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DISABILITY AND EMPLOYMENT DISCRIMINATION AT THE REHNQUIST COURT

Anita Silvers
Michael E. Waterstone & Michael Ashley Stein

INTRODUCTION

This symposium celebrates, examines, and raises challenges on the fifteenth anniversary of the Americans with Disabilities Act (ADA). It also presents an opportunity to consider another important legal milestone, namely, the end of the Rehnquist Court. While it is too early to fully assess its twenty-year legacy, much attention has already been paid to that Court's federalism jurisprudence. Receiving less scrutiny

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3 See, e.g., JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1131 (2001) (noting additional pressure new federalism puts on Congress to legislate pursuant to its Section 5 powers); Roderick M. Hills, Jr., The Eleventh Amendment as Curb on Bureaucratic Power, 53 STAN. L. REV. 1225, 1225-26 (2001) (arguing that the Rehnquist Court's jurisprudence serves the public interest by maintaining a damages versus injunction distinction that serves as a check on public agencies); Vicki C. Jackson, Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity, 75 NOTRE DAME L. REV. 953 (2000) ("The Court's Eleventh Amendment and sovereign immunity case law de-
has been the Rehnquist Court's general pattern of favoring plaintiffs in race and sex-based employment discrimination cases, while being decidedly pro-defendant in the parallel context of disability-related claims.4

serves the condemnation and resistance of scholars.

4 For Title VII, pro-employee cases, see Bazemore v. Friday, 478 U.S. 385 (1986) (holding that statistical studies of salary discrimination are relevant for purposes of proving discrimination); see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that subjective or discretionary employment practices can be analyzed under disparate impact framework); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that when a Title VII plaintiff demonstrates that gender played a motivating part in an employment decision, the defendant could avoid a finding of liability only by proving by a preponderance of the evidence that it would not have made the same decision even if it had not taken the plaintiff’s gender into account); Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding that term “employees” in Title VII must include former employees); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that an employee does not need to present direct evidence for reasonable jury to conclude that an employment practice was illuminated by a discriminatory motivating factor). To be sure, a significant exception to the Rehnquist Court’s broadening of Title VII rights was Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in Raytheon Co. v. Hernandez, 540 U.S. 44 (2003), where the Court sharply restricted a plaintiff’s ability to demonstrate, using the disparate impact proof structure, that an employer’s policy favored whites over non-whites. Our point, however, is to identify trends and parallels. For ADA Title I pro-employer cases, see Sutton v. United Airlines, 527 U.S. 471 (1999) (holding that in considering whether an individual’s impairment substantially limits one or more major life activities, courts should consider the individual in their mitigated state; moreover, under the “regarded as” prong of the definition of disability, an employer must view the individual as unable to work a class or range of jobs, not just one particular job); see also Murphy v. UPS, Inc., 527 U.S. 516 (same); Toyota Motor Manufacturing, Kentucky v. Williams, 534 U.S. 184 (2002) (holding that in considering the major life activity of performing manual tasks, courts should only consider activities that are of central importance to most people’s daily lives); Clackamas v. Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) (holding that clinic did not have requisite number of employees for ADA coverage because physicians were not employees); Albertson’s Inc. v. Kirkinburg, 527 U.S. 555 (1999) (holding that an employer can show that an individual is not qualified for a job because that individual cannot meet a legitimate qualification standard, even if the standard is not, in and of itself, essential to the job); US Airways v. Barnett, 535 U.S. 391 (2002) (holding that ADA’s reasonable accommodation requirement did not require employer to make exceptions to seniority system); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (holding that employer’s policy of refusing to rehire former employees who had violated its misconduct rules was a legitimate, non-disability-based reason); Board of Trustees v. University of Alabama v. Garrett, 531 U.S.
Various explanations have been proffered to explain this differential treatment. Some commentators aver a backlash against the disabled; others point to the vague definition of disability contained in the statute. Almost all scholars agree that as a civil rights statute, the ADA is viewed by courts differently than its predecessor, the Civil Rights Act of 1964 (Title VII). Indeed, nearly all legal commentators, even those supportive of disability-based employment rights, concur with this position. To quote one assessment: "the ADA is not an antidiscrimination law" for it mandates "firms to treat unequal people equally, thus discriminating in favor of the dis-

356 (2001) (holding that state employers were not subject to damage suits under Title I of the ADA based on Eleventh Amendment principles of sovereign immunity). The one Rehnquist Court ADA Title I case that was decided in favor of the plaintiff was Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) (holding that plaintiff who had claimed that she could not work in Social Security Disability Insurance application was not estopped from arguing she was disabled under ADA).


abled." This last, overarching issue is crucial for evaluating the ADA.

In this Article, we treat the convergence of the fifteenth anniversary of the ADA and the end of the Rehnquist Court (until recently, the only Supreme Court to adjudicate ADA issues) as an opportunity to demonstrate how that Court took a lead in treating disability discrimination cases differently than those based on race and sex. We show that far from treating equal people equally, there are circumstances in which the Court has treated similarly situated nondisabled and disabled people differently, to the disadvantage of the latter.

To illustrate this point, we set forth the Rehnquist Court's approach to paternalistic notions that "protect" female workers and workers with disabilities by contrasting the assumptions underlying and influencing the decisions in UAW v. Johnson Controls, Inc.11 with Chevron U.S.A., Inc. v. Echazabal.12 Although the cases are not exactly parallel—notably, the governing legal standards differ—examining their respective methodologies provides insight into the Rehnquist Court's view that disability-based exclusion from the workplace is fundamentally different from exclusion on the basis of race or sex.13 Put

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10 On January 10, 2006, the Roberts Court announced its first ADA decision. See United States v. Georgia, 126 S. Ct. 877, 882 (2006) (holding that "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity").
13 Viewing race and sex discrimination as different from discrimination on the basis of disability predates the ADA. This position first emerged most prominently in Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) (holding that state discrimination on the basis of disability receives rational basis review). For a discussion of Cleburne as demonstrating judicial hostility to disability-based discrimination claims, see Anita Silvers & Michael Ashley Stein, From Plessy (1896) and Goesart (1948) to Cleburne (1985) and Garrett (2001): A Chill Wind from the Past Blows Equal Protection Away, in Backlash Against the ADA: Reinterpret-
another way, by contrasting the Court's varied methodologies, we make concrete Ronald Dworkin's famous observation that judges interpret law so as to fit and justify their choices from among the existing legal landscape.  

