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## THE SUPREME COURT, THE AMERICANS WITH DISABILITIES ACT, AND RATIONAL DISCRIMINATION

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Disability rights advocates, it is fair to say, have been highly critical of the current Supreme Court. And they have had every reason to be. From the 1999 *Sutton* trilogy<sup>1</sup> (in which the Court adopted a quite narrow understanding of the class protected by the Americans with Disabilities Act (“ADA”)), to the 2001 *Garrett* decision<sup>2</sup> (which held that the ADA’s employment title was not valid legislation under section 5 of the Fourteenth Amendment), to the 2001-2002 “Disabilities Act Term”<sup>3</sup> (in which ADA plaintiffs lost four cases by a combined vote of 34-2),<sup>4</sup> the Court has taken a decidedly restrictive view of the proper scope of federal disability discrimination law.

The Court’s performance in ADA cases has triggered a forceful critique from disability rights lawyers, as well as those in the academy who favor expansive readings of disability discrimination law. The basic line of argument is that the Court, in a sense, “doesn’t get” that disability rights are civil rights.<sup>5</sup> Trapped in a view of people with disabilities as proper objects of

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1. See generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

2. *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001).

3. The label comes from Justice O’Connor. See Charles Lane, *O’Connor Criticizes Disabilities Law as Too Vague*, WASH. POST, Mar. 15, 2002, at A2.

4. See *Barnes v. Gorman*, 536 U.S. 181 (2002) (9-0 decision); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (9-0 decision); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (7-2 decision); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (9-0 decision).

5. Arlene Mayerson & Matthew Diller, *The Supreme Court’s Nearsighted View of the ADA, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS* 125 (Leslie Pickering Francis et al. eds., 2000). For good recent examples of this view,

pity or charity, the Court sees the ADA not as a civil rights law but as a means of providing largesse to “unfortunates” with disabilities.<sup>6</sup> That view, disability rights advocates say, has led the Court to limit the ADA in ways it would not limit any other civil rights law.<sup>7</sup>

In previous work, I have agreed with some aspects of this critique and disagreed with others.<sup>8</sup> But what is notable about the critique is that it focuses almost entirely on the wrong cases. Most of the critical energy focuses on cases involving the ADA’s definition of “disability”—cases that interpret a statutory provision that has no analog whatsoever in prior civil rights statutes outside of the disability discrimination context.<sup>9</sup> A truer test of the theory that the Court does not understand disability rights to be civil rights would involve ADA cases that raise issues that are not unique to disability discrimination law but instead have analogs in civil rights laws involving race and gender discrimination. If the Court reaches different results or employs a different analysis in the ADA context, that would be strong evidence in support of the critics’ theory.

Although the critics have not focused much attention on them, however, there *are* such cases. In *Albertson’s, Inc. v. Kirkingburg*<sup>10</sup> and *Chevron U.S.A., Inc. v. Echazabal*,<sup>11</sup> the Court considered issues with clear parallels in earlier race and gender discrimination law—in *Chevron*, almost a precise parallel.<sup>12</sup> In both cases, the Court ruled (with a surprising unanimity) for the defendant, even though longstanding principles applied under Title VII would seem to have dictated a ruling for the plaintiff.<sup>13</sup>

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see MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS 79-83 (2003); BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003). I give further examples in Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 930-52 (2003) [hereinafter Bagenstos, *ADA as Welfare Reform*].

6. Mayerson & Diller, *supra* note 5, at 124.

7. See, e.g., *id.* at 125.

8. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 402 (2000) (arguing that the bottom-line holding in *Sutton*, as well as one of its key legal rulings, is consistent with a civil rights view of disability rights law, but arguing that broader language in *Sutton*, as well as the holding and reasoning in *Murphy*, is not consistent with such a view). See generally Bagenstos, *ADA as Welfare Reform*, *supra* note 5 (arguing that many of the Court’s decisions are most consistent with a theory that the ADA is a means of moving people with disabilities off of welfare and into work rather than a general guarantee of civil rights, but arguing that this welfare-reform theory drew significantly on aspects of disability rights ideology).

9. See, e.g., RUTH O’BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 192-205 (2001); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model of Disability*, in BACKLASH AGAINST THE ADA, *supra* note 5, at 62, 67-70; Mayerson & Diller, *supra* note 5, at 124-25; Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, in BACKLASH AGAINST THE ADA, *supra* note 5, *passim*; Kay Schriener & Richard K. Scotch, *The ADA and the Meaning of Disability*, in BACKLASH AGAINST THE ADA, *supra* note 5, at 164, 171-76; Anita Silvers, *The Unprotected: Constructing Disability in the Context of Anti-discrimination Law*, in AMERICANS WITH DISABILITIES, *supra* note 5, *passim*; Bonnie Poitras Tucker, *The Supreme Court’s Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 *passim* (2000).

10. 527 U.S. 555 (1999).

11. 536 U.S. 73 (2002).

12. See *id.*

13. See *infra* Part I.

In particular, in both *Albertson's* and *Chevron*, the Court seemed to find it determinative that the defendant employers' acts of discrimination rationally served the employers' bottom-line interests.<sup>14</sup> In *Albertson's*, the employer engaged in conduct that, when unpacked, bears a striking resemblance to statistical discrimination—excluding an entire class of people from opportunities because members of that class are believed to be, on average, less net productive than other workers.<sup>15</sup> In *Chevron*, the employer sought to avoid the liability and other costs it might face by employing a worker who appeared to pose a hazard to himself on the job.<sup>16</sup> Although statistical discrimination—even where rational—is generally illegal under Title VII law, and the Supreme Court has specifically held that paternalistic discrimination is barred by Title VII as well,<sup>17</sup> *Albertson's* and *Chevron* found both forms of discrimination permissible under the ADA.<sup>18</sup>

Surprisingly, there has been little critical commentary on *Chevron* and *Albertson's*.<sup>19</sup> But I hope to show that those two cases provide a window into some of the key premises the Justices take for granted in addressing disability rights claims in particular and civil rights claims more generally. In particular, the Court's focus on the rationality of the employer's conduct in these cases appears to mark a sharp break from earlier antidiscrimination law, in which rationality was no defense to a claim of disparate treatment. There are two related ways of reading this development: (1) as reflecting the premise that antidiscrimination law—even in its prohibition of intentional discrimination—should prohibit nothing more than irrational discrimination; and (2) as reflecting the premise that discrimination on the basis of disability is frequently rational in ways that discrimination on the basis of race or sex never is.

Neither of these readings should be comforting to disability rights advocates or civil rights advocates generally. The assumption that discrimination on the basis of race or sex is never rational, and the related normative view that discrimination should be prohibited only when it is irrational, simply misdescribe the empirical and normative bases of antidiscrimination law.

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14. See *infra* Part II.

15. See *infra* Part II.B.2.

16. See *infra* Part II.B.1.

17. See *infra* Part II.A.

18. See *infra* Part II.B.

19. It may be too soon for much critical commentary to have emerged regarding *Chevron*. Probably the only serious scholarly treatment of the case so far appears in Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1325-28 (2003). *Albertson's* has been on the books much longer. But although the scholarly literature contains a great deal of discussion of that case's dicta regarding the definition of disability, shockingly little has been written about the case's actual holding. The three major exceptions are the brief discussions of the case that appear in Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1504-07 (2001) [hereinafter Bagenstos, *ADA as Risk Regulation*], Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1311-12 (2001), and Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 324-25, 336-37 (2001).

