, 511 U.S. at 250-51 ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4), 105 Stat. 1071, note following 42 U.S.C. § 1981, expressly identifies as one of the Act's purposes 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.' That section, as well as a specific finding in § 2(2), identifies *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989), as a decision that gave rise to special concerns. Section 105 of the Act, entitled "Burden of Proof in Disparate Impact Cases," is a direct response to *Wards Cove*. Other sections of the Act were obviously drafted with 'recent decisions of the Supreme Court in mind.'").

71. *Id.* at 251.

72. *Id.* at 252 ("Among the provisions that did not directly respond to any Supreme Court decision is the one at issue in this case, § 102.").

73. See *supra* Part I.A (discussing the use of the *Sutton* and *Williams* in deciding *AutoZone*); See also cases cited *supra* note 12 and accompanying text.

modation requested before the enactment of the act may be renewed, and therefore covered under the ADAAA.<sup>74</sup> She stated:

Also, in *Rivers* the Court said just because a statute is restorative, that doesn't automatically make it retroactive. But - and there are a lot of buts here - employers should not take it easy on this issue because even if a claim was filed before the effective date of the ADA Amendments Act, before January 1st of this year, if it involved, for example, reasonable accommodation and the person renews the request for accommodation, it is the ADA Amendments Act standard that controls.

And also, we have one case - *Jenkins v. National Board of Medical Examiners* - that involved someone who was seeking a reasonable accommodation to take the medical boards and there's a very good Sixth Circuit decision in which the court notes that even though the suit was brought before January 1st, 2009, the actual exam is not taking place until spring 2010 and therefore the ADA Amendments Act controls.<sup>75</sup>

The Court in *Jenkins* aptly noted that "*Landgraf* does not stand for the principle that new laws should never apply to cases pending on appeal."<sup>76</sup> It reasoned that "[b]ecause this case involves prospective relief and was pending when the amendments became effective, the ADA must be applied as amended."<sup>77</sup> In remanding the case, the Sixth District Court of Appeals noted that the district court should not rely on the *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* decision, which was repudiated by Congress in the ADAAA.<sup>78</sup> In taking this approach, the court implemented a limited form of pipeline retroactivity. Since *Jenkins* was not controlling precedent in *AutoZone* because it was an unpublished decision in a different circuit, and it was limited to future requests for reasonable accommodations, it would not have helped the EEOC with the damages sought on behalf of John Sheppard in *AutoZone*.

74. See generally *supra* note 64, at 21.

75. *Id.* (footnote omitted) (referring to *Jenkins v. Nat'l Bd. of Med. Exam'rs*, 2009 WL 331638 (6th Cir. 2009)).

76. *Jenkins v. Nat'l Bd. of Med. Exam'rs*, 2009 WL 331638, at \*2 (6th Cir. 2009).

77. *Id.* at \*1.

78. *Id.* at \*3 ("Without the benefit of these amendments, the district court relied on the Supreme Court's analysis in *Toyota*, which was controlling precedent at the time the district rendered its decision. The district court concluded that Jenkins would only qualify for protection under the ADA if his disability 'precluded' him from performing reading tasks that were 'central to most people's daily lives.' *Jenkins*, 2008 WL 410237, at \*3.

In holding that Jenkins was not substantially limited in his ability to read, the district court relied on the very language from *Toyota* that Congress repudiated in the ADA Amendments Act. Compare *id.* at \*4-5, with ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008). The change in the law has therefore undermined the district court's holding, and the resolution of this case will require the district court to make a fresh application of the law to the facts in light of the amendments to the ADA."); see also cases cited *supra* note 12 and accompanying text.

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The EEOC's recently promulgated ADAAA regulations continue to take the position that application of the ADAAA is prospective by stating "[t]he ADA Amendments Act of 2008 (the Amendments Act) was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009."<sup>79</sup> The interpretive regulations themselves have a prospective application, stating "[t]hese final regulations will become effective on May 24, 2011," 60 days after their publication in the Federal Register.<sup>80</sup> While courts are often expected to grant deference to EEOC interpretations under the familiar *Chevron* doctrine,<sup>81</sup> there is no express reasoning in the newly released regulations explaining how the agency arrived at this conclusion to make the new regulations effective only in the future.<sup>82</sup>

Shortly after promulgating the ADAAA regulations, the EEOC also posted a number of "Questions and Answers" on their web site.<sup>83</sup> Of the thirty-three questions posed and answered, the one about retroactivity is the first one listed.<sup>84</sup> Specifically, they state:

1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

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79. Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, *supra* note 17, <http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as>.

80. *Id.*

81. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing the rule that when an agency is interpreting a statute, and it is ambiguous or silent on the precise issue, courts must accept the agency's interpretation as long as it is a reasonable one) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* at \*866); *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (holding when Congress has explicitly left a gap for an agency to fill, any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute).

82. See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (although the EEOC interpretation of retroactive effect may not warrant *Chevron* deference, it may at least be granted *Skidmore* deference) (establishing a four part test for determining when deference should be granted to an agency) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon [1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade, if lacking power to control.") *Id.* at 140.

83. See generally EEOC, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited April 9, 2011).

84. *Id.*



No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.<sup>85</sup>

These “Questions and Answers” do not have the force of law.<sup>86</sup> They do however clearly reflect the EEOC’s opinion that although the ADAAA does not have pipeline retroactive effect, it would apply in situations such as *Jenkins* where the accommodation requested would occur in the future, or in situations where there was a renewed request for accommodations. However, this “Question and Answer” is not necessarily inconsistent with the result in *AutoZone*. Following Judge Hamilton’s approach “the *original* ADA definition to be applied to such a charge” is the more expansive definition envisioned by the authors of the ADA, and subsequently clarified in the ADAAA; not the definition wrongfully created by the Supreme Court which was expressly overruled by the ADAAA.<sup>87</sup>

## II. CONGRESS HAS A LONG HISTORY OF OVERTURNING SUPREME COURT CIVIL RIGHTS DECISIONS, THEREBY LIMITING THEIR SCOPE

### A. *Disrespecting Congress — The Supreme Court’s Interpretation of Civil Rights Laws*

In an empirical study of congressional overrides of Supreme Court decisions, Professor Eskridge reported that from 1967 to 1990, civil rights was one of the top categories, trailing only the category of crim-

85. *Id.*

86. These types of interpretive materials that do not go through notice and comment rule making are entitled only to so-called *Skidmore* deference as described in *What the ADA Amendments and Higher Education Acts mean for Law Schools*, *supra* note 64. Justice Scalia recently pointed out that the term “*Skidmore* deference” may be an oxymoron:

In my view this doctrine (if it can be called that) is incoherent, both linguistically and practically. To defer is to subordinate one’s own judgment to another’s. If one has been persuaded by another, so that one’s judgment accords with the other’s, there is no room for deferral — only for agreement. Speaking of “*Skidmore* deference” to a persuasive agency position does nothing but confuse.

*Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1349, n. 6 (2011) (Scalia, A., dissenting).

87. See cases cited *supra* note 12 and accompanying text.

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inal law, tying for second with antitrust law.<sup>88</sup> With the enactment of the Civil Rights Act of 1991, which overrode twelve Supreme Court decisions, civil rights moved up to the top category for period 1967 to 1992.<sup>89</sup> Professor Colker expounds on the Supreme Courts approach prior to the ADAAA which led to this result.