This article proceeds in four parts. Part I briefly sets forth the history and importance of paternalism and the law. Next, Part II describes the jurisprudential shift in the treatment of women over the course of the Twentieth Century from a model of paternalism to one that acknowledges women's equality and autonomy, culminating in the Court's decision in *Johnson Controls*. Part III turns to the different course of disability discrimination, setting forth each of the rulings in the *Echazabal* litigation, and critiquing the Court's opinion. In Part IV, we conclude by arguing that the Rehnquist Court's failure to reject paternalistic notions of "protecting" people with disabilities (in this case, from themselves) is inconsistent with its race and sex antidiscrimination jurisprudence, and misapprehends the larger purposes of the ADA.

I. PATERNALISM AND THE LAW

A standard dictionary definition of "paternalism" is "the care or control of subordinates (as by a government or employer) in a fatherly manner." Historically, the phrase was used in reference to the government acting in the guise of one's actual father, to secure its citizens' best interests. Extensi...
sion of the concept to additional contexts such as that of employment, is a more contemporary, and increasingly derogatory, usage.

Feminist theory’s identification of paternalism as a tool of patriarchy explains this metamorphosis. Because paternalism involves a power relationship in which the more powerful decide for the less powerful, paternalistic policy-making stands suspect of controlling those whose moral and political right of self-determination it vacates, frequently for the good of the policymakers themselves.

Upholding paternalistic employment policies is not a new phenomenon in Supreme Court jurisprudence. More than a century ago, the Supreme Court proclaimed, infamously, in

undue solicitude on the part of the central government for the protection of the people and their interests, and interference therewith.”).


19 See, e.g., THE DICTIONARY OF BIAS-FREE USAGE: A GUIDE TO NONDISCRIMINATORY LANGUAGE 211 (Rosalie Maggio ed., 1991) (noting that the term “is offensive to many women and minorities”); ALAN & THERESA VON ALTENDORF, ISMS: A COMPRENDIUM OF CONCEPTS, DOCTRINES, TRAITS & BELIEFS 227 (1991) (stating that paternalism’s prevalence contravenes “the most fundamental freedom of the right to guide your own life . . . without being perpetually scolded like a child”).


21 See The Online Ethics Center, at http://www.onlineethics.org/glossary.html #anchP (last visited Mar. 6, 2006) (defining paternalism “as violating a moral rule of conduct toward someone or limiting that person’s self-determination . . . for what is perceived as being [in] that person’s own benefit”).

Lochner v. New York\textsuperscript{23} that the freedom to contract one's own labor was a central tenet of liberty in a free society.\textsuperscript{24} That autonomous right, even when firmly grounded in the Equal Protection Clause\textsuperscript{25} was, however, neither unlimited nor universal.\textsuperscript{26} In a series of decisions following \textit{Lochner}, the Court upheld various limitations on women's occupational freedom, all on the professed public policy ground of protecting women due to their frail constitutions. Three years after the \textit{Lochner} Court generally recognized freedom of contract, the Justices held in \textit{Muller v. Oregon}\textsuperscript{27} that restricting the hours of women's employment was a valid exercise of the state's police power.\textsuperscript{28} Without citing any evidence on the deleterious effects that working more than ten hours a day at a laundry would have, the Court stated that the restriction was warranted due to a "woman's physical structure and the performance of maternal functions" which "place her at a disadvantage" relative to man with whom "she is not an equal competitor."\textsuperscript{29} Since "healthy mothers are essential to vigorous offspring," the Court reasoned that women's physical well-being was "an object of public interest and care."\textsuperscript{30}

Similar restrictions on the hours women could work, the wages they could earn, and the occupations they could hold, were subsequently upheld in a number of other cases.\textsuperscript{31} Each

\begin{footnotes}
\item[23] 198 U.S. 45 (1905).
\item[24] Id. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected" under the Constitution.).
\item[25] U.S. CONSTIT. amend. XIV.
\item[26] The freedom to contract was certainly prevalent, however, because the \textit{Lochner} era Court invalidated some two hundred regulatory measures. \textit{See} Strauss, supra note 22, at 373.
\item[27] 208 U.S. 412 (1908).
\item[28] Id. at 422-23. The statute restricted the employment of any "female . . . in any mechanical establishment, or factory, or laundry for "more than ten hours" of any twenty-four hour cycle. \textit{Id.} at 416 (quoting 1903 Or. Laws 148).
\item[29] Id. at 421-22.
\item[30] Id. at 421.
\item[31] In \textit{Goesaert v. Cleary}, for instance, the Supreme Court upheld a Michigan statute requiring that bartenders be licensed but prohibiting the licensing of women as "barmaids," unless they were either the spouses or daughters of male liquor establishment owners. 335 U.S. 464 (1948), \textit{overruled} by Craig v. Boren, 429 U.S.
of these decisions relied on the broadly accepted, but factually unsubstantiated ground that women were relatively frail compared to men. As a result, the state had a legitimate interest both in protecting women’s health, and by extension, the safety of members of the public who came into contact with them. Hence, resting on apparently benign and paternalistic considerations, the Supreme Court endorsed the restriction of women’s workplace opportunities based on their biological difference, without real evidence that this difference rendered them exceptionally vulnerable.