Race and sex discrimination is frequently a bottom-line rational decision for employers, and the law properly prohibits it even in those circumstances.<sup>20</sup> The acceptance of rationality as a defense to claims of intentional discrimination in *Albertson's* and *Chevron* suggests the Court does not appreciate this long-established point—or at least does not find it salient in the disability context.

One of the main arguments of the disability rights movement is that society frequently views a disability as imposing limitations that are more severe or more extensive than they actually are. This “spread effect”—in which a limitation in one functional area is erroneously viewed as indicating the existence of limitations in other functional areas—means that discrimination against individuals with disabilities is often perceived as rational even when those individuals are as productive as other potential employees.<sup>21</sup> The assumption that discrimination against people with disabilities is frequently rational thus plays into and may reflect societal biases and stigmas, rather than hard bottom-line calculations.

My argument proceeds as follows. In Part I, I describe the *Albertson's* and *Chevron* decisions. Taking those decisions on their own terms, I identify several serious problems in the Court's analysis. In Part II, I draw out the theme that I argue connects the two cases—the Court's acceptance of bottom-line rationality as a strong defense to claims of intentional disability discrimination. I also attempt to demonstrate the ways in which the Court's rulings seem to mark a significant break from principles applied to race and gender discrimination claims under Title VII. In Part III, I speculate about what these cases imply about the Justices' attitudes toward disability discrimination law and antidiscrimination law generally.

### I. THE ALBERTSON'S AND CHEVRON DECISIONS

Although they have not been the targets of criticism that the Supreme Court's definition-of-disability decisions have been, to my mind *Albertson's* and *Chevron* are the least defensible of the Court's ADA rulings. That the Court spoke unanimously in both cases is particularly striking.<sup>22</sup> In this part,

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20. See generally Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) [hereinafter Bagenstos, *Rational Discrimination*].

21. See Bagenstos, *Subordination, Stigma, and “Disability,”* *supra* note 8, at 423-25. I take the term “spread effect” from U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 25 (1983).

22. Striking, but perhaps not surprising. A unanimous opinion may not indicate that the case involved an “obvious” legal question so much as it reflects the Court's uncritically shared assumptions—assumptions that might not have withstood the testing of a dissenting opinion. As Justice Brennan (a great dissenter himself) once wrote, a dissenting opinion “safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision.” William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986). For a recent defense of the role of dissenting judges (or judges who, by holding out the possibility of dissenting, keep the majority “honest”) in dampening ideological polarization on multimember appellate courts, see CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 166-93 (2003).

I describe the facts and holdings of these cases, and I argue that—even when the cases are considered on their own terms—there are substantial problems with their analysis and their results. That discussion sets the stage for Parts II and III, in which I will examine more deeply what the Court’s decisions reveal about the Justices’ collective mindset regarding disability discrimination and employment discrimination more generally.

#### A. Albertson’s: *No Waiver Required*

Hallie Kirkingburg worked as a truck driver for Albertson’s supermarkets.<sup>23</sup> Kirkingburg had amblyopia, a condition that left him with uncorrectable 20/200 vision in his left eye.<sup>24</sup> At the time Albertson’s hired him in 1990, regulations of the Federal Highway Administration (“FHWA”) required commercial truck drivers to have 20/40 vision or better in both eyes, even if only with the use of corrective lenses.<sup>25</sup> Through an oversight, the company hired Kirkingburg anyway, but it discharged him in 1992 when it discovered that he did not satisfy the FHWA’s 20/40 binocular vision standard.<sup>26</sup>

Just a few months before Albertson’s fired Kirkingburg, however, the FHWA had, in an effort to gather information regarding whether its vision standard remained necessary for safety purposes, adopted regulations that instituted a waiver program.<sup>27</sup> Under that program, experienced drivers with good driving records could obtain agency certification to drive commercial trucks notwithstanding their failure to satisfy the *prima facie* vision standards in the regulation.<sup>28</sup> As the Court explained, the recipient of such a waiver was required “to have his vision checked annually for deterioration, and to report certain information about his driving experience to the Federal Highway Administration.”<sup>29</sup> Kirkingburg quickly received such a waiver and asked for his job back, but Albertson’s stood by its dismissal.<sup>30</sup>

Kirkingburg filed suit under the ADA, but the Supreme Court rejected his claim.<sup>31</sup> Arguing in support of Kirkingburg, the EEOC had contended that the “direct threat” provisions of the statute and its implementing regulations<sup>32</sup> provided the exclusive means by which an employer could justify a safety-based qualification standard.<sup>33</sup> Those provisions require an individualized showing that the plaintiff’s employment poses a “significant risk to the health or safety of others that cannot be eliminated by reasonable ac-

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23. *Id.* at 558.

24. *Id.* at 559.

25. *See id.* at 558-59.

26. *See id.* at 559-60.

27. *See id.* at 560 n.5.

28. *See id.* at 560.

29. *Id.*

30. *See id.*

31. *See id.* at 560, 576-78.

32. *See* 42 U.S.C. § 12113(b) (2000); 29 C.F.R. § 1630.2(f) (2003).

33. *See Albertson’s*, 527 U.S. at 569.

commodation.”<sup>34</sup> Because *Albertson’s* had not made any individualized showing that Kirkingburg would be unsafe, the EEOC contended that the company could not justify its decision to exclude him.<sup>35</sup> In a unanimous opinion by Justice Souter, the Court rejected that argument.<sup>36</sup> It ruled that the employer was entitled to rely on the prima facie vision standard adopted by the FHWA—even though the plaintiff had obtained a valid waiver from that agency.<sup>37</sup>

One might think that *Albertson’s* has little to do with the application of the ADA more generally. One might see it as a simple case of harmonizing conflicting regulatory regimes.<sup>38</sup> The transportation-specific FHWA regulations, on this view, simply took priority over the ADA’s general requirement of individualized examination of an applicant’s qualifications and possible accommodations.<sup>39</sup> And indeed, as the Court recognized, EEOC regulations establish a defense when an employer’s “action is required or necessitated by another Federal law or regulation.”<sup>40</sup>

But any suggestion that the *Albertson’s* decision was necessary to harmonize conflicting regulatory regimes is simply untenable.<sup>41</sup> For there was *absolutely no conflict* in Kirkingburg’s case between the FHWA regulation and the ADA’s requirement of individualized consideration of qualifications and accommodations.<sup>42</sup> Although the validity of the basic vision standard was unchallenged before the Court, so too was the validity of the waiver program.<sup>43</sup> That program, established through notice and comment rulemaking just like the basic standard, provided an alternative way for drivers who

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34. 42 U.S.C. § 12111(3) (2000) (defining “direct threat”).

35. See *Albertson’s*, 527 U.S. at 569.

36. *Id.* at 558.

37. *Id.* at 577-78.