In recent years, the Supreme Court has narrowly interpreted the scope of protection provided under federal civil rights law while also increasingly disavowing the usefulness of legislative history to interpret these statutes. Left only with the legislative text, the Court has imposed an interpretation on these statutes that can only be described as 'dissing Congress,' because it flouts both the statutory language and congressional intent as reflected in the legislative history. Hence, the civil rights community has had to persuade Congress to enact key civil rights legislation *twice*—first as a pathbreaking statute, and then again as a “restoration act” —to attain the intended scope of statutory protection.<sup>90</sup>

Although she wrote this passage before the enactment of the ADAAA, the ADA eventually followed the same pattern.<sup>91</sup> The remaining sections of this part will describe the progression of increasing levels of retroactivity enacted in several congressional overrides of civil rights decisions.

### B. *The Pregnancy Discrimination Act of 1978*

“The Supreme Court’s repeated insistence on interpreting the scope of civil rights laws narrowly began in 1976, when it concluded that the prohibition against ‘sex discrimination’ found in Title VII did not include a prohibition against pregnancy-based discrimination in *General Electric v. Gilbert*.”<sup>92</sup> In *Gilbert*, “the Court held that an employer’s disability plan that excluded pregnancy-related disabilities did not violate Title VII. However, Congress reacted relatively swiftly to this decision and on October 31, 1978, Title VII was amended through the Pregnancy Discrimination Act [PDA] of 1978.”<sup>93</sup> “The PDA’s language and legislative history indicate that the amendment was designed to overrule *Gilbert* and to require employers who provide disability benefits to their employees to extend such benefits to wo-

88. William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344–45 (1991).

89. *Id.* at 345 n.31.

90. Colker, *supra* note 10, at 4 (alteration in original).

91. *Id.* at 6-7; see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); see *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

92. *Id.* at 15; See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

93. Paula G. Ardelean, Mitchell C. Baker, Brian D. Hall, Wynter Allen, Thomas F. Hurka, Alison T. Vance, and David J. Carr, *The Development of Employment Rights and Responsibilities from 1985 to 2010*, 25 ABA J. LAB. & EMP. L. 449 (2010) (footnotes omitted).

men who are unable to work because of pregnancy-related conditions.”<sup>94</sup>

The text of the PDA, by expressly stating it becomes effective on the date of enactment and by providing provisions for the application to employee benefits programs to be phased-in, makes it clear that its application is prospective.<sup>95</sup> The legislative history also expresses this intent.<sup>96</sup> As recently as 2009, the Supreme Court reinforced the notion of prospective application in *AT&T Corp. v. Hulteen*.<sup>97</sup> In *Hulteen*, AT&T made adjustments to their pension plan when the PDA became effective, but did not “make any retroactive adjustments to the service credit calculations of women who had been subject to the pre-PDA personnel policies.”<sup>98</sup> Therefore, the women received less service credit for pregnancy leave taken prior to the effective date

94. *Id.* (footnotes omitted).

95. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat 2076.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 701 of the Civil Rights Act of 1964 // 42 USC 2000e. // is amended by adding at the end thereof the following new subsection:

‘(k) The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title // 42 USC 2000e-2. // shall be interpreted to permit otherwise. . . .’

Sec. 2. (a) Except as provided in subsection (b), the amendment made by this Act // 42 USC 2000e. // shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act .

Sec. 3. Until the expiration of a period of one year from the date of enactment of this Act // 42 USC 2000e // or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: And provided further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

96. *Discrimination on the Basis of Pregnancy*, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the Comm. on Human Res. 95th Cong. (1977) (statement of Orrin Hatch, Senator of the United States) (“Senator HATCH. Well, I am concerned because I think that the bill is drafted too broadly also. So I am sending a letter to the chairman and the ranking minority member and asking them to consider some of the suggestions that I have made here. And some that I am making, I think are quite important. And you might give me your ideas on them. One of them is that I think this ought to be applied prospective and not retroactive. If we provide it retroactively, it could dislocate and create many problems in America. Mr. LAZARESCU. I would agree.”).

97. *AT & T Corp. v. Hulteen*, 129 S.Ct. 1662 (2009).

98. *Id.* at 1667.

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of the PDA than they would have accrued on the same leave for disability, resulting in a lower pension benefits.<sup>99</sup> Citing *Landgraf* for the presumption against retroactivity without a clear expression of intent,<sup>100</sup> the court held that this form of discrimination was not illegal because the PDA was not retroactive.<sup>101</sup> The court cited *Rivers*, and also cited the overridden *Gilbert* decision approvingly in a footnote stating that it is “to no avail to argue that the pregnancy leave cap was unlawful before *Gilbert* and that the PDA returned the law to its prior state.”<sup>102</sup> It is clear that in their first attempt to override the Supreme Court on a hyper-technical Title VII civil rights decision, Congress did not intend to or inadvertently create any retroactive coverage for victims of pregnancy discrimination.

### C. *The Civil Rights Act of 1991*

During the summer of 1989, the Supreme Court decided seven cases interpreting civil rights statutes in ways that were restrictive to plaintiffs.<sup>103</sup> “On February 7, 1990, the Civil Rights Act of 1990 was introduced by Edward Kennedy in the Senate and Gus Hawkins in the House.”<sup>104</sup> “Both houses of Congress responded to these decisions by

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99. *Id.* (“... a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”).

100. *Id.* at 1971.

101. *Id.* at 1973.

102. *Id.* at 1971 n.5. (“Although certain circuit courts had previously concluded that treating pregnancy leave less favorably than other disability leave constituted sex discrimination under Title VII, this Court in *Gilbert* clearly rejected that conclusion, 429 U.S. 125, at 147, 97 S. Ct. 401 (Brennan, J., dissenting); see also *id.*, at 162, 97 S. Ct. 401 (Stevens, J., dissenting) or 429 U.S. 125, at 147 (Brennan, J., dissenting); see also *id.*, at 162, (Stevens, J., dissenting). *Gilbert* declared the meaning and scope of sex discrimination under Title VII and held that previous views to the contrary were wrong as a matter of law. And “[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313, 114 S. Ct. 1510, 128 L.Ed.2d 274 (1994); see also *id.*, at 313, n. 12, 114 S. Ct. 1510; see also *id.*, at 313, n. 12. It is therefore to no avail to argue that the pregnancy leave cap was unlawful before *Gilbert* and that the PDA returned the law to its prior state.”).

103. Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924 (1993) (citing *Independent Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). “In addition to these cases, § 102 of the Act, 42 U.S.C. § 1981(a) (Supp. III 1992), overruled a long line of precedents going back to *Lehman v. Nakshian*, 453 U.S. 156 (1981). *Lehman*, and cases in its wake, had held that there are no jury trials in Title VII cases. *Id.* at n.2.

104. Neal Devins, *Regan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 984 (1993) (citing 136 Cong. Rec. 1624 (1990) (text of S.2104 and accompanying remarks by Sen. Kennedy); 136 Cong. Rec. 1550 (1990) (introduction of H.R. 4000 and accompanying remarks by Rep. Hawkins)).

passing the Civil Rights Act of 1990, reversing at least five of these Supreme Court employment discrimination cases.”<sup>105</sup> “In addition, this proposed law explicitly provided for its *retroactive* application to fact situations that occurred before the bill became law and to cases then pending on appeal.”<sup>106</sup> “However, it never became law because President Bush vetoed it on October 22, 1990. The Senate failed to override that veto by only one vote.”<sup>107</sup> In his veto message, the Pres-

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105. Rotunda, *supra* note 103, at 924.