190 (1976). This was because only the “oversight” of a male with special interest in both the woman’s welfare and the protection of bar room property, “assured through ownership of a bar by a barmaid’s husband or father,” could be trusted to “minimize[] hazards” otherwise confronting an unprotected barmaid. Id. at 466; see Chill Wind, supra note 13; Anita Silvers & Michael Ashley Stein, Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification, 35 U. MICH. J. L. REF. 81, 88-89 (2002) [hereinafter Standing at the Crossroads].


33 For example, in 1915 the Court upheld dual challenges to a California statute limiting the number of hours women could contract to work in Miller v. Wilson, 236 U.S. 373, 382 (1915) and in Bosley v. McLaughlin, 236 U.S. 385, 394-96 (1915). In the latter case, the Court reasoned that limiting the number of hours a woman could work as either a pharmacist or a student nurse was reasonable in light of “the extreme importance to the public that it should not be performed by those who are suffering from over-fatigue.” Id. at 392.

34 The analogy of a parallel social convention, between women and individuals with disabilities, because of perceived biological differences, is one that several of the authors have made previously as part of a continuing research agenda. See Chill Wind, supra note 13, at 221; Standing at the Crossroads, supra note 31.
II. THE TREND TOWARDS AUTONOMY—UAW v. JOHNSON CONTROLS, INC.

The framework for justifying women's exclusion from occupational opportunity on the basis of unfounded stereotypical assumptions was dramatically changed following passage of the Civil Rights Act of 1964.\textsuperscript{35} As elegantly explained in \textit{Weeks v. Southern Bell Telephone \\& Telegraph Co.}:\textsuperscript{36} "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with power to decide whether or not to take on unromantic tasks."\textsuperscript{37} Consequently, previously held notions that automatically assigned women to certain occupational roles, and precluded their participation in others based on stereotypes of their bodily deficiency, were replaced by a standard which placed a heavy burden upon employers seeking their exclusion.\textsuperscript{38}

The Court's developing jurisprudence on the standards necessary to exclude women from the workplace reached an apotheosis in 1991 with \textit{UAW v. Johnson Controls}.\textsuperscript{39} Defen-

\textsuperscript{35} Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e et seq. (2000)). Concurrent with the Court's recognition of women's right to autonomy in the workplace, was judicial acknowledgment that women were also entitled to make decisions about their own health and well-being. These rulings, whether based on constitutional, statutory, or common law principles, clearly rejected the notion that paternalism was a sufficient justification for intervening in personal decision making. This is particularly evident in women's reproductive rights cases, as well as in the general health care context. See \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965) (prohibiting state from interfering with individual's ability to use contraceptives); see also \textit{Cruzan v. Mo. Dep't of Health}, 497 U.S. 261 (1990) (holding that surrogate decision maker could refuse lifesaving treatment on behalf of patient if there was clear and convincing evidence of patient's wishes); \textit{Roe v. Wade}, 410 U.S. 959 (1973) (upholding woman's right to abortion); \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972).

\textsuperscript{36} 408 F.2d 228 (5th Cir. 1969).

\textsuperscript{37} Id. at 236.

\textsuperscript{38} See, e.g., \textit{Mississippi Univ. for Women v. Hogan}, 458 U.S. 718, 730 n.16 (1982) (observing that the sex-based differential treatment was merely a codification of empirically unsubstantiated social conventions); \textit{Frontiero v. Richardson}, 411 U.S. 677, 686 (1973) (holding as a general empirically verified proposition that one's sex was frequently unrelated "to ability to perform or contribute to society").

dant corporation was engaged in the manufacture of batteries, a central process of which exposed its workers to lead. In 1982, Johnson Controls enacted a policy excluding all women "capable of bearing children," which it defined as every female employee "except those whose inability to bear children is medically documented," from any jobs which exposed them to lead. Further, the policy defined an unacceptable work station as one below the critical level established by the Occupation Safety and Health Administration (OSHA) for safe reproduction by either sex. A class action on behalf of "all past, present and future production and maintenance employees" was filed and successfully certified.

At trial, the parties did not dispute that excessive lead exposure could result in "significant harm to persons." They differed, however, on whether the lead exposure at the Johnson Controls plant actually endangered fetuses, and if so, whether this risk was confined only to women workers. Each side proffered expert testimony, which also did not reach a consensus. The district court granted summary judgment

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40 Id. at 190.
41 Id. at 192 (citation omitted). This policy departed from an earlier one in which fertile women wanting to work in jobs that brought them in proximity to lead were required to sign a statement indicating they had been apprised of the attendant risks. Id. at 191.
42 Id. Specifically, thirty micrograms of lead per deciliter of blood or thirty micrograms of lead per cubic meter of air. See id. at 191-92 (citing 29 C.F.R. § 1910.1025 (1990)).
43 Id. at 192 (citation omitted). The class composition, which included both men and women, was arrived at by stipulation. Id. Among the named class representatives were a woman who had chosen sterilization as a means of retaining her position, a post-menopausal divorcee who had been transferred from her position to a lower paying one where she would not be exposed to lead, and a male employee who had been denied a leave of absence in order to lower his lead level prior to fathering children. See UAW v. Johnson Controls, Inc., 680 F. Supp. 309 (E.D. Wis. 1988) [hereinafter Johnson Controls District Court], aff'd 886 F.2d 871 (7th Cir. 1989), rev'd 499 U.S. 187 (1991).
44 Johnson Controls District Court, 680 F. Supp. at 310.
45 Id.
46 Id. at 315. Dr. Whortin testified on behalf of the class that the OSHA standard "should generally protect adults of either sex from significant adverse effects," but admitted that high exposure could endanger a fetus. Id. at 311 (cita-
for Johnson Controls, holding that although medical evidence on the effect of lead exposure on fetuses varied in relation to the level of exposure,47 "concern for society and future generations" impelled it to uphold Johnson Controls' fetal protection policy.48 Moreover, because "[t]here is a business necessity to protect fetuses,"49 the court held that Johnson Controls had sufficiently carried its burden of proof to invoke the business necessity defense.50 Consequently, the district court declined to undertake a Bona Fide Occupational Qualification (BFOQ) analysis.51