38. Professor Hubbard appears to see *Albertson’s* that way. She argues that the decision is “consistent with congressional intent” to defer to regulatory agencies’ risk determinations. Hubbard, *supra* note 19, at 1312. I have previously argued that deference to front-line regulatory agencies that exclude people with particular disabilities from particular jobs because of safety-risk concerns is problematic from a disability rights standpoint; the balance of political forces acting on such regulatory agencies is likely to lead them to take insufficient account of the interests of people with disabilities. Bagenstos, *ADA as Risk Regulation*, *supra* note 19, at 1504-07. In the text here, I go beyond that point to argue that the *Albertson’s* holding is also problematic as a formal matter of statutory interpretation.

39. Cf. *Traynor v. Turnage*, 485 U.S. 535, 538, 551 (1988) (specific provision in GI Bill of Rights dictating that primary alcoholics could not take advantage of “physical or mental disability” exemption from ten-year period for claiming benefits took precedence over general prohibition on disability discrimination in section 504 of the Rehabilitation Act).

40. 29 C.F.R. § 1630.15(e) (2003) (quoted in *Albertson’s*, 527 U.S. at 570 n.16).

41. Indeed, the Court expressly declined to rely on the EEOC’s regulatory compliance defense. See *Albertson’s*, 527 U.S. at 570 n.16.

42. The position taken in Justice Thomas’s concurring opinion is thus particularly puzzling. Justice Thomas argued that Kirkingburg was simply “not qualified” to serve as a truck driver—in the terms of the statute, not able to “perform the essential functions of the employment position,” 42 U.S.C. § 12111(8) (2000)—because the unchallenged FHWA vision standards forbade him from doing so, see *Albertson’s*, 527 U.S. at 579-80 (Thomas, J., concurring). But neither the driver who obtained a waiver nor the company that employed him would violate the FHWA regulations. That was the entire point of the waiver program.

43. See generally *Albertson’s*, 527 U.S. 555.

could not satisfy that standard to become eligible to drive commercial trucks.<sup>44</sup>

The *Albertson's* holding, then, could not have rested on a defense of regulatory compliance or on a need to harmonize conflicting regulatory regimes. In the end, it seemed to rest instead on a notion of fairness to employers. Without citing any provision of the statute to support its argument, the Court said that it would not be “reasonable”:

to read the ADA as requiring an employer like *Albertson's* to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate[.]<sup>45</sup>

Under a contrary reading, the Court explained, employers “would be required on a case-by-case basis to reinvent the Government's own wheel when the Government had merely begun an experiment to provide data to consider changing the underlying specifications.”<sup>46</sup> Because “the Government had made an affirmative record indicating that contemporary empirical evidence was hard to come by,”<sup>47</sup> the Court found such a requirement especially unfair.

But *Kirkingburg* was not demanding that *Albertson's* “reinvent the Government's own wheel,” for the “Government's own wheel” included the waiver program.<sup>48</sup> *Kirkingburg* was demanding that *Albertson's* explain why it refused to permit him to work *notwithstanding the government's grant of a waiver to him*. It is only by disregarding the existence and legality of the waiver regulation that one could think that *Kirkingburg* was calling on *Albertson's* to defend the government's—rather than the company's—own decision.<sup>49</sup>

More important, the Court—so frequently a bastion of textualism<sup>50</sup>—made absolutely no effort to tie its analysis to any language in the statute.<sup>51</sup> Indeed, the Court disclaimed reliance on the two provisions of the statute

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44. *Id.* at 559-60.

45. *Id.* at 577.

46. *Id.*

47. *Id.*

48. *Id.*

49. Distrust of the waiver regulation is a clear subtext of the *Albertson's* opinion. *See id.* at 576-77 n.21.

50. For a discussion of how the Court has deployed a firm textualism to *limit* the coverage of the ADA, see Parmet, *supra* note 9, *passim*.

51. Professor Issacharoff and Justin Nelson, who are far more sympathetic to the *Albertson's* bottom line than I am, describe the Court in that case as having “virtually abandoned the narrow statutory structure and interposed a broader policy concern about the statute” and having done so perhaps out of “frustration with the potential sweep of [the] ADA.” *See* Issacharoff & Nelson, *supra* note 19, at 325.

that seem most closely on point—the general defense for “qualification standards” that an employer shows to be “job-related and consistent with business necessity,”<sup>52</sup> and the specific defense for refusing to hire individuals who pose a “direct threat” to others<sup>53</sup>—for both of these provisions would require the employer to engage in an individualized analysis to determine whether the plaintiff could be reasonably accommodated.<sup>54</sup> Indeed, *on the very same day on which it decided *Albertson’s**, the Court emphasized that the requirement of an individualized inquiry reflects a core purpose of the statute—to require employers to treat people with disabilities as individuals, rather than as members of medical categories.<sup>55</sup> Yet the *Albertson’s* decision incongruously accorded dispositive weight to the employer’s interest in *avoiding* an individualized inquiry into the abilities of a class of employees with a particular disability.

### B. Chevron: *The Business Interest in Paternalism*

*Chevron*, too, unanimously reversed the Ninth Circuit. The plaintiff, Mario Echazabal, had chronic liver disease.<sup>56</sup> Chevron rejected his application for a position at its refinery because it believed that exposure to the hepatotoxic substances present in the refinery environment would pose a risk of further liver damage.<sup>57</sup> The case presented the question whether an employer could reject an applicant on the ground that employment would pose a direct threat to the health or safety of the applicant himself.<sup>58</sup> Understanding that issue requires consideration of the peculiar structure of the ADA’s employment title.

Although the statute provides a defense to an employer that refuses to hire an individual who presents a “direct threat,”<sup>59</sup> the provisions establishing that defense are quite convoluted. The statute requires plaintiffs to prove, as a threshold matter in all ADA employment cases, that they are

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52. 42 U.S.C. § 12113(a) (2000).

53. *Id.* § 12113(b).

54. *See Albertson’s*, 527 U.S. at 568-70. The “qualification standards” provision requires the employer to show both that the standards are “job-related and consistent with business necessity” and that no “reasonable accommodation” can be provided. *See* 42 U.S.C. § 12113(a). And the statute defines “direct threat” as “a significant risk to the health or safety of others *that cannot be eliminated by reasonable accommodation.*” *Id.* § 12111(3) (2000) (emphasis added). As the Court has emphasized, both the reasonable accommodation requirement generally and the direct threat defense specifically require employers to engage in an “individualized inquiry.” *See* *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (requiring “individualized inquiry” into reasonable accommodations/reasonable modifications); *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287-88 (1987) (requiring “individualized inquiry” into significant risk under Rehabilitation Act); *see also* *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (recognizing that the ADA’s “direct threat” provisions codify *Arline*).

55. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483-84 (1999) (“a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals” is “contrary to both the letter and the spirit of the ADA”).

56. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76 (2002).

57. *Id.* at 76-77.

58. *See id.* at 76.

59. 42 U.S.C. § 12113(b) (2000).