106. *Id.* (emphasis added); see 136 Cong. Rec. 29,605-06 (1990) (recording the Senate vote on the final version of the bill (S. 2104)); 136 Cong. Rec. 30,136 (1990) (recording the House vote on S. 2104). The language of S. 2104 appears in the Conference Report, H.R. Conf. Rep. No. 101-856, at 1-13 (1990) (Conf. Rep.), reprinted in 136 Cong. Rec. 28,789-93 (1990). Section 15 of the act expressly indicated the retroactive intent by stating:

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.-The amendments made by-

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115];

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775];

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180];

(4) section 7(a)(1), 7(a)(3), and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or after June 12, 1989 [the date of *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261]; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363].

(b) TRANSITION RULES.-

(1) IN GENERAL.-Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 6.-Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(3) FINAL JUDGMENTS.-Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, shall be vacated in whole or in part if justice requires pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent with the constitutional requirements of due process of law.

(c) PERIOD OF LIMITATIONS.-The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2), or 12.

*Id.*

107. Rotunda, *supra* note 103, at 924.

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ident devoted the bulk of his justification to concerns that it would lead to quotas.<sup>108</sup> President Bush also found the “unfair retroactivity rules” unacceptable.<sup>109</sup>

On the first day of the next Congress, many members of the House introduced House Resolution 1, the Civil Rights and Women’s Equity in Employment Act of 1991.<sup>110</sup> “This new bill added two 1991 Supreme Court decisions to the list of pro-employer decisions that the new legislation would correct.”<sup>111</sup> “After much debate, Congress produced the Civil Rights Act of 1991, which President Bush signed on November 21, 1991.”<sup>112</sup> The 1991 version of the bill did not have the retroactivity provisions.<sup>113</sup> As Justice Stevens pointed out in *Landgraf*, omission of the elaborate retroactivity provision of the 1990 bill cannot realistically be attributed to oversight or to unawareness of the retroactivity issue.<sup>114</sup> He speculates that its omission is likely to have been one of the compromises struck to gain sufficient support for enactment.<sup>115</sup> Civil rights advocates may have lost the battle on retroactivity, but they “won the war” by overturning the Supreme Court decisions which misinterpreted the statutes.

There was another item left out of the final version of the 1991 bill that would have been useful to ADA plaintiffs such as Shepherd — a canon of statutory construction that would broadly construe civil

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108. Devins, *supra* note 104, at 988.

109. Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 2 Pub. Papers 1437 (Oct. 22, 1990), available at [http://bushlibrary.tamu.edu/research/public\\_papers.php?id=2345&year=1990&month=10](http://bushlibrary.tamu.edu/research/public_papers.php?id=2345&year=1990&month=10) (“The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules; attorneys fee provisions that will discourage settlements; unreasonable new statutes of limitation; and a [“]rule of construction” that will make it extremely difficult to know how courts can be expected to apply the law.”).

110. Rotunda, *supra* note 103, at 926 (citing H.R. REP. NO. 102-40, pt. 1, at 14, 16 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 554-55).

111. Rotunda, *supra* note 103, at 926 (citing *W. Va. Univ. Hosp. v. Casey*, 499 U.S. 83 (1991); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)).

112. Rotunda, *supra* note 103, at 926.

113. *Id.* at 927.

114. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 256-57 (1994). (“The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill. The omission of the elaborate retroactivity provision of the 1990 bill—which was by no means the only source of political controversy over that legislation—is not dispositive because it does not tell us precisely where the compromise was struck in the 1991 Act. The Legislature might, for example, have settled in 1991 on a less expansive form of retroactivity that, unlike the 1990 bill, did not reach cases already finally decided. A decision to reach only cases still pending might explain Congress’ failure to provide in the 1991 Act, as it had in 1990, that certain sections would apply to proceedings pending on specific preenactment dates”); see also *supra* part I.C.

115. *Id.* at 256.

rights statutes. As Professor Colker recounts before the passage of the ADAAA:

Congress expressed its frustration with the Court's narrow interpretations of the Civil Rights Acts by proposing a "rule of construction" in the 1991 Act, which applied to disability nondiscrimination laws as well as those laws that applied to race, color, nationality, origin, sex, religion, and age. The proposed rule stated that "[a]ll federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies." This language was adopted by the House but, without any explanation in the legislative history, was not in the final version adopted by the Senate. Had the Court followed the civil rights canon on its own volition, Congress would not currently be in the position of having to restore the ADA to its original intentions.<sup>116</sup>

The Civil Rights Act of 1991 also took the highly unusual step of specifying in the statute the portions of legislative history relevant to its interpretation.<sup>117</sup>

#### D. *The Lilly Ledbetter Fair Pay Act of 2009 – Express Retroactivity*

Congress most recently expressed dissatisfaction with the Supreme Court's mistaken interpretation of a civil rights statute when it enacted the Lilly Ledbetter Fair Pay Act of 2009.<sup>118</sup> Lily Ledbetter was a retiree from Goodyear Tire & Rubber Corporation alleging sex discrimination in compensation.<sup>119</sup> She alleged that this was due to discriminatory acts that had occurred years ago early in her career.<sup>120</sup> Since these events occurred long ago, the statute of limitations might have been exhausted. Some circuits at the time accepted the "paycheck accrual rule", which in effect reset the tolling of the statute of limitations each time a new paycheck was issued.<sup>121</sup> Ledbetter won her case at the district court level,<sup>122</sup> but the Eleventh Circuit Court of Appeals overturned the decision,<sup>123</sup> and the Supreme Court af-

116. Colker, *supra* note 10, at 17–18 (footnotes omitted).

117. *Id.* at 18 n.64; see Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 3(2), 105(b), 105 Stat. 1071, 1075.

118. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

119. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007).

120. *Id.* at 622 ("Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues.").

121. See *id.* at 633–43.

122. *Id.* at 622.

123. *Id.* at 622–23.

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firmed.<sup>124</sup> Justice Alito, writing for the majority expressed the opinion that “because a pay setting decision is a discrete act, it follows that the period for filing an EEOC charge begins when the act occurs.”<sup>125</sup> The court expressly rejected the paycheck accrual rule theory by distinguishing this case situation from *Bazmore v. Friday*.<sup>126</sup> Justice Alito went on to summarize the history of legislative compromise which preceded the enactment of Title VII, describing how the EEOC filing deadline protects employers from the burden of defending claims arising from employment decisions which had occurred long ago, and how congress expressly chose to take a different approach than the equitable doctrine of laches for these types of claims.<sup>127</sup>

Justice Ginsburg wrote a scathing dissent, choosing to read the entire eight page slip opinion from the bench.<sup>128</sup> Noting that “[t]his is not the first time the Court has ordered a cramped interpretation of Title VII incompatible with the statute’s broad remedial purpose,”<sup>129</sup> she concluded her opinion with an invitation to Congress.<sup>130</sup> Referring to the Supreme Court decisions that led to the enactment of the Civil Rights Act of 1991,<sup>131</sup> she pronounced “[o]nce again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”<sup>132</sup>

“Members of the 110th Congress promptly countered the Court’s decision with legislation designed to overturn Ledbetter, but opponents of the bill successfully forestalled the measure in the Senate.”<sup>133</sup> After the 2008 elections, members of the 111th Congress acted quickly

124. *Id.* at 621.

125. *Id.* at 621. The Court further explained that a “discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequence.” *Id.* at 625-26 (citing *United Airlines Inc. v. Evans*, 431 U.S. 553, 558 (1977)).