Sitting en banc,52 the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment on three grounds.53 First, the appellate court held that the business necessity defense (rather than BFOQ) was the proper one under which to evaluate defendant's fetal-protection policy.54 In so ruling, it disagreed with the Fourth and the Eleventh Circuits, and created an inter-circuit conflict.55 Applying that standard, it held that Johnson Controls was entitled to sum-

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47 Id. at 315.
48 Id. at 316.
49 Id.
50 Id. at 317.
51 Id.
52 As a result, the interim three judge panel decision was vitiated. See generally Michael Ashley Stein, Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review, 54 U. Pitt. L. Rev. 805 (1993).
54 Johnson Controls Seventh Circuit, 886 F. 2d at 885.
55 See Hayes v. Shelby Mem'l Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).
mary judgment. The court held that even if a BFOQ standard was applied, defendant would still be entitled to summary judgment. Id. at 888-89.

57 Id. at 885.
58 Id. at 889.
60 Id. at 197.
61 Id.
62 Id. at 198.
63 Id.
64 Id. at 199.
65 Id. at 198.
66 Id. at 199.
exclusionary policy, for Title VII required a BFOQ, rather than business necessity, analysis in disparate treatment cases.\textsuperscript{67} Under a BFOQ analysis, discrimination on the basis of sex because of safety concerns was only allowable in “narrow circumstances.”\textsuperscript{68} To pass judicial scrutiny, an employer had first to demonstrate that its policy was prompted by a “high correlation between sex and ability to perform job functions,” one in which “sex or pregnancy actually interferes with the employee’s ability to perform the job.”\textsuperscript{69} In the circumstance of battery manufacturing fertile women were clearly as functionally capable as infertile ones, for at trial Johnson Controls had failed to demonstrate any “factual basis for believing” otherwise.\textsuperscript{70} Moreover, the “sparse record” established that the company was concerned with an unknown number but apparently “small minority of women.”\textsuperscript{71} What’s more, for the eight pregnancies previously reported at the company, no evidence was given that any of the babies had had their health affected.\textsuperscript{72}

Thus, rather than the permissible altruism of wanting to protect the health of unborn children, the Court reasoned that the exclusionary fetal-protection policy was driven by self-serving motivations, especially evading potential tort liability. Thus, the policy bore a hallmark of paternalism, namely, serving the policymakers’ interest while purporting to protect the interests of those subordinated by the policy. Further, this motivation was not justifiable.\textsuperscript{73} Allowing a defendant to evade an antidiscrimination law “by resorting to an exclusionary policy” would negate both the goal and the efficacy of those measures.\textsuperscript{74} Nor could “the extra cost of employ-

\textsuperscript{67} Id. at 200.
\textsuperscript{68} Id. at 202.
\textsuperscript{69} Id. at 202, 204.
\textsuperscript{70} Id. at 207.
\textsuperscript{71} Id. at 206.
\textsuperscript{72} Id. at 207. For an assessment of empirical studies relating to fetal exposure, see generally ROBERT H. BLANK, FETAL PROTECTION IN THE WORKPLACE: WOMEN’S RIGHTS, BUSINESS INTEREST, AND THE UNBORN (1993).
\textsuperscript{73} See Johnson Controls, 499 U.S. at 208-10.
\textsuperscript{74} Id. at 210.
ing" women constitute an affirmative defense under civil rights statutes, for after considering the issue at length, Congress had decided to prohibit discrimination "despite the social costs associated therewith."75

Moreover, Justice Blackmun reasoned, in each of the few cases where this strict standard was met (including the Court's ruling in Dothard v. Rawlinson,76 as well as a handful of circuit court opinions involving pregnancy exclusions),77 the exclusion of women was justified only because of safety risks to third parties.78 By contrast, "[t]he unconceived fetuses of Johnson Controls' female employees" were not "third parties whose safety is essential to the business of battery manufacturing."79 Noting how women had historically been excluded from workplace opportunity under the guise of altruistic concern for their well-being,80 the Court emphasized that it was the "individual woman's decision to weigh and accept the risks of employment."81

Thus, the ruling in Johnson Controls firmly established that to justify excluding women from workplace opportunities because of their sex, employers had first to prove such exclusions actually prevented women from harming third parties. When the potential hazards were to their own well-being, women retained the autonomy of choosing whether to undergo those risks unless employers could also demonstrate that the hazards interfered with job performance.82

75 Id.
77 Johnson Controls, 499 U.S. at 202.
78 Id.
79 Id. at 203.
80 Id. at 211; see supra notes 73-79 and accompanying text.
81 Johnson Controls, 499 U.S. at 202 (citing Dothard, 433 U.S. at 335).
Like women, people with disabilities have a history of being subjected to overprotective laws and workplace policies based on notions of biological incapability. Congress recognized this, stating in the “Findings and Purposes” section of the ADA that individuals with disabilities continually encounter the discriminatory effects of “overprotective rules and policies,” and have been faced with restrictions and limitations “based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” The first (and only) Rehnquist Court case to deal with the ADA and paternalism was Chevron U.S.A., Inc. v. Echazabal.