“qualified” for the position they seek—that is, that they “can perform the essential functions of the employment position.”<sup>60</sup> This requirement, which seems to focus entirely on the present ability to perform job tasks, says nothing about safety risks. Rather, safety risks are treated under the section of the statute that establishes defenses.<sup>61</sup> That section first provides, in a generally phrased provision, a defense for “qualification standards” that are “job-related and consistent with business necessity.”<sup>62</sup> The statute then provides that “[t]he term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>63</sup> According to the statutory definition, “[t]he term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”<sup>64</sup> ADA Title I thus establishes the “direct threat” defense not through a provision creating the defense in its own right, but as a gloss on the general defense for “qualification standards.”

The statutory “direct threat” provision says nothing about risk to the health or safety of the disabled employee himself; both it and its companion definitional provision speak exclusively of risks posed to “others.”<sup>65</sup> But the EEOC adopted a regulation that extended the “direct threat” defense to cases in which the employee with a disability poses a risk only to him- or herself.<sup>66</sup> Echazabal argued the EEOC’s threat-to-self regulation was inconsistent with the limited language of the statutory “direct threat” provision.<sup>67</sup> The absence of threat-to-self language from the statute was particularly telling, Echazabal argued, because the EEOC’s regulations interpreting the Rehabilitation Act—the predecessor statute to the ADA—explicitly included such language.<sup>68</sup> By rejecting the threat-to-self language of the earlier EEOC regulations, Echazabal contended, Congress made a clear decision to adopt the same rule that applies under Title VII, which forbids an employer from excluding protected-class employees for their own safety.<sup>69</sup> Such a decision would be in keeping with the recognition in statutory find-

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60. *Id.* §§ 12111(8), 12112(a).

61. *Id.* § 12113.

62. *Id.* § 12113(a).

63. *Id.* § 12113(b).

64. *Id.* § 12111(3).

65. *Id.* §§ 12111(3), 12113(b).

66. 29 C.F.R. § 1630.15(b)(2) (2003) (“The term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace.” (emphasis added)).

67. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 79 (2002).

68. *See id.* at 79-80. Those regulations defined “qualified handicapped person”—a term that was not defined in the Rehabilitation Act itself—to mean “a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others.” 29 C.F.R. § 1613.702(f) (1990).

69. *See Chevron*, 536 U.S. at 85-86 n.5; *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991) (“danger to a woman herself does not justify discrimination”); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (“In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”).

ings and legislative history that, just as it was with women before the enactment of Title VII, paternalistic exclusions had been a major contributor to the disadvantage experienced by people with disabilities.<sup>70</sup>

The Court rejected that argument. It began by noting that the terms “job-related and consistent with business necessity” establish “spacious defensive categories, which seem to give an agency (or in the absence of agency action, a court) a good deal of discretion in setting the limits of permissible qualification standards.”<sup>71</sup> Given the permissive language of the “direct threat” provision (*viz.*, “may include”), the Court concluded that a requirement that an employee not pose significant risks to others was merely an example of the qualification standards that might be embraced by the statute’s general business justification provision.<sup>72</sup> The Court held that the EEOC permissibly interpreted that general business justification defense to include cases where the employee would pose a significant risk to his own health.<sup>73</sup>

But the inclusive language of the “direct threat” provision is hardly dispositive: What Congress *includes* also gives a clue as to what Congress *excludes*. Can there be any doubt, for example, that by saying qualification standards “may include” a requirement that the employee pose no “direct threat” or “significant risk,” that Congress prohibited employers from refusing to hire individuals with disabilities based on *indirect* threats or *insignificant* risks?<sup>74</sup> The carefully crafted textual limitations in the “direct threat” provision, coupled with the express statutory purpose of eliminating discrimination based on “stereotypic assumptions,”<sup>75</sup> strongly imply that the circumstances in which a safety-risk defense may be asserted are limited to those involving a “direct threat” and a “significant risk.” Similarly, one can

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70. See 42 U.S.C. § 12101(a)(2), (5) (2000) (listing “overprotective rules and policies” as among the “forms of discrimination” against people with disabilities that “continue to be a serious and pervasive social problem”). For just two of the many references to paternalism in the legislative history, see H.R. REP. NO. 101-485, pt. 2, at 72, 74 (1990) (finding it “critical that paternalistic concerns for the disabled person’s own safety not be used to disqualify an otherwise qualified applicant” because “[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities”), and *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong. 126 (1990) (testimony of Arlene Mayerson) (“[L]ike women, disabled people have identified ‘paternalism’ as a major obstacle to economic and social advancement.”). The writings of disability rights advocates have also frequently identified paternalism as a major engine of disability discrimination. See, e.g., JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 3 (1998) (“Control has universal appeal for DRM [disability rights movement] activists because the needs of people with disabilities and the potential for meeting these needs are everywhere conditioned by a dependency born of powerlessness, poverty, degradation, and institutionalization. This dependency, saturated with paternalism, begins with the onset of disability and continues until death.”); JOHNSON, *supra* note 5, at 187 (describing “paternalism” as “pity-coated bigotry” whose “role was to insist that there was, in fact, no harm in treating disabled people differently, even as they suffered for it”); see also Bagenstos, *ADA as Welfare Reform*, *supra* note 5, at 1010-12 (noting that opposition to paternalism united disparate elements of the disability rights movement).

71. *Chevron*, 536 U.S. at 80.

72. *Id.*

73. *Id.* at 84-87.

74. The *Chevron* Court acknowledged this point. *Id.* at 80 n.3.

75. 42 U.S.C. § 12101(a)(7).

make a strong argument that the textual limitation of the “direct threat” provision to cases involving risks to *others*, when considered in the light of the prohibition of paternalistic discrimination under Title VII<sup>76</sup> and Congress’s clear recognition of paternalism as a major target of the ADA,<sup>77</sup> implies a clear rejection of the EEOC’s earlier endorsement of a threat-to-self defense under the Rehabilitation Act.

The Court answered this point by arguing that in the law prior to the enactment of the ADA, there was no “clear, standard pairing of threats to self and others” such that the inclusion of a defense for one in the statute would ordinarily be taken to imply an exclusion of a defense for the other.<sup>78</sup> Indeed, the Court asserted, the threat-to-self language in the EEOC’s Rehabilitation Act regulation itself represented an effort to give content to the Rehabilitation Act’s own “direct threat” language—language that, like the ADA’s direct threat provision, applied by its express terms only in cases involving a threat to others: “Instead of making the ADA different from the Rehabilitation Act on the point at issue, Congress used identical language, knowing full well what the EEOC had made of that language under the earlier statute.”<sup>79</sup>

But both steps of that argument are flawed. First, there has indeed been a longstanding “pairing of threats to self and others”<sup>80</sup> in disability law—most notably in the law governing civil commitment. “General civil commitment statutes ordinarily require mental illness and dangerousness to self or others as criteria of commitment.”<sup>81</sup> When the normative justification for involuntary commitment based on “dangerousness to self” has been challenged, the challenges have been framed and understood as attacks on paternalism.<sup>82</sup>

Second, the Court was simply wrong to assert that the EEOC’s threat-to-self regulation under the Rehabilitation Act represented an interpretation of the “*direct threat*” language in that earlier statute. To the contrary, that regulation expressly purported to interpret the Rehabilitation Act’s requirement that the plaintiff be “qualified” for the position he or she seeks<sup>83</sup>—

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76. See *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977).