126. *Bazemore v. Friday*, 478 U.S. 385, 390 (1986) (holding that service employees who were originally segregated prior to the enactment of Title VII into a “white branch” and “negro branch”, with the later receiving less pay was not excused after the employees became covered by Title VII).

127. *Ledbetter*, 550 U.S. at 629-32.

128. Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, <http://www.nytimes.com/2007/05/31/washington/31scotus.html>; Kay Steiger, *Equal Pay Reality Check: Now that the Supreme Court has gutted pay discrimination law, it's up to Congress to ensure that employers don't get away with paying women or minorities less money for the same work.*, AM. PROSPECT, June 19, 2007, [http://prospect.org/cs/articles?article=equal\\_pay\\_reality\\_check](http://prospect.org/cs/articles?article=equal_pay_reality_check) (“Last month, when the Supreme Court issued a majority opinion in *Ledbetter v. Goodyear* denying employees the right to sue for discrimination after 180 days, Justice Ruth Bader Ginsburg was so incensed she read her scathing dissent aloud from the bench.”).

129. *Ledbetter*, 550 U.S. at 661 (Ginsburg, R., dissenting).

130. *Id.*

131. See Rotunda, *supra* note 103 and accompanying text.

132. *Ledbetter*, 550 U.S. at 661 (Ginsburg, R., dissenting).

133. Brian P. O'Neill, Note, *Pay Confidentially: A Remaining Obstacle to Equal Pay after Ledbetter*, 40 SETON HALL L. REV. 1217, 1218 (2010) (citing Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22, available at <http://www.nytimes.com/2008/04/24/washington/24cong.html>).



in January of 2009 to enact the Lilly Ledbetter Fair Pay Act of 2009.<sup>134</sup> On January 29, 2010, newly elected President Obama signed his first bill into law, the Lily Ledbetter Fair Pay Act of 2009.<sup>135</sup>

Section two of the Act directly addresses the Court's misinterpretation in *Ledbetter*.<sup>136</sup> Section six clearly expresses Congress's intent to make the bill retroactive to the day *before* the Supreme Court's mistaken interpretation in *Ledbetter* when it writes:

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, *take effect as if enacted on May 28, 2007* and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are *pending on or after that date*.<sup>137</sup>

Although the EEOC has not promulgated new notice and comment regulations in response to the Ledbetter Fair Pay Act of 2009, they have expressed their interpretation that it is retroactive in at least two ways.<sup>138</sup> First, their website states that the "Act has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date."<sup>139</sup> They have also updated the EEOC Compliance manual which now reads that "[a]n aggrieved individual can bring a charge up to 180/300 days after *receiving* compensation that is affected by a discriminatory compensa-

134. *Id.*

135. *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, EEOC, [http://www.eeoc.gov/laws/statutes/epa\\_ledbetter.cfm](http://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm)[http://www.eeoc.gov/laws/statutes/epa\\_ledbetter.cfm](http://www.eeoc.gov/laws/statutes/epa_ledbetter.cfm) (last visited Apr. 10, 2011).

136. Lilly Ledbetter Fair Pay Act of 2009, Pub L. No. 111-2, § 2, 123 Stat. 5 ("Congress finds the following:

(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections 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.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.").

137. *Id.* § 6 (emphasis added).

138. See *infra* notes 139-40 and accompanying text.

139. EEOC, *supra* note 135 (emphasis added).

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tion decision or other discriminatory practice, *regardless of when the discrimination began*.”<sup>140</sup>

### E. *Interplay between the Courts and the Legislature*

This interplay between the Courts and Legislature is not unique to Civil Rights statutes. Judge Satter, who served as a state legislator prior to becoming a judge, describes the relationship as “symbiotic.”<sup>141</sup> Although this paper has already described four instances where the Supreme Court has narrowed the civil rights provided by statutes,<sup>142</sup> the courts have also at times been the branch of government that has taken the lead on expanding civil rights in some circumstances. As Judge Satter explains:

For centuries, the courts developed the main body of law, called common law, through their judicial decisions. More recently, particularly in the 1960s when courts failed to keep the law they had created in tune with the enlightened common sense of the times, the legislature acted to provide remedy in the form of statutory law. This dynamic interplay between the legislature and the judiciary continues, as courts constantly interpret statutes and apply them to cases they decide, and legislatures, when they disagree with that interpretation, or its application, amend the statutes. Also, when the legislature neglects or refuses to deal with a situation that implicates fundamental rights, or passes a law that violates such rights, the courts declare a constitutional violation. Then the courts nullify the law and call upon the legislature to provide a solution.<sup>143</sup>

Since legislatures are highly political institutions, they sometimes are willing to let the courts “take the heat on controversial public policy issues.”<sup>144</sup> By utilizing the legislative history of the ADAAA to interpret the ADA, Judge Hamilton in *AutoZone* cured the Supreme Court misinterpretations of the ADA in a manner reminiscent of the state courts half a century ago. By inventing a clever way to cover Shepherd under the ADA, Judge Hamilton effectively “took the heat” for Congress’s inability to make this sweeping legislation expressly retroactive.

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140. EEOC, EEOC COMPLIANCE MANUAL, No. 915.003, sec.2-IV.C.4 (2009), available at <http://www.eeoc.gov/policy/docs/threshold.html#2-IV-C-4> (last visited Apr. 11, 2011) (emphasis added).

141. ROBERT SATTER, UNDER THE GOLD DOME: AN INSIDER’S LOOK AT THE CONNECTICUT LEGISLATURE 258 (2d ed. 2009).

142. See discussion *supra* Parts I.A., II.B-D.

143. SATTER, *supra* note 141, at 258.

144. *Id.* at 271 (citing the courts finding Connecticut’s method of school financing resulting in racial inequalities unconstitutional and also a separate case finding welfare residency requirements unconstitutional); *Horton v. Meskill*, 376 A.2d 359 (1977) (holding school financing systems based on local property taxes unconstitutional); *Thompson v. Shapiro*, 270 F. Supp. 331 (D. Conn. 1967) (holding public welfare requirements unconstitutional).

## III. THE HISTORY OF WORKPLACE DISABILITY LEGISLATION

A. *The Original and Current Need for Disability Rights Legislation*

In enacting the ADA, Congress in 1990 noted that people with disabilities encounter employment discrimination.<sup>145</sup> Congress found that “census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, *vocationally*, economically, and educationally.”<sup>146</sup> Although progress is evident in other areas such as the reduction in architectural and transportation barriers, the employment rates for people with disabilities has not changed appreciably since the ADA was enacted.<sup>147</sup> In March 2009, the employment rate of working-age people with disabilities was 16.8 percent in contrast with an employment rate of working-age people without disabilities of 76.5 percent.<sup>148</sup> The employment rate for people with disabilities was down from 17.7 percent in the prior year, and well below the peak of 28.8 percent in 1989.<sup>149</sup> The employment rate for people with disabilities such as John Shepherd has therefore decreased since the original ADA was enacted in 1990.<sup>150</sup>

B. *The Precursor to the ADA: The Rehabilitation Act of 1973*

The Rehabilitation Act of 1973<sup>151</sup> was the first national declaration of the rights of people with disabilities.<sup>152</sup> “Despite revisions meant to

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145. 42 U.S.C. § 12101(a)(5) (2008) (“individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . .”).

146. *Id.* § 12101(a)(6) (emphasis added).