In Echazabal, oil refinery worker Mario Echazabal was employed by independent contractors of Chevron from 1972 to 1996. During that period he twice applied directly to Chevron for a job, a prerequisite of which was to pass a physical examination. Both examinations revealed his liver to have abnormalities, eventually diagnosed as a Hepatitis C infection. Each time, Chevron’s doctors asserted that Echazabal’s liver could be harmed through continued exposure to toxins at the refinery, and Chevron subsequently withdrew

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83 See, e.g. ALAN GARTNER & TOM JOE, IMAGES OF THE DISABLED DISABLING IMAGES (1987) (demonstrating how the disabled are characterized as feeble or incapable, and are often objectified); PAUL LONGMORE, WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY 1131-148 (2003) (describing images of pity that Hollywood and other mass media disseminate about people with disabilities); Feldblum, supra note 6, at 165 (asserting that the general public’s view is that “disabled people lack value and are to be pitied”).
85 Id. at § 12101(a)(7).
87 Id. at 76.
88 Id. This pre-condition to employment, required of all job applicants, is authorized under the ADA. 42 U.S.C. § 12112 (2000); see generally Chai R. Feldblum, Medical Examinations and Inquiries Under the Americans With Disabilities Act: A View From the Inside, 64 TEMP. L. REV. 521 (1991).
89 Echazabal, 536 U.S. at 76.
its offer of employment. 90 After the second instance, Chevron directed the independent contractor employing Echazabal to either reassign him to a job where he would not be exposed to toxic chemicals or to make him redundant. 91 The contractor laid off Echazabal, who filed suit against Chevron in state court, alleging that the refusal to either hire him directly or retain him through the contractor constituted disability discrimination under the ADA. 92

Chevron removed the suit to federal court and defended its action under an EEOC regulation interpreting the ADA's defense of employees engendering a "direct threat." 93 In pertinent part, the regulation stated that a direct threat involved "a significant risk of substantial harm to the health or safety of the individual or others," the determination of which "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions" of their employment. 94

At trial, expert medical witnesses disputed whether Echazabal was in fact exceptionally vulnerable to toxins at Chevron's plant. 95 Echazabal's doctors testified that Chevron's assertion about Echazabal's posing a risk to himself was unfounded, 96 and that working at the refinery placed

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90 Id.
91 Id.
92 Id. at 76-77.
93 Id. at 77; 42 U.S.C. § 12113(b) (2000).
94 29 C.F.R. § 1630.2(r) (2006). Under this regulation, this decision had to be based upon "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and specified four factors to be considered: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." Id.
95 Joint Appendix of Petitioner and Respondent to Chevron U.S.A., Inc. v. Echazabal (on file with authors) (hereinafter Joint Appendix).
96 Testifying on behalf of Echazabal, Drs. Fedoruk and Gitnick countered Chevron's assertion that he would pose a risk to himself as unfounded for three main reasons. Id. at 99-116. First, because as a matter of general pathology, chronic cases of Hepatitis C of the type with which Echazabal presented could take decades of exposure to toxins before impairing liver function. Id. at 101, 102, 112-114. Second, that Echazabal's albumin blood levels, "the best and only true
him at no greater risk than any other Chevron employees. In opposition, Chevron presented expert medical testimony that Echazabal had "abnormal liver function tests" consistent with chronic Hepatitis C, as a result of which he had a "greatly decreased capacity to process toxins," and therefore ought not to be allowed to work in the refinery. None of these witnesses, however, was confident that Echazabal would be harmed through continued employment. Nevertheless, the district court granted summary judgment for Chevron, holding that no genuine issue of material fact had been raised as to whether the company had acted reasonably in relying upon its own doctor's assessments, regardless of their accuracy.

On appeal to the Ninth Circuit, the court had the parties brief a question not previously raised, namely whether the EEOC regulation, which extended the definition of direct threat to encompass direct threats to one's own self, was permissible rulemaking under the ADA. Holding that the EEOC had exceeded its authority, the Ninth Circuit reversed the grant of summary judgment. As Title I specified threats only to "other individuals in the workplace," the Ninth Circuit reasoned that the defense could not be applied to dis-

indicators of liver function," demonstrated that his "liver is functioning properly" so that "Echazabal is in no greater risk of injuring himself and specifically his liver [sic] by working in the refinery than other employee[s]." Id. at 113, 115. Third, that Chevron's own records indicated that none of the toxins alleged to endanger Echazabal were present at a level sufficient to endanger any of its refinery workers. Id. at 102-110

97 id. at 109.
98 Id. at 41-44, 157-58, 172-73, 212 (testimony of Drs. Baily, McGill, Bridge, and Tang).
99 For example, in cross-examination, Dr. Tang could not state with certainty that there was a higher than one percent chance of Echazabal being so injured, and that if such harm ensued, whether it would manifest in hours, months, or years. Id. at 83-88.
102 Id. at 1072. It also vacated part of the judgment, and remanded the case back to the district court for proceedings consistent with its opinion. Id. at 1073.
abled workers themselves. Such an interpretation conflicted with the legislative history, which expressly rejected the use of paternalism as a means for excluding individuals with disabilities from the workplace. It also diverged from the general policy, as demonstrated in Johnson Controls, of interpreting antidiscrimination provisions “to prohibit paternalistic employment” practices by allowing the protected individuals to choose for themselves whether to undertake risk.

The Court of Appeals also rejected Chevron's argument that Echazabal was not “otherwise qualified” under the statute, ruling that an ability to perform the job without risking one's health was not an essential job function. To hold otherwise would allow Chevron to include any functions it chose in the job description, and thereby render “meaningless” the term “essential functions.” Finally, the court noted that Chevron’s apprehension about potential tort liability reflected a concern that hiring a worker with a disability would prove more costly than hiring one without a disability. Even if that were true, however, “[t]he extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individu-

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103 Id. at 1067.
104 Id. at 1067-68. The court quoted at length the explanation given by Senator Kennedy, one of the ADA's co-sponsors:

It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. . . . that is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician. 

Echazabal Ninth Circuit, 226 F.3d at 1067-68 (quoting 136 CONG. REC. S9684-03, at S9697 (1990)).