77. See *supra* note 68.

78. *Chevron*, 536 U.S. at 82.

79. *Id.* at 83.

80. *Id.* at 82.

81. ROBERT F. SCHOPP, *COMPETENCE, CONDEMNATION, AND COMMITMENT: AN INTEGRATED THEORY OF MENTAL HEALTH LAW* 18 (2001); see generally 1 Michael L. Perlin, *Mental Disability Law: Civil and Criminal* 44-190 (2d ed. 1998).

82. See, e.g., Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54 (1982); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1223-28 (1974); see also 1 PERLIN, *supra* note 81, at 159-69 (describing antipaternalist challenges to *parens patriae* civil commitments throughout the 1970s and the resurgence of the *parens patriae* rationale for commitment in the 1980s and 1990s).

83. See 29 C.F.R. § 1613.702(f) (1990) (defining “qualified handicapped person” as “a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health or safety of the individual or others”); see also 29 U.S.C. § 794(a) (1988) (limiting statutory protection to an “otherwise qualified individual with handi-

while the statutory “direct threat” provisions appeared in a portion of the statute that defined the term “handicapped person.”<sup>84</sup> Indeed, the EEOC’s Rehabilitation Act regulation had a far broader scope than the direct threat provisions that existed in that earlier statute. The statutory provisions expressly applied only to two classes of people with disabilities: (1) alcoholics or drug abusers “whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others”<sup>85</sup>; and (2) individuals with a “currently contagious disease or infection,” who, “by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals.”<sup>86</sup> The EEOC’s Rehabilitation Act regulation applied to *all* individuals with disabilities who posed risks to themselves or others—not just alcoholics, drug abusers, and people with contagious diseases.<sup>87</sup> Moreover, the Rehabilitation Act’s two “direct threat” provisions were not adopted until *after* the EEOC promulgated its regulations.<sup>88</sup> It is therefore implausible to suggest that the EEOC’s threat-to-self regulation in any way interpreted the “direct threat” language in that statute.

Thus, by defining the term “qualified individual with a disability” in the ADA solely by reference to present abilities to perform job tasks,<sup>89</sup> Congress removed the statutory basis on which the EEOC had rested its threat-to-self regulation. Congress moved consideration of safety risks from the threshold “qualified individual” inquiry, where the EEOC’s Rehabilitation Act regulation had put it, to the new general “direct threat” defense. And Congress expressly tailored that defense—in contrast to the EEOC’s earlier approach—to cases involving threats to others. When viewed in this light, the omission of threat-to-self language from the ADA seems far more telling than the *Chevron* opinion suggests.

## II. THE DEPARTURES FROM PRIOR EMPLOYMENT DISCRIMINATION LAW

As I argued in the introduction, *Albertson’s* and *Chevron* are particularly good tests of the critics’ theory that the Supreme Court fails to appre-

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caps”).

84. See 29 U.S.C. § 706(8)(B), (C) (1988).

85. *Id.* § 706(8)(B).

86. *Id.* § 706(8)(C).

87. *Id.* § 706(8)(B).

88. Congress added the “direct threat” provision relating to drug abusers and alcoholics in 1978, a year after the EEOC promulgated its regulations. See Rehabilitation Act of 1973, Pub. L. No. 95-602, § 122(a)(6), 92 Stat. 2955, 2984 (1978). Congress added the “direct threat” provision relating to contagious diseases in 1988. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988). The latter provision was obviously intended to codify the Supreme Court’s decision in *School Board v. Arline*, 480 U.S. 273, 287 n.16 (1987) (“A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”).

89. See 42 U.S.C. § 12111(8) (2000) (“qualified” individual is one who, “with or without reasonable accommodation, *can perform* the essential functions of the employment position that such individual holds or desires” (emphasis added)).

ciate that disability rights are civil rights. Unlike many other ADA cases (notably the definition-of-disability cases), the Court in *Albertson's* and *Chevron* addressed issues with clear parallels in race and gender antidiscrimination law. As I have already suggested, *Chevron* appears to disavow the clear rejection of paternalistic discrimination that exists under gender discrimination doctrine.<sup>90</sup> In this part, though, I focus on a deeper respect in which *Albertson's* and *Chevron* seem to break from earlier employment discrimination law. Although under Title VII there is no business necessity defense to a claim of disparate treatment,<sup>91</sup> and statistical discrimination is accordingly forbidden even when it is rational, these two cases stake out a different path for the ADA. By expressly holding in *Chevron* that a “spacious” business necessity defense applies even to disparate treatment cases,<sup>92</sup> and approving in *Albertson's* something that when unpacked looks a great deal like statistical discrimination, the Court has suggested that the principles applied under race and gender discrimination law do not apply here.

#### A. Statistical Discrimination and Business Necessity Under Title VII

Since *Griggs v. Duke Power Co.*<sup>93</sup> and *McDonnell Douglas Corp. v. Green*,<sup>94</sup> the Supreme Court has distinguished between two types of employment discrimination cases: disparate treatment cases, exemplified by *McDonnell Douglas*, in which the employer singled out the plaintiff for disadvantage because of his or her protected class status;<sup>95</sup> and disparate impact cases, exemplified by *Griggs*, in which the employer imposes a neutral rule that screens out members of a protected class without sufficient business justification.<sup>96</sup> Importantly, the court has recognized a business

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90. See *supra* text accompanying note 69 (discussing *Johnson Controls* and *Dothard* cases). There is a further respect in which *Chevron* seems to depart from the earlier Title VII jurisprudence. In *Johnson Controls*, the Court held that the prospect of workplace tort liability could not be used to justify exclusion of protected-class employees, at least where the basis for liability was “remote.” *Johnson Controls, Inc.*, 499 U.S. at 208. Yet in *Chevron*, the Court accorded decisive defensive weight to the company’s fear of liability under the Occupational Safety and Health Act (“OSH Act”)—even though the Occupational Safety and Health Administration, which is the only entity that can initiate enforcement action under the OSH Act, had never enforced or even threatened to enforce the general duty clause against an employer that hired an individual with a disability who posed a risk to only himself, see *Chevron*, 536 U.S. at 84, and even the Solicitor General’s brief in *Chevron* expressed some doubt as to whether a general duty clause violation *could* be found in such circumstances, see Brief for the United States and the EEOC as Amici Curiae Supporting Petitioner, *Chevron U.S.A., Inc. v. Echazabal*, No. 00-1406, at 19 n.7 (“This general duty clause has not been interpreted as requiring employees to refuse employment to job applicants, but it is not clear how this clause would apply to an employer that hires a worker who posed a clear threat to his or her own safety on the job.”).

91. 42 U.S.C. § 2000 3-2(k)(2) (2000).

92. *Chevron*, 536 U.S. at 80.

93. 401 U.S. 424 (1971).

94. 411 U.S. 792 (1973).

95. See *id.* at 796.

96. See *Griggs*, 401 U.S. at 427-28. For a clear statement of the distinction, see *Int’l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). For a reaffirmation that the distinction applies under the ADA, see *Raytheon v. Hernandez*, 124 S. Ct. 513, 516 (2003).

justification defense only in the *Griggs*-type disparate impact case. Both as a matter of judicial interpretation of Title VII,<sup>97</sup> and as a matter of express statutory language in the Civil Rights Act of 1991,<sup>98</sup> there is no such defense to a claim of disparate treatment.