147. Melissa J. Bjelland, Richard Burkhauser, Sara von Schrader & Andrew Houtenville, *2009 Progress Report on the Economic Well-Being of Working-Age People with Disabilities*, REHABILITATION RESEARCH AND TRAINING CENTER FOR ECONOMIC RESEARCH ON EMPLOYMENT POLICY FOR PERSONS WITH DISABILITIES AT CORNELL UNIVERSITY 3 (Sept. 2009), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1283&context=edicollect>. (This report is based upon data from the 2009 and earlier Current Population Surveys – Annual Social and Economic Supplement (CPS-ASEC, a.k.a. Annual Demographic Survey, Income Supplement, and March CPS). “The CPS is the only dataset that provides continuously-defined yearly information on the working-age population with disabilities since 1981. . . . The Census Bureau conducts the CPS on behalf of the Bureau of Labor Statistics.”).

148. *Id.* at 4.

149. *Id.*

150. *Id.*

151. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as 29 U.S.C. § 701 (1973)).

152. RUTH COLKER & ADAM A. MILANI, *FEDERAL DISABILITY LAW IN A NUTSHELL* 34 (West 4th ed. 2010) (citing Section 504 of the act “No otherwise qualified handicapped individual in the United States, as defined in section 705(20) [29 U.S.C.A. § 705(20)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected

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reduce the likelihood of a presidential veto, the bill had many significant provisions.”<sup>153</sup>

Section 501 required the agencies of the federal government to take affirmative action in the employing persons with disabilities. Section 502 established the Architectural and Transportation Barriers Compliance Board to oversee compliance of federal agencies with the Architectural Barriers Act. And Section 503 stipulated that any contract by the federal government in excess of \$2,500 contain a provision requiring that contracting parties engage in affirmative action to employ and advance in employment, handicapped workers.<sup>154</sup>

Section 504 forbids that any person with a disability “be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>155</sup> In limiting the law to recipients of federal funding, “Congress stopped short of imposing obligations on private employers that could not pass along the costs of regulation to the federal government.”<sup>156</sup>

C. *Another Independence Day: The Americans with Disabilities Act of 1990*

“Congress rarely writes on a clean slate, and the ADA is no exception to this rule. Congress drew heavily on section 504 and its regulations when enacting the ADA.”<sup>157</sup> “By enacting the Title I of the ADA in 1990 . . . congress took the additional step of imposing on all employers subject to Title VII the duty not to discriminate against any ‘qualified individual with a disability.’”<sup>158</sup> The Supreme Court had previously broadly construed the definition of a person with a disability under § 504 of the Rehabilitation Act of 1973 in the case of *School Board of Nassau County v. Arline*,<sup>159</sup> and it was expected that the ADA would improve the lives of people with disabilities.<sup>160</sup> President George H.W. Bush, utilizing an analogy to the fall of the Berlin wall,

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to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service”).

153. STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* 54 (Univ. of Ala. Press Tuscaloosa & London 1989).

154. *Id.* at 55.

155. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 417 (B), 87 Stat. 394.

156. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 493 (Thomson-West 3d ed. 2008).

157. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1131 (2010).

158. Estreicher, *supra* note 156, at 155.

159. Sch. Bd. v. Arline, 480 U.S. 273, 289 (1987) (“We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent [school teacher] Arline is such a person.”).

160. American with Disabilities Act of 1990, Pub. L. No. 101-336, 1990 Stat. 933.

described signing the ADA as taking “a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.”<sup>161</sup> He also declared the signing another *independence day*:

Three weeks ago we celebrated our nation’s Independence Day. Today we’re here to rejoice in and celebrate another “independence day,” one that is long overdue. With today’s signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.<sup>162</sup>

As noted in part III.A, this exuberance did not come to fruition with respect to employment of people with disabilities. This led advocates for people with disabilities to seek reform.

#### D. *Failed Reform: The ADA Restoration Acts of 2006 and 2007*

“As a result of restrictive judicial interpretation of the definition of disability, most scholars and disability advocates agree that the ADA has not lived up to its promise of preventing discrimination and integrating people with disabilities into the mainstream of society.”<sup>163</sup> Chai Feldblum, currently an EEOC commissioner, was one of the drafters of the original ADA and the ADAAA.<sup>164</sup> She recounts the history of the ADA Restoration Acts (ADARA) as follows:

161. *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, <http://archive.eeoc.gov/ada/bushspeech.html> (last modified July 26, 1990).

162. *Id.*

163. Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments on Schools and Universities*, 25 Ga. St. U. L. Rev. 641, 652 (2009) (citing Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the “Disability Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1408 (1999) (“Although the ADA has been hailed as the chief accomplishment of a civil rights movement on behalf of people with disabilities, the way in which “disability” is defined in the statute has undercut its effectiveness as a guarantor of civil rights.”); Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 369 (2000) (stating that recent Supreme Court decisions “drastically curtailed the number of persons who may seek protection from discrimination on the basis of disability under the ADA and seriously limited the circumstances under which even individuals with obvious disabilities may seek protection from discrimination.”); Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 36 (2000) (“If the ADA was meant to be a revolutionary remaking of America, then the judicial interpretation and implementation of the ADA’s employment title has been nothing less than a betrayal of the ADA’s promise.”).

164. Press Release, EEOC, *Chai Feldblum Sworn in as a Commissioner Of the Equal Emp’t Opportunity Comm.* (April 7, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/4-7-10a.cfm> (“Chai Feldblum, a former Georgetown University law professor, was sworn in today as a Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC). . . . Before becoming a law professor, Feldblum played a leading role in drafting the ground-breaking Americans with Disabilities Act of 1990 while serving as Legislative Counsel to the AIDS Project of the

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In late September 2006, Congressman Sensenbrenner presented some members of the disability community with an ADA Restoration Act that he wished to introduce before Congress adjourned. Although most members of the disability community had not expected a bill to be introduced until the following Congress, Congressman Sensenbrenner's enthusiasm and commitment presented an opportunity to begin the momentum for such a bill in the 109th Congress.

Thus, on September 29, 2006, the last day of the session for the 109th Congress, Congressman Steny Hoyer (D-MD) and Congressman John Conyers, then-ranking member of the House Judiciary Committee, joined Congressman Sensenbrenner in cosponsoring H.R. 6258, the first ADA Restoration Act to be introduced in Congress.

On July 26, 2007, the 17th anniversary of the ADA's passage, Majority Leader Hoyer and Congressman Sensenbrenner, and Senator Harkin and Senator Arlen Specter (R-PA), introduced companion ADA Restoration bills (H.R. 3195 and S. 1881) that closely reflected the draft bill that had been developed by the disability community lawyers.<sup>165</sup>

"As support for ADARA grew over time, the business community voiced its opposition to the bill. Similar concerns were echoed by the Justice Department on behalf of the Bush Administration."<sup>166</sup> The business community had two main concerns:

First, because the bill defined a disability as an "impairment" (removing the "substantially limits" and "major life activity" language), business advocates predicted that it "would unquestionably expand ADA coverage to encompass almost any physical or mental impairment." Employers feared that removing this language would cover up to 95% of the workforce. Second, the business community expressed concern that the "qualified individual" requirement would become an affirmative defense rather than part of the plaintiff's case. The DOJ also opposed the bill.<sup>167</sup>

The ADARA of 2007 also never came to fruition before the close of the legislative session.<sup>168</sup>

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American Civil Liberties Union. Later, as a law professor, she was equally instrumental in helping with the passage of the ADA Amendments Act of 2008.").

165. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. ON C.L. & C.R. 187, 197-98 (2008).