106 Id. at 1068-69.
106 See id. at 1070.
107 Id. at 1071.
108 Id. at 1070.
109 This has never empirically been proven to be the case. In fact, existing studies indicate the opposite conclusion. Michael Ashley Stein, The Law and Economics of Disability Accommodations, 53 DUKE L.J. 79, 123-141 (2003).
Because the Ninth Circuit's interpretation of the EEOC regulation was in direct conflict with that of the Eleventh Circuit (and also opposed the understanding of the Seventh Circuit), the Supreme Court granted certiorari.

Writing for a unanimous Supreme Court which reversed and remanded the case to the Ninth Circuit, Justice Souter reasoned that the ADA's exclusions of job-related direct threats were "consistent with business necessity" and created "spacious defensive categories" that left the EEOC "a good deal of discretion" for interpreting the statute. Additionally, Congress did not explicitly exclude this interpretation, a significant omission in light of the EEOC's having previously interpreted the same provision under the Rehabilitation Act to include threats to self. Further, Echazabal's argument failed because "there is no apparent stopping point" to its implications. Accordingly, the EEOC's interpretation was a valid one under the doctrine enunciated in another action involving the defendant, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.

110 Echazabal Ninth Circuit, 226 F.3d at 1070.
111 See Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (1996) (upholding the dismissal of an epileptic for fear that he would have a seizure and fall into rolling machinery).
112 Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (1999) (permitting, on grounds of self-hazard, the dismissal of plaintiff with a degenerative hand disease who worked in close proximity to heavy machinery).
113 534 U.S. 991 (2001). The Court did not list the questions upon which it granted certiorari. Id.
115 Echazabal, 536 U.S. at 78.
117 Echazabal, 536 U.S. at 83. Thus, "[i]f Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?" Id. at 84.
118 467 U.S. 837 (1984) (articulating the standards for deference to agency guidelines in the face of unclear statutes).
The Court also reasoned that Chevron's motivations were reasonable: "it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating" administrative agency guidelines.\(^\text{119}\) This motivation was especially pressing in regard to OSHA, which fulfills its mandate to assure all workers "safe and healthful working conditions"\(^\text{120}\) by requiring employers to provide workplaces that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm".\(^\text{121}\) OSHA concerns placed Chevron "at loggerheads" with Echazabal's interpretation of the ADA,\(^\text{122}\) so Chevron's decision to keep its workplace free of the kind of worker who could be harmed seemed reasonable.\(^\text{123}\)

Thus, the Court in Echazabal held the ADA's direct threat defense applicable to workers when endangered by their own job performance. It also differentiated this exclusion of workers with disabilities from the prohibited form that had banned women in Johnson Controls.\(^\text{124}\) The Court, however, declined to articulate under what burden employers ought to be placed to properly assert the affirmative defense. It also avoided the factual question of whether Mario Echazabal had actually endangered himself.

Unlike Johnson Controls where the Court directly addressed the paternalism issue,\(^\text{125}\) it sidestepped it in

\(^{119}\) Echazabal, 536 U.S. at 84.

\(^{120}\) Id. (citing 29 U.S.C. § 651(b) (2000)).

\(^{121}\) Id. (citing 29 U.S.C. § 654(a)(1) (2000)).

\(^{122}\) Id. at 85.

\(^{123}\) In a pair of footnotes, the Court stated that it did not consider the issue of whether Echazabal was himself a qualified individual with a disability such that he could perform essential job functions. That question would only arise if the Ninth Circuit, on remand, concluded that Chevron's decision to exclude Echazabal "was not based on the sort of individualized medical enquiry required" under the ADA. Id. at 76 n.1. Similarly, the Court declined to "try to describe how acutely an employee must exhibit a disqualifying condition before an employer may exclude him from the class of the generally qualified." Id. at 87 n.6.

\(^{124}\) See id. at 86 n.5.

\(^{125}\) Broadly speaking, Echazabal can be criticized on several fronts. As a matter of statutory construction, the Court's holding is curious. The Court held that the text of the ADA was not clear on whether the direct threat provision could
Echazabal, claiming that:

[T]he EEOC's resolution [cannot] be called unreasonable as allowing the kind of workplace paternalism the ADA was meant to outlaw. The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. This sort of sham protection is just what the regulation disallows, by demanding a particularized enquiry into the harms an employee would probably face.126

But the ADA was intended to do more than provide just an individualized inquiry.127 Rather, the overreaching goal of this civil rights statute was to prevent discrimination against peo-

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127 Even on this occasion, Echazabal's doctors gave a very different account of the risks inherent given his liver condition. Echazabal Ninth Circuit, 336 F.3d at 1032 (finding level of toxins present placed Echazabal at no greater risk of injury than other workers).
ple with disabilities. This aspiration included protection against workplace policies that impose employers’ narrow ideas of their employees’ good and thereby deprive competent disabled individuals of employment opportunities.\footnote{\texttt{42 U.S.C. § 12101(5)} (2000).}

That competent citizens should be free to determine and pursue their own good, as long as doing so does not place others in harm’s way, is a keystone of liberal democracy.\footnote{\texttt{John Stuart Mill famously urged:}}

There is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode."\footnote{\texttt{JOHN STUART MILL, ON LIBERTY 64 (1891). Mill’s commitment to pleasure as the good is in his book, \textit{Utilitarianism}:}}

Moreover, respect for an individual’s decisions regarding his or her own health or well being has been a fundamental right recognized in American jurisprudence. To quote Justice Cardozo’s seminal remark, “\texttt{[E]very human being of adult years and sound mind has a right to determine what should be done with his own body.”}

\footnote{\texttt{JOHN STUART MILL, UTILITARIANISM 8 (1895). The discussion continues with the argument that some pleasures are qualitatively superior to others: “It is quite compatible with the principle of utility to recognize the fact, that some kinds of pleasure are more desirable and more valuable than others. \textit{Id.} at 9.}}\footnote{\texttt{Schloendorff v. Society of NY Hospital, 105 N.E. 92, 93 (NY 1914). See Peter H. Schuck, \textit{Rethinking Informed Consent}, 103 YALE L.J. 899 (1994).}}
To understand how far the Court in *Echazabal* distanced disabled people beyond the scope of this core democratic principle, we may once more compare the circumstance of Mario Echazabal with that of the plaintiffs in *Johnson Controls*, this time to ask about the ways in which, although similarly situated, they were inappropriately treated by the Court.