One might try to explain this distinction by asserting that there in fact can be no legitimate business justification for the intentional discrimination that is the essence of a disparate treatment case. But that assertion is emphatically false.<sup>99</sup> In a wide range of circumstances, a bottom-line oriented employer might well find discrimination to be reasonable, profit-maximizing behavior.<sup>100</sup> An important class of cases involves so-called “statistical discrimination.” Statistically speaking, in some contexts race or sex may (in combination with other factors) be a good predictor of efficiency.<sup>101</sup> To be sure, predictions based on the proxy of race or sex speak only to statistical aggregates, not individuals. Even if *most* members of a given race or sex are less efficient employees in a given context, not all will be, and some are likely to be superior. But it may be costly for an employer to engage in an individualized inquiry—sufficiently costly that the employer will find it more efficient, all things considered, to rely on the crude proxy of race or sex. In such cases, a rational, self-interested employer might intentionally discriminate on the basis of race or sex even without any prejudice on its part.

Yet even in such cases, an employer is barred from raising a business justification defense to shield its act of disparate treatment. This point emerges clearly from *City of Los Angeles, Department of Water & Power v. Manhart*.<sup>102</sup> There, plaintiffs challenged a pension plan provision that required women to make larger monthly contributions than their male co-workers.<sup>103</sup> The reason for the distinction, the Court observed, was not prejudice but rather a statistical “generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men.”<sup>104</sup> The

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97. See *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197-200 (1991).

98. 42 U.S.C. § 2000e-2(k)(2) (2000) (“A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.”).

99. David Strauss deserves the most credit for pressing this point in the legal academic literature. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

100. I discuss a number of these circumstances in Bagenstos, *Rational Discrimination*, *supra* note 20, at 848-51.

101. Alternatively, an employer’s usual means for predicting the performance of employees might be less reliable for female employees or members of certain minority groups. For a discussion of statistical discrimination, see *id.* at 849. Important works on statistical discrimination include Kenneth J. Arrow, *The Theory of Discrimination*, in *DISCRIMINATION IN LABOR MARKETS* 3 (Orley Ashenfelter & Albert Rees eds., 1973), and Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

102. 435 U.S. 702 (1978).

103. See *id.* at 705 (noting that female employees were required “to make monthly contributions to the fund that were 14.84% higher than the contributions required of comparable male employees”).

104. *Id.* at 707.

average woman thus could be expected to draw out more from the pension fund than the average man. The employer required women to contribute more simply to cover their larger expected benefits. Although the pension plan rules constituted discrimination of an extremely understandable and rational sort, the Supreme Court held that they violated Title VII.<sup>105</sup> The Court relied in significant part on the statutory language, which it read “unambiguous[ly]” to “focus on the individual.”<sup>106</sup> Under that language, the Court ruled, “[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”<sup>107</sup> The higher costs of paying pension benefits to women did not provide a defense.<sup>108</sup>

*Manhart* demonstrates that even where an employer has a well-grounded, bottom-line-focused justification for its discrimination, Title VII affords it no business justification defense to a claim of disparate treatment.<sup>109</sup> The Court reaffirmed that principle in *International Union v. Johnson Controls, Inc.*, a case involving a sex-specific fetal protection policy that excluded potentially fertile women from jobs entailing exposure to large amounts of lead.<sup>110</sup> The *Johnson Controls* Court rejected the assertion that a benign purpose of protecting fetuses from harm rendered the sex-specific policy anything other than disparate treatment: “Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”<sup>111</sup> Having determined that the employer’s conduct constituted disparate treatment, the Court readily concluded that no business necessity defense could be available.<sup>112</sup>

### B. The Shift in *Albertson’s* and *Chevron*

The *Albertson’s* and *Chevron* decisions depart from this Title VII jurisprudence in two related ways. First, in *Chevron*, the Court expressly held that the business justification defense under the ADA applies in disparate treatment as well as disparate impact cases. Second, in *Albertson’s* the

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105. *Id.* at 711.

106. *Id.* at 708 (“The statute makes it unlawful ‘to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual’s* race, color, religion, sex, or national origin.’” (quoting 42 U.S.C. § 2000e-2(a)(1))).

107. *Id.*

108. *See id.* at 716-17 (noting the absence of a “cost-justification defense”).

109. The Court extended the basic holding of *Manhart* in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1086 (1983), to cases where the employer contracts with a pension provider who charges female employees more than male employees.

110. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 191-92 (1991).

111. *Id.* at 199.

112. *See id.* at 197-200. Although the Court recognized that a bona fide occupational qualification defense is available in cases of intentional sex discrimination, *see* 29 U.S.C. § 623(f)(1) (2000); 42 U.S.C. § 2000e-2(e)(1) (2000), it held that *Johnson Controls* could not satisfy the heavy burden of showing that being a fertile woman was fundamentally incompatible with performance of job tasks that “involve[] the central purpose of the enterprise.” *Johnson Controls*, 499 U.S. at 203.

Court approved conduct that ultimately looks very much like statistical discrimination.

*1. Applying a Business Justification Defense to a Claim of Disparate Treatment*

Take *Chevron* first. There, the Court made clear in both its result and its explicit reasoning that the ADA's business necessity defense applies not just to claims of disparate impact but also to claims of disparate treatment. *Chevron*, after all, was itself a case of disparate treatment. Although the company may have been moved to exclude Echazabal from its refinery out of concern for his safety, Echazabal's diagnosis with Hepatitis C (which the Court assumed to be a "disability") was the *only* reason Chevron believed he would be in danger.<sup>113</sup> To paraphrase *Manhart*'s disparate treatment analysis, the company's action did "not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's [diagnosis with a disabling impairment] would be different."<sup>114</sup> Yet the Court allowed a business justification defense anyway, and it expressly rejected the argument that the ADA's business justification provision is limited to neutral practices that, in the *Griggs* mode, incidentally screen out workers with disabilities.<sup>115</sup> The Court explained that "[i]t is just as much business necessity for skyscraper contractors to have steelworkers without vertigo [disparate treatment] as to have well-balanced ones [disparate impact]."<sup>116</sup>

But the question was not whether an employer might have a "business necessity" for refusing to hire an individual with a disability. The question was whether that "business necessity" could constitute a *defense* of such disparate treatment—particularly given that the statute requires the plaintiff to show that he or she "can perform the essential functions" of the job in any event.<sup>117</sup> There are plenty of circumstances where an employer would have a strong business justification for engaging in intentional race or sex discrimination—indeed, in cases involving discriminatory customer preferences, an employer might legitimately fear being put out of business—but Title VII does not permit such a business justification to serve as a defense to a charge of disparate treatment.<sup>118</sup> The ADA's text suggests that the same rule should apply under that statute.<sup>119</sup>

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113. See *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 76 (2002).

114. *Manhart*, 435 U.S. at 711 (internal quotation marks omitted).

115. *Chevron*, 536 U.S. at 86 n.6.