166. Hensel, *supra* note 163, at 653.

167. Hillary K. Valderrama, *Is the ADAAA a "Quick Fix" Or Are We Out of the Frying Pan and into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent under the ADAAA*, 47 Hous. L. Rev. 175, 198 (2010) (footnotes omitted).

168. Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 359 (2010) ("This bill [The ADARA of 2007], however, also never came to fruition."); see also U.S. Library of Congress, *Bill Summary & Status 110th Congress (2007 - 2008) S.1881, Americans with Disabilities Act Restoration Act of 2007*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:S1881>: (last updated Nov. 15, 2007).

E. *Restoration Accomplished: The ADA Amendments Act of 2008*

"In the legislative history of the ADAAA, Congress asserted that it was restoring the ADA to what it was originally intended to be. In fact, the first version of what later become the ADAAA made this clear in its very name, "The Americans with Disabilities Restoration Act" (ADARA)."<sup>169</sup> In February 2008, the first negotiation session occurred between representatives of the disability community and of the business community; thirteen weeks later after numerous hearings and multiple drafts, a final compromise was reached.<sup>170</sup> The ADAAA was significantly different than its predecessor the ADARA in one important regard: "it [the ADARA] proposed an open-ended, virtually unlimited protected class, eliminating the substantial limitation requirement and providing that an individual need only have an impairment to have a statutory disability."<sup>171</sup> "'Impairment' has consistently received a very broad interpretation even as courts were construing other parts of the definition of disability narrowly."<sup>172</sup> This approach under the ADARA was consistent with disability rights' major goal of "[e]liminating the probing first stage inquiry into the existence of disability."<sup>173</sup> However the final version of the ADAAA "keeps the original [ADA] 'substantial limitation' language, but deletes the 'materially restricts' definition and instead adds Rules of Construction designed to clarify Congress' intent regarding how 'sub-

169. Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1270 (2009); 110 CONG. REC. S8345 (2008) (statement of Managers to Accompany S. 3406, Americans with Disabilities Act Amendments Act of 2008) (asserting that the intent of the Act is to "establish a degree of limitation required for an impairment to qualify as a disability that is consistent with what Congress originally intended, a degree lower than courts have construed it to be"); Americans with Disabilities Act Restoration Act of 2007, S. 1881, 110th Cong. (2007).

170. Feldblum, *supra* note 165, at 229–30. ("On February 19, 2008, the first negotiation session occurred between representatives of the disability community and of the business community. At the first negotiation session, the group signed an agreement that if the discussions resulted in acceptable compromise language, both parties to the discussion would defend the deal before members of Congress and, as changes were put forward during the legislative process—as presumably they would be—both sides would have to agree to such changes in order for "the deal" to hold. After thirteen weeks of meetings between the disability and business negotiating teams, endless drafting and redrafting of legislative language (and agreement on a generic new name for the bill), and numerous meetings and calls for internal vetting within the separate communities (including lengthy meetings of the Drafting & Analysis Group, as well as numerous meetings with the larger disability community), a final compromise was reached on May 15, 2008. The "deal" language formed the basis of the "ADA Amendments Act of 2008" (ADAAA). Offered as an amendment to H.R. 3195 in the nature of a substitute during House Committee markups, the ADAAA was voted out of the House Education and Labor Committee by a vote of 43-1, and out of the Judiciary Committee by a vote of 27-0, both on June 18, 2008. On June 25, 2008, the House of Representatives passed the ADAAA by an overwhelming vote of 402-17.) (footnotes omitted).

171. Anderson, *supra* note 169, at 1270.

172. *Id.*

173. *Id.* at 1286.

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stantial limitation' is to be interpreted."<sup>174</sup> This compromise bill had strong bipartisan support, passing the Senate and House unanimously in September 2008.<sup>175</sup> President George W. Bush signed the ADAAA on September 25, 2008 — eighteen years and two months after his father signed the original ADA.<sup>176</sup>

The ADAAA specifically overturned the *Sutton* and *Williams* Supreme Court decisions misinterpreting the ADA,<sup>177</sup> and restored the law on a the definition of a disability to be consistent with the pre-ADA Rehabilitation Act of 1973 Supreme Court decision in *Arline*.<sup>178</sup> In doing so, the definition of a person with a disability had come full circle to where it stood on the day the ADA was originally enacted. This is the definition that Judge Hamilton applied in *AutoZone*.<sup>179</sup>

#### IV. OTHER CIRCUITS SHOULD ADOPT THE REASONING OF AUTOZONE

##### A. *Equal Protection Cases Have Historically Utilized a Similar Approach*

The sleight of hand Judge Hamilton performed in *AutoZone*<sup>180</sup> is not a new maneuver. The Supreme Court has used a similar methodology in Equal Protection cases when it clearly stated a rule (an intent requirement), but then did not apply the rule (instead relying on evidence of disparate impact).<sup>181</sup>

In 1976, the Supreme Court held in *Washington v. Davis*<sup>182</sup> that "in the absence of a racially discriminatory purpose, a facially neutral governmental action having an adverse racial impact would not be subject to strict scrutiny."<sup>183</sup> Commentators agree that "current doctrine

174. *Id.* at 1287; ADAAA § 3(2); ADAAA § 4(a).

175. Feldblum, *supra* note 165, at 239–40 (citing 154 CONG. REC. S8342 (2008); 154 CONG. REC. H8286 (2008)).

176. Feldblum, *supra* note 165, at 240; *See generally* White House, Statement on the ADA Amendments Act of 2008, (Sept. 17, 2008) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/09/20080917-9.html> (last visited Apr. 18, 2011) ("The Americans with Disabilities Act of 1990 is instrumental in allowing individuals with disabilities to fully participate in our economy and society, and the Administration supports efforts to enhance its protections. The Administration believes that the ADA Amendments Act of 2008, which has just passed Congress, is a step in that direction, and is encouraged by the improvements made to the bill during the legislative process. The President looks forward to signing the ADAAA into law").

177. *See supra* note 12 and accompanying text.

178. *See* Bjelland, ET AL., *supra* note 147 and accompanying text.

179. *See* EEOC v. AutoZone Inc., 630 F.3d 635, 641 n.3 (2010); *see also* Rehabilitation Act of 1973, Pub. L. No. 8-112, 87 Stat. 355.

180. *See supra* Part I.A, notes 40–45 and accompanying text.

181. *See generally* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

182. *Washington v. Davis*, 426 U.S. 229 (1976).

183. Ortiz, *supra* note 181, at 1105.



makes intent the key to equal protection and nearly all agree why.”<sup>184</sup> In *Washington v. Davis*, several black police officers charged that the hiring and promotion policies used by the District of Columbia’s police department discriminated against them in violation of the equal protection component of the Fifth Amendment.<sup>185</sup> “In particular, they argued that a written test developed by the Civil Service Commission for general federal use and employed by the District to test verbal ability and reading and comprehension skills had a highly adverse impact on blacks.”<sup>186</sup> The Supreme Court held that black police officers had to show, not only disparate impact, but also discriminatory purpose, which they failed to do.<sup>187</sup> “By itself, the evidence of adverse impact could not establish such a purpose, and the remaining evidence in the case—including special efforts by the police department to recruit blacks and the test’s admittedly legitimate aim of improving the verbal skills of public employees—served to rebut any suggestion of discriminatory motivation.”<sup>188</sup> The Court in two more cases decided over the next three years confirmed this seemingly strict intent requirement.<sup>189</sup>

The voting case of *Rogers v. Lodge*<sup>190</sup> is one example where the court stated the rule for equal protection cases that evidence of intent, not merely disparate impact is required, but then used a sleight of hand to go around the rule.<sup>191</sup> In *Rogers*, Black plaintiffs challenged the constitutionality of the at-large election system used in Burke County, Georgia, where no Black had ever been elected despite comprising 54 percent of the population and 38 percent of registered voters.<sup>192</sup> “The Court reaffirmed that intent was the central inquiry, but it then proceeded to find intent in an aggregate of factors having at best an indirect bearing on motivation.”<sup>193</sup> As Professor Ortiz explains:

184. *Id.* (citing Gayle Binion, ‘Intent’ and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 403-04 (describing consensus amongst various commentators)).