**IV. DISABILITY TERRORS AND THE RETREAT FROM AUTONOMY**

At first, similarities in the situations of the *Johnson Controls* plaintiffs and Mario Echazabal stand out. At the time the decision to exclude them from working was made, each was biologically capable of doing the job despite having the potential to become not so. As the *Johnson Controls*, Court observed: "Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else."132

Similarly, Echazabal worked for a contractor at the Chevron refinery, in the atmosphere supposedly toxic to him, for more than twenty years with no discernible harm to himself or his productivity, including a half decade after the initial discovery of his infection.133 There further seems to be no evidence related to his being Hepatitis C positive to prove that working would have been more damaging to Echazabal than taking Tylenol. The history of concern about Hepatitis C positive individuals being at risk from Tylenol is instructive here. Overdoses of Tylenol, or acetaminophen (the generic name), can cause liver damage, and on the basis of extrapolation from this fact, people who showed signs of Hepatitis C once were warned against taking acetaminophen. Subsequently, longitudinal studies of this group of subjects showed that even those who already have sustained liver damage do not appear to be at increased risk of further damage.134

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132 *Johnson Controls*, 499 U.S. at 206.


134 See DAVID H. WINSTON & DONNA C. WINSTON, MANAGEMENT OF HEPATITIS
As noted in an *amicus* brief filed on behalf of Echazabal, hepatotoxic chemicals such as those present at the Chevron refinery cause liver damage only if present in toxic amounts, in which case exposure threatens liver damage in all workers equally.\(^{135}\) Here, another similarity to the *Johnson Controls*, plaintiffs is revealed. The *Johnson Controls* Court found that the exclusionary policy was not facially neutral because it did "not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system."\(^{136}\) The medical evidence that refinery toxins are damaging to people who test negative and positive to Hepatitis C resembles the medical evidence that battery chemicals are damaging to male and female reproductive capabilities.\(^{137}\) Yet in *Echazabal* the Court did not take notice of Chevron's decision to prohibit disabled workers from risking liver function for the opportunity of well-compensated refinery work while permitting nondisabled workers to take similar risks for access to this opportunity.

Despite the potential to focus on these similarities, the *Echazabal* Court turned to dissimilarities between the cases, namely, to the question of who besides the plaintiff stood to be harmed by his presence in the workplace. In *Johnson Controls* the others at risk were believed to be the unborn, but in *Echazabal*, the class consisted of present and future workers, including disabled workers.

Both sides stipulated in *Johnson Controls* that "there was a substantial risk to a fetus from lead exposure."\(^{138}\) Therefore,

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\(^{135}\) See generally APHA Amicus Brief, *supra* note 132.

\(^{136}\) *Johnson Controls*, 499 U.S. at 188.

\(^{137}\) Compare *Joint Appendix, supra* note 95, at 109 (asserting that working at refinery placed Echazabal at no greater risk than other workers), *with Johnson Controls District Court*, 680 F. Supp. at 310 (concluding that lead exposure could result in significant harm to males and females).

\(^{138}\) *Johnson Controls*, 449 U.S. at 194.
fetuses were the potential recipients of harm, and the goal of the employer’s policy was variously described as “preventing the health hazard to the fetus” or “protecting the unborn” and even as protecting “unconceived children.” Indeed, the Court took safeguarding the unconceived to be the company’s main articulated justification for the policy. The Court did not understand risks to the unconceived to fall under the concept of risks to others, especially others essential to the business of battery-making.

The company was prevented from invoking any burden the possible limitations of a pregnant co-worker might pose for other employees by the terms of the 1978 Pregnancy Discrimination Act. Nevertheless, the company might have referenced parenthood by constructing a harm-to-fellow workers defense and arguing the difficulties of raising children whose fetal development has been damaged by exposure to lead. The argument would be that these children would suffer from greater than normal illness, and less than normal capability, needing extensive services from family, medical and school systems. Frequent absences might be expected of mothers of such children, creating hardships for co-workers.

That neither the Johnson Controls Court nor the defendant in this case cited potential harm to co-workers, despite the possibility of such, differentiates Johnson Controls from Echazabal. The Echazabal Court endorsed Chevron’s reasonable wish “to avoid time lost to sickness, [and] excessive turnover from medical retirement or death.” The Court reasoned that even if Echazabal agreed not to hold the refinery liable for any liver-related illness he might develop, such illness still would impose an employee absence and turn-over costs on the employer. Yet, nothing in Echazabal’s previous years of work performance, in the same job at the same site,

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139 Id. at 194-95, 198; see also Johnson Controls District Court, 680 F. Supp. at 316.
141 Echazabal, 536 U.S. at 84.
142 Id.
demonstrated unusual sick time use, nor was there evidence in his prior work performance that hiring him courted the other problems. Had his work record raised such questions, it is unlikely that Chevron would have extended two offers of regular employment to him.

From this perspective, then, the Court weighed the similar possibility of burdens to co-workers differently. The prospective harms the Court discounted in Johnson Controls are similarly speculative to the harms the Court took as dispositive in Echazabal. Yet the Justices treated permitting Echazabal to judge the risk of working at Chevron for himself as a great threat to other people.