116. *Id.* (citation omitted).

117. 42 U.S.C. §§ 12111(8), 12112(a) (2000). A person with vertigo is probably not "qualified" to work as a steelworker for a skyscraper contractor under this test, so there is no need for an employer to assert a business necessity defense.

118. See *Bagenstos, Rational Discrimination*, *supra* note 20, at 848-51.

119. See *Raytheon Co. v. Hernandez*, 124 S. Ct. 513, 519 (2003) (suggesting the ADA incorporates the same disparate treatment/disparate impact division as does Title VII). ADA Title I contains a complex set of provisions defining unlawful discrimination. One of these provisions prohibits disparate



The point is not merely formal or technical. Much of the discrimination identified and targeted by the ADA's principal supporters rested on statistically valid but individually unreliable generalizations about the higher costs of hiring people with disabilities. It has long been understood, for example, that employers' usual predictors of performance are for a variety of reasons often unreliable for people with disabilities.<sup>120</sup> A rational employer, uncertain about its ability to predict the performance of an applicant with a disability, might well compensate by putting a thumb on the scale in favor of apparently similar nondisabled applicants.<sup>121</sup> To bring the matter a little

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treatment by making it unlawful to "discriminate against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). That provision was obviously modeled on the Title VII provision on which the Court relied in *Manhart*. Compare *Manhart*, 435 U.S. at 708 ("The statute makes it unlawful 'to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." (quoting 42 U.S.C. § 2000e-2(a)(1))), with 42 U.S.C. § 12112(a) (making it unlawful to "discriminate against a qualified *individual* with a disability because of the disability of such *individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (emphasis added)). Like the disparate treatment prohibition under Title VII, the text of § 12112(a) contains no exception for discrimination that is justified by "business necessity." Of all the ADA provisions that define prohibited discrimination, only one contains such a "business necessity" exception—the screening-out provision, which defines discrimination to include:

using qualification standards, employment tests or other selection criteria that *screen out or tend to screen out* an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6) (emphasis added). That provision appears to target the *Griggs*-type situation in which a generally applied, facially neutral job criterion has the effect of denying an opportunity to an individual with a disability. The ADA repeats the "job-related and consistent with business necessity" language in 42 U.S.C. § 12113(a), which states that

[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity.

42 U.S.C. § 12113(a)(2000). This provision seems to walk in tandem with § 12112(b)(6)'s screening-out prohibition. Both provisions extend only to cases involving application of "qualification standards, tests, or selection criteria." *Id.*; see also *id.* § 12112(b)(6). And both provisions use the "screen out or tend to screen out" language of discriminatory effect rather than the "because of" language of discriminatory purpose used in § 12112(a). *Id.* §§ 12112(b)(6), 12113(a). What § 12113(a) adds is clarification that the showing of business necessity is a "defense," on which the employer bears the burden of proof—a clarification that was necessary to remove the ADA from the shadow of *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 649 (1989), which held that the employer bore the burden of persuasion on the business justification issue in a Title VII disparate impact case.

120. See JOHN GLIEDMAN & WILLIAM ROTH, *THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA* 288 (1980) (finding it "arguable that a significant portion" of discrimination against people with disabilities "is perfectly rational given the special margin of uncertainty in the information currently available to employers about the economic value of disabled job applicants and disabled job holders—the extra margin of 'noise' in their formal and informal credentials and records"). For additional discussion of this point, see William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?*, in *DISABILITY AND THE LABOR MARKET: ECONOMIC PROBLEMS, POLICIES, AND PROGRAMS* 242, 246 (Monroe Berkowitz & M. Anne Hill eds., 1986).

121. Ironically, the ADA itself—particularly with the current enforcement skew in which discharge cases are overwhelmingly more common than hiring cases—may exacerbate this effect by making litigation-conscious employers less likely to engage in probationary hiring of individuals with disabilities whose likely job performance is uncertain. See Steven L. Willborn, *The Nonevolution of Enforcement Under the ADA: Discharge Cases and the Hiring Problem*, in *EMPLOYMENT, DISABILITY, AND THE*

closer to home, the ADA's legislative history notes that one "common barrier[] to employment for persons with disabilities" has been the fear of increased worker's compensation costs that would attend to hiring an individual with a disability who subsequently becomes injured on the job.<sup>122</sup> That fear may well be rational, considered in the aggregate: One recent analysis found that the results of four nationally representative studies "strongly support[ed]" the conclusion that "workers with a range of disabilities are at increased risk for occupational injuries."<sup>123</sup> A rational employer, concerned with minimizing worker's compensation costs, might well intentionally discriminate against applicants with various disabilities.

Both of these rational forms of statistical discrimination rely on predictions that will not hold for every individual whom a rational employer would choose to exclude. If employers were permitted to engage in them under the guise of "business necessity," fully capable individuals with disabilities would be excluded from opportunities in a wide range of cases. The Court's decision in *Chevron* to apply a business necessity defense to disparate treatment claims appears to open the door to just that kind of statistical discrimination.

To be sure, the *Chevron* Court did insist that it would not countenance paternalistic judgments based on "untested and pretextual stereotypes" about "classes of disabled people."<sup>124</sup> The Court relied heavily on the agency's requirement that, in the Court's words, "judgments based on the direct threat provision be made on the basis of individualized risk assessments."<sup>125</sup> That, indeed, was the Court's basis for distinguishing the Title VII paternalism cases, which "were concerned with paternalistic judgments based on the broad category of gender."<sup>126</sup> These statements in the *Chevron* opinion suggest that the Court would not approve of the class-based exclusions that statistical discrimination would require.

But the implication that the *Chevron* holding might support statistical discrimination cannot be avoided so easily. For one thing, it is hard to say that *any* judgment based on risks is "truly" individualized.<sup>127</sup> A risk, by

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AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 103, 111-14 (Peter David Blanck ed., 2000).

122. H.R. REP. NO. 101-485, pt. 3, at 31 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 453.

123. Craig Zwerling et al., *Occupational Injuries Among Workers With Disabilities, in EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH*, supra note 121, at 315, 325. To be sure, there are reasons to question the precise results of this analysis, both because the definition of "disability" used in the analysis is not coextensive with the ADA's coverage and because the risk of workplace injury probably depends on whether employers provide sufficient accommodations. See Letters to the Editor, *Risk of Injury Among Workers With Disability*, 279 JAMA 1348-50 (1998). But that does not undercut the basic point: A rule that permits employers to engage in rational, intentional discrimination against people with disabilities could easily lead to quite widespread discrimination.

124. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85 (2002).

125. *Id.* at 85-86 n.5.