185. *Id.* at 1110 n.26 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954), for the proposition that the Supreme Court implicitly held that the due process clause of the Fifth Amendment contains an equal protection component that applies against the federal government).

186. *Id.* at 1110-11 (citing *Davis*, 426 U.S. at 237).

187. *Id.* at 1111 (citing *Davis*, 426 U.S. at 245-48).

188. *Id.* at 1111 (citing *Davis*, 426 U.S. at 245-46).

189. *Id.* at 1106; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Personnel Adm’r v. Feeney*, 442 U.S. 256 (1979).

190. *Rogers v. Lodge*, 458 U.S. 613 (1982).

191. *See id.* at 621-22.

192. Ortiz, *supra* note 181 at 1127 (citing *Rogers*, 458 U.S. at 614-15).

193. *Id.* (citing *Rogers*, 458 U.S. at 623-27). “In particular, the Court found discriminatory intent substantiated by the following factors: (i) that blacks constituted a majority of the county’s overall population but a distinct minority of its registered voters; (ii) the presence of bloc racial voting; (iii) the fact that no black candidates had ever won election; (iv) past discrimination against blacks in voting, including the use of literacy tests, poll taxes, and white primaries, which

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[T]he overall result . . . is to make intent largely coextensive with adverse impact in voting cases. By allowing adverse impact plus evidence of past governmental discrimination in decisions unrelated to the adoption or maintenance of the at-large system to demonstrate intent, the Court moves . . . far away . . . from any traditional conception of intent as motivation.<sup>194</sup>

Professor Ortiz also cites similar examples in both the juror selection<sup>195</sup> and education<sup>196</sup> contexts. Judge Hamilton used a similar methodology when he clearly stated the rule (the ADAAA is not retroactive), but then proceeded to apply ADAAA principals to the instant case by using the legislative history of the ADAAA to establish the intent of Congress close to two decades earlier.

Judge Hamilton's approach is different in one way from the Equal Protection cases described above. The Equal Protection cases described above state the correct legal rule (intent required), and then marshal the facts in to meet the requirements of the rule. On the other hand, Judge Hamilton stated the correct legal rule (no retroactivity), but then proceeded to use the legislative history of the ADAAA to illuminate the original meaning of the ADA. The approach taken by the lower courts in the Equal Protection cases may be more immune to being overturned on appeal because findings of fact are reviewed deferentially under a "clearly erroneous standard," while the question of law about the meaning of the statute in the ADA

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had a continuing effect on black registration rates; (v) past discrimination against blacks in education; (vi) past discrimination in political party affairs and primaries; (vii) property ownership requirements that made it difficult for blacks to serve as chief registrar of the county; (viii) past discrimination in grand jury selection, county hiring, and appointment to county boards and committees; (ix) unresponsiveness and insensitivity of elected officials to the needs of the black community; (x) the depressed socioeconomic conditions of blacks; (xi) the large geographic size of the county, which made it difficult for blacks to reach polling places; (xii) a requirement of repeated runoff elections until one candidate received a majority of the votes cast; (xiii) a requirement that candidates run for specific seats, which prevented a cohesive political group from focusing their support on a single candidate; and (xiv) the absence of a residency requirement, which allowed all the commissioners to come from a single, perhaps 'lily white,' part of the county." *Id.*

194. *Id.* at 1129.

195. *Id.* at 1119–26; *see, e.g.* *Castaneda v. Partida*, 430 U.S. 482 (1977) (finding that the State failed to rebut the presumption of purposeful discrimination by competent testimony of those involved in the selection of the grand jury, despite two opportunities to do so, resulted in a denial of equal protection of the law in the grand jury selection process in respondent's case); *see, e.g.* *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that prosecutors using preemptory challenges to exclude all black jurors in a criminal case come forward with a neutral explanation for his action).

196. *Id.* at 1131–34; *see, e.g.* *Columbus Bd. of Edu. v. Penick*, 443 U.S. 449 (1979) (holding that plaintiffs could satisfy the intent requirement by showing that the district had acted purposefully to segregate the schools as far back as the time of *Brown v. Board of Education*); *e.g.* *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (also holding that plaintiffs could satisfy the intent requirement by showing that the district had acted purposefully to segregate the schools as far back as the time of *Brown v. Board of Education*).

would be reviewed *de novo*.<sup>197</sup> Judge Hamilton did not say that he was not following the Supreme Court precedent; instead he chose not to utilize it, instead relying on the legislative history of the ADAAA.<sup>198</sup> Judge Hamilton's approach to statutory construction may be more vulnerable to be overturned with *de novo* review than the Equal Protection cases were, but the Supreme Court would be in the position where they would have to tell the lower courts to specifically follow their misinterpretation of the statute. The author suspects that there are not five votes on the current Supreme Court willing to do so.

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197. FED. R. CIV. P. 52(a)(6); see also Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. Vol. 1 (Forthcoming 2012); Pepperdine University Legal Studies Research Paper No. 2011/12, available at SSRN: <http://ssrn.com/abstract=1805999>;

The organization of the federal judiciary is premised on the division of labor between trial and appellate courts, the boundaries of which are delineated by the standards of review. The standard of review divides trial court decisions into three broad categories, each of which is subject to a different standard: (1) conclusions of law, (2) fact-finding, and (3) discretionary rulings. Trial court conclusions of law, or what Hart and Sacks called the 'law declaration' function, specify what consequences legal doctrine attaches to various factual situations, including the factual situation as found by the trial court. Trial court fact finding is the process of determining the historical facts relevant to the case, or what has been called 'a case-specific inquiry into what happened here.' Discretionary rulings typically include trial court decisions on detailed questions of trial supervision, procedure, and evidence. Each of these basic components of the adjudicative process—law, fact, and discretion—is subject to its own level of appellate scrutiny according to a 'standard of review.'

The decisions in the first category—questions of law—are reviewed 'de novo' by the appellate court, meaning that the appellate court is not required or expected to give any deference to the trial court. Instead, the appellate court exercises its own judgment on the legal questions presented, exercising a form of review sometimes referred to as 'free, independent, or even plenary review.' In such cases, '[t]he appellate courts merely ask themselves whether they agree with the trial judge's resolution of the legal issue. If not, they reverse him quick as a flash. . . .' The appellate court is entitled to—and should—take into account the legal analysis of the trial court, but the appellate court has the right and even the duty to exercise its own independent judgment.

In contrast to legal conclusions, factual determinations by the trial court are reviewed deferentially. Appellate review of factual findings by the district court is limited to whether those findings are 'clearly erroneous,' a very high bar to reversal of a trial judge's factual findings. The clear error standard does not require that there be no evidence to support the finding. Instead, as the canonical formulation of the clearly erroneous standard suggests, a finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The key point is that the standard of review constrains the appellate court to defer to the trial court's findings of fact, meaning that the appeal is primarily an appeal of legal issues, not a new trial of the whole case. Indeed, the conventional wisdom on review of findings of fact is very simple: 'appellate courts do not engage in factual evaluation,' so that the clear error review is "usually cited to justify refusal to interfere with the fact findings made in the trial court." (footnotes omitted).