There is another way that Johnson Controls and Echazabal are inapposite. In Johnson Controls, the majority dismissed the importance and possibility of tort liability in the BFOQ inquiry. In Echazabal, however, the Court viewed fear of state tort suits as a reason Chevron's policy was reasonable and legitimate. This demonstrates at least two ways that the Court views disability-based paternalism differently from that based on gender. First, as noted by Justice White in his concur­rence, the majority’s view in Johnson Controls seems to rest on the notion that women could waive tort liability on behalf of their unborn children. Although, as a matter of tort law, Justice White shows this to be wrong, assuming its correctness reveals that the Court believes parents can waive tort liability on behalf of their unborn children but competent individuals with disabilities, like Mario Echazabal, cannot do the same for themselves. Second, by making tort costs irrelevant in

143 See Johnson Controls, 499 U.S. at 208 (“If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.”).
144 See Chevron, 536 U.S. at 84.
145 See Johnson Controls, 299 U.S. at 213 (White, J., concurring).
146 Id. (“[A]lthough warnings may preclude claims by injured employees, they will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents’ negligence will not be imputed to the children.”).
Johnson Controls but controlling in Echazabal, the Court gives credence to the idea that disability discrimination is acceptable for economic reasons, a phenomenon commentators have referred to as “rational discrimination.”

During the Echazabal argument, Justice Breyer illustrated another dimension of the reluctance to prohibit paternalistic treatment of people with disabilities. He asked whether allowing disabled people the autonomy to decide what risks to take would extend to known suicidal workers seeking the means to die in their workplace. But nothing about Echazabal suggests that a rule protecting his autonomy as a competent citizen would have nearly so wide a scope. A pre-employment medical exam that uncovered suicidal illness in a prospective worker would indicate as well the individual’s deficit of decisional capacity. Unlike Echazabal, a suicidal patient is a general threat to himself, at risk wherever he is and not just in a specific workplace. In virtue of being suicidal, such a patient does not have decisional capacity and therefore is not competent to exercise autonomy in assuming risks. There is no record that suggests the ADA could preclude courts from judging a suicidal individual to be incompetent and therefore not suited to assuming risks to himself. On examination, therefore, Echazabal’s exercising his own autonomy, weighing risks to himself against benefits for himself in deciding whether to take the Chevron job, does not put suicidal or other incompetent people in harm’s way.

Also during argument in Echazabal, Justice Kennedy worried about whether requiring employers to give disabled workers access to environments possibly harmful to them, but safe for species-typical persons, might sap hard-won protective attitudes. Here again, Echazabal’s exercising autonomy to pursue a benefit despite its risk is cast as prospectively harmful to disabled people generally. But the view that employers’ concern

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149 Id.
about the safety of disabled people (or about safety in general) will be eroded unless disabled people are banned from taking risks seems to applaud the kind of workplace paternalism the ADA was meant to outlaw. The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. Surely no even break is afforded when workers with disabilities who seek equal opportunity to work must abandon being autonomous simply to assuage employers’ concern about their safety. Being concerned for employees’ safety is the right thing for employers to do, both for nondisabled and disabled groups, but deprivation of autonomy, and the concomitant ability to seek one’s own good as one sees it, seems a high price to extract from just the latter group to induce employers to do the right thing.

CONCLUSION

The Rehnquist Court has taken the lead amongst the federal courts in treating disability discrimination claims as being of a fundamentally different stripe than those on the basis of race or gender. Nowhere is this more apparent than in the case of paternalism, which is expressly disallowed for gender but allowed for disability. As a result of this case, the employer was permitted to decide whether Mario Echazabal could risk working near toxic chemicals for the sake of an excellent income and benefits.

Mario Echazabal, a person who met the legal standard of decisional capacity but who had a disability, was not permitted to decide his own good. After losing his job at the Chevron refinery in 1996, Echazabal finally found part-time work in late 1998 as a school bus driver. His beginning pay was $7.00 an hour without benefits. His contracted job at the refinery paid an average of $11.50 with overtime and benefits, and the position to which he aspired, being employed by Chevron itself,

150 See supra note 104 and accompanying text (Ninth Circuit discussing the legislative history of the ADA).
would have averaged $17.29 an hour plus overtime and benefits.\textsuperscript{151}

The Court compromised Echazabal’s freedom to decide risks and benefits for himself, which is the very essence of being free. That the Court denied this was a case about paternalism,\textsuperscript{152} combined with the fact that this was a unanimous decision, portends ill for the disability antidiscrimination project. The Court’s failure to recognize the lines it is drawing and the effects of its decisions will be particularly harmful to workers with disabilities. Not recognizing paternalistic employment policies as discriminatory when disabled workers alone are subjected to them encourages stereotyping disabled people as incompetent, incapable of deciding their good for themselves, and embeds the idea that they are inauthentic workers.\textsuperscript{153} Encouraging such policies also invites the adoption of exclusionary workplace norms.\textsuperscript{154} This is a far cry from what Congress clearly hoped the ADA would accomplish.


From that point on, the story becomes even more tragic. See Peter Blanck, \textit{Justice for All? Stories About the Americans with Disabilities and Their Civil Rights}, 8 J. GENDER RACE & JUST., 1, 14 (2004) ("For Mario, the litigation was upsetting and unsettling. He was deprived of employment in his chosen trade, a trade he performed successfully for more than twenty years, because of unfounded fears about his health and potential liability. Mario passed away in January 2004.").

\textsuperscript{152} See \textit{Echazabal}, 536 U.S. at 75.

\textsuperscript{153} See generally Stein, \textit{supra} note 8.

\textsuperscript{154} See Michael Ashley Stein & Michael E. Waterstone, \textit{Disability, Disparate Impact, and Class Actions}, 56 DUKE L.J. \textit{___} (forthcoming 2006) (manuscript on file with authors).