198. See *supra* Part I.A.

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The text of the ADAAA indicates that the original intent of the ADA was that coverage under this remedial act was to be construed broadly seven times.<sup>199</sup> It also resets the definition of disability back to how it existed under the Rehabilitation Act of 1973, as interpreted by *Arline* prior to the passage of the original ADA.<sup>200</sup> I agree with Professor Colker, writing before the introduction of the ADAAA, that “[t]he application of the civil rights canon should be an inherent part of the judicial process. . . . Broad construction of civil rights is as old as the Fourteenth Amendment’s Equal Protection Clause; it is time for that rule of construction, once again, to become a mainstay of the interpretation of civil rights laws.”<sup>201</sup> One way to produce the results originally commanded by Congress is to not abandon people with disabilities in cases which are currently in the pipeline. Applying the legislative history of the ADAAA to interpretation of the ADA would be consistent with both the original congressional intent,<sup>202</sup> and the Supreme Court’s equal protection jurisprudence.<sup>203</sup>

## V. CONCLUSION

Congress stated, in enacting the ADA, that it sought to protect a discrete and insular minority.<sup>204</sup> It further stated it wanted to provide meaningful protection in Title I for employment discrimination.<sup>205</sup> “The Supreme Court undermined this basic intention by construing the protected class so narrowly that it has virtually become a nullity in the employment context.”<sup>206</sup> Although the *text* of the ADAAA may not be able to be directly applied to cases in the pipeline, it can be used to clarify the original intent of the ADA. While the mechanism is different, the net effect of this approach is a type of retroactive application for people with disabilities such as John Shepherd who were stuck in the pipeline.

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199. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

200. *Id.* at § 2(b)(3) (“ . . . and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.”).

201. Colker, *supra* note 10, at 64.

202. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2(a)(1), 122 Stat. 3553 (“[I]n enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act ‘provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities’ and provide broad coverage[.]”).

203. See *supra* Part IV.A.

204. Colker, *supra* note 10, at 64; see generally 42 U.S.C. § 12101(a)(7).

205. Colker, *supra* note 10, at 62; see generally 42 U.S.C. §§ 12111–17.

206. Colker, *supra* note 10, at 62.

On remand, a trial court in Illinois recently returned a verdict of \$600,000 against AutoZone, Inc. for failing to provide a reasonable accommodation to John Shepherd; an additional claim for \$115,000 in back pay will be decided by the presiding judge at a later date.<sup>207</sup> After first getting past the threshold issue of whether Mr. Shepherd had a disability, when the case subsequently went to trial the EEOC presented evidence that mopping floors was a non-essential function of the sales manager position that could have been reassigned to other employees, and that Shepherd could perform all of the essential functions of his job.<sup>208</sup> Shepherd testified that that he asked not to be assigned mopping and supported his request with documentation of his impairment.<sup>209</sup> The EEOC's evidence at trial indicated that in 2003, new store management refused the request and required Shepherd to mop, leading to further injury and necessitating a medical leave.<sup>210</sup> This case proceeded past the threshold question of coverage under the ADA because Judge Hamilton was willing to interpret the original ADA as covering Mr. Shepherd.<sup>211</sup> Getting past this threshold issue is critical for people with disabilities. As the EEOC regional attorney stated after the verdict, "[j]uries well understand that providing reasonable accommodations to employees with disabilities is critical to keeping them on the job and moving the economy forward. They get it, and employers should too."<sup>212</sup>

Others who are similarly situated should likewise not be penalized for the lack of express retroactivity in the ADAAA. For example, employers should not question whether an employee undergoing dialysis for kidney failure is covered under the ADA.<sup>213</sup> The EEOC reports that as of April 28, 2011, there were 3081 ADA charges pending with one or more alleged acts of discrimination occurring before the January 1, 2009 effective date of the ADAAA; 1916 of these were

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207. Press Release, EEOC Obtains \$600,000 Verdict Against AutoZone For Failure To Accommodate Disabled Employee (June 6, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/6-3-11e.cfm>.

208. *Id.*

209. *Id.*

210. *Id.*

211. See *supra* Part I.A.

212. See Press Release, EEOC, *supra*, note 207 (for a more detailed discussion of the requirements of the reasonable accommodation process, see Frederick J. Melkey, Note, *The Emerging Trend of Extending ADA Reasonable Accommodation beyond the Workplace to Include Commuting Issues: A comment on Colwell v. Rite Aid*, 7 MOD. AM. 22, 25-31 (2011) (describing the statutory text, EEOC regulations, and Supreme Court precedent related to the reasonable accommodation obligations of the ADA)).

213. *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 382-83 (3d Cir. 2004) (holding kidney failure to be disabling because eliminating waste from one's body is a major life activity).

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filed after the January 1, 2009.<sup>214</sup> This is a significant number of people currently caught without the protection that Congress intended in enacting the ADA nearly two decades ago.

One additional implication for future civil rights restorative laws is that retroactivity should be expressly stated to receive full effect. The Lilly Ledbetter Fair Pay Act is a recent example where Congress was clear in the text of the statute that it meant to restore the law to the way it existed before the Supreme Court decision with which it disagreed.<sup>215</sup> But that is not the *only* way. If that is not politically feasible, a back-up for civil rights advocates is to include restorative language to aid cases in the pipeline. Following the approach utilized by Judge Hamilton in *AutoZone*, laws that are purely restorative can be used as an aid in the statutory construction of the original law, bypassing the requirement of express retroactivity.<sup>216</sup>

Most ADA cases in the pipeline have perpetuated the “Goldilocks Dilemma”<sup>217</sup> by applying the overturned *Sutton* and *Williams* decisions.<sup>218</sup> In the fairy tale, when Baby Bear locates Goldilocks sleeping in her bed, she awakens and runs away; *never to be seen again*.<sup>219</sup> If other courts apply Judge Hamilton’s approach in *AutoZone*, the regressive effects of *Sutton* and *Williams* will likewise disappear, *never to be seen again*.

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214. Letter from Stephanie Garner, Assistant Legal Counsel, Equal Employment Opportunity Commission, Response to FOIA Request No. 820-2011-139055 (May 18, 2011) (on file with author).

215. See *supra* Part II.D.

216. See *supra* Part I.A.

217. See *supra* note 36 and accompanying text.

218. See *supra* note 12 and accompanying text.

219. *The Story of Goldilocks and the Three Bears*, DLTK’S CRAFTS FOR KIDS, [http://www.dltk-teach.com/rhymes/goldilocks\\_story.htm](http://www.dltk-teach.com/rhymes/goldilocks_story.htm) (last visited Oct. 17, 2011)

They decided to look around some more and when they got upstairs to the bedroom, Papa bear growled, ‘Someone’s been sleeping in my bed.’ ‘Someone’s been sleeping in my bed, too’ said the Mama bear. ‘Someone’s been sleeping in my bed and she’s still there!’ exclaimed Baby bear. Just then, Goldilocks woke up and saw the three bears. She screamed, ‘Help!’ And she jumped up and ran out of the room. Goldilocks ran down the stairs, opened the door, and ran away into the forest. And *she never returned* to the home of the three bears. (emphasis added).