126. *Id.*

127. This point is a major theme of FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003). See *id.* at 67 ("Once we are in the realm of prediction, it turns out that even so-called individualized assessment is far less individual and far more general than may be apparent at first

definition, is a probability that something will occur in the future—a probability that, even if legally “significant,” may not eventuate in many or even most cases. To say that person *X* faces a *Y*% risk of harm in a given activity is thus to engage in class-based thinking: It is to say that *X* is one of a group of people of whom *Y* out of every 100 will experience harm in that activity. This inquiry can be made *more* individualized, by taking account of additional traits of *X* (“risk factors”) that increase or decrease the risk *X* faces.<sup>128</sup> But the inquiry remains at bottom a class-based one.<sup>129</sup> Although one might seek to paper over that fact by deferring to the clinical judgment of a professional who determines that *X* is “safe” or “unsafe” in a particular setting, such a professional is merely using a different language for the same kind of class-based concept—a conclusion (intuitively or statistically derived) based on experience with other individuals with the same diagnosis in similar environments, that *X* is more or less likely to experience harm than is tolerable.<sup>130</sup>

*Chevron*’s insistence on an “individualized” inquiry, then, ultimately boils down to an insistence on a probabilistic inquiry that relies on the best available evidence.<sup>131</sup> That is a significant protection for individuals with disabilities who might otherwise be excluded from jobs because of purported safety risks—and indeed the *Chevron* plaintiff himself ultimately relied on it to prevail (at least at the summary judgment stage) on remand.<sup>132</sup>

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glance.”).

128. This, by the way, is the kind of judgment the employer made in *Johnson Controls*. The employer did not exclude all women, but simply women “who are pregnant or [medically] capable of bearing children.” *Johnson Controls, Inc.*, 499 U.S. at 192 (quoting the company’s policy). The employer excluded those women only from jobs in which “‘over the past year,’ an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter”—with 30 micrograms being “the critical level noted by the Occupational Safety and Health Administration (OSHA) for a worker who was planning to have a family.” *Id.* at 191-92. And the employer did so only after eight of its workers in a five-year period “became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter.” *Id.* at 191.

129. See SCHAUER, *supra* note 127, at 69 (“[W]hat appears to be an individualized analysis is simply an aggregate of stereotypes . . . .”); *id.* at 101 (“[E]ven those decisions that appear initially to be maximally individual . . . may turn out to rely more on generalizations than many people suppose . . . .”); *id.* at 103 (“[A]cknowledging the way in which seemingly direct observation involves a process of inference and generalization enables us to appreciate that even the processes that initially appear to us to be ‘direct,’ ‘actual,’ or individualized turn out to rely far more on generalizations from past experience than is often appreciated.”).

130. See William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL’Y & L. 293, 305-09, 314 (1996). Professor Schauer makes the point as well. See SCHAUER, *supra* note 127, at 65-66. There is a substantial, though controversial, body of evidence to indicate that individualized clinical predictions of risk are actually *less* accurate than actuarially derived predictions in many contexts. See *id.* at 96-97. Reliance on such clinical judgments is often simply a form of under-the-table delegation to clinical professionals of the authority to make the normative judgment regarding the acceptability of a given risk. See Bagenstos, *ADA as Risk Regulation*, *supra* note 19, at 1492-1503 (describing and defending the similar delegation of acceptable-risk determinations to public health officials under federal disability discrimination law).

131. See *Chevron*, 536 U.S. at 86 (relying on portion of the EEOC regulation, 29 C.F.R. § 1630.2(r), that requires employers to make a “reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence”).

132. See *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027-35 (9th Cir. 2003).

But it does not offer clear protection to people with disabilities against statistical discrimination; if anything, it seems to require only that the statistical discrimination be rationally rooted in actual facts rather than “untested and pretextual stereotypes.”<sup>133</sup> That is a major departure from Title VII law.

## 2. *The Role of Rational Discrimination*

In *Albertson's*, moreover, the Court approved employer conduct that bears a striking resemblance to statistical discrimination.<sup>134</sup> Recall that nothing in the FHWA's regulations *required* *Albertson's* to exclude Kirkingburg.<sup>135</sup> Those regulations generally barred people with monocular vision from driving commercial trucks, but the agency had adopted a separate regulation that provided for waivers of that general prohibition, and Kirkingburg had received such a waiver.<sup>136</sup> The Court nonetheless held that the FHWA's general vision standard authorized *Albertson's* to reject Kirkingburg—*notwithstanding* that the agency itself had made clear that it did not believe that its general standard should apply to him.<sup>137</sup>

The Court suggested that its ruling rested on the difficulty an employer would have in justifying a refusal to accept a FHWA waiver; after all, the government itself “had made an affirmative record indicating that contemporary empirical evidence was hard to come by.”<sup>138</sup> Because an employer could likely never *succeed* in showing that a monocular driver with a government waiver was unsafe, the Court seemed to say, it would be unfair to force the employer to make that showing to justify excluding a monocular driver.<sup>139</sup> But that obviously begs the question. If the employer cannot demonstrate that a facially qualified individual with a disability will perform unsafely, perhaps it should bear the burden of uncertainty and be forced to hire that individual. The fact that such a showing will be difficult to make might just as well be an argument for the employee as for the employer. In fact, since the basic point of the accommodation requirement is to put on employers a burden of justifying practices that exclude individuals with disabilities,<sup>140</sup> the argument for resolving the issue in favor of the *employee* seems much stronger.

That it may be difficult for an employer to show that a monocular driver with a waiver is unsafe therefore cannot be a sufficient reason to excuse the employer from the burden of making such a showing. And indeed, the *Albertson's* opinion suggests that the Court was moved by a distinct problem—that the seemingly conflicting government pronouncements made it

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133. *Chevron*, 536 U.S. at 85.

134. *Albertson's*, 527 U.S. at 577-78.

135. *See id.* at 559-60.

136. *Id.*

137. *Id.* at 577-78.

138. *Id.* at 577.

139. *See id.*

140. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 295-96 (1985).

difficult for an employer to *know* whether such a driver is safe. When the government promulgated its basic visual acuity regulations, with no waiver exception, it stated that excluding monocular drivers was necessary for roadway safety.<sup>141</sup> When it adopted its waiver regulation, the government did not affirmatively negate that original statement.<sup>142</sup> Instead, it simply said that it was no longer sure that blanket exclusion of monocular drivers was necessary, and that it wanted to obtain further data on the question.<sup>143</sup> The waiver program was simply “a way to gather facts going to the wisdom of changing the existing law.”<sup>144</sup> In the Court’s words, “[t]he FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety.”<sup>145</sup> Thus, although the promulgation of the waiver regulation fundamentally changed the *legal* rules governing whether monocular individuals could drive, it only mildly changed the government’s publicly stated *empirical* position: Where the government had previously said categorically that people with monocular vision were unsafe drivers of commercial trucks, it was now expressing uncertainty about whether that previous statement was true.

A rational employer in Albertson’s position, viewing the government’s updated empirical position, thus might well engage in something that looks very much like statistical discrimination. Based on the government’s long-standing position and the tentative nature of the decision to back away from that position, such an employer would have reason to believe that people with monocular vision were generally unsafe drivers of commercial trucks. Although not all people with monocular vision would be unsafe, an individualized inquiry might be expensive, and the employer could not be assured that it would be reliable. Notwithstanding the existence of an explicit waiver program, the employer might be better off excluding everyone with monocular vision rather than engaging in case-by-case consideration of waiver recipients. But if an employer may properly engage in that sort of conduct—as the Court held that Albertson’s could—it is hard to explain why an employer should be forbidden from engaging in *any* rational form of statistical discrimination.

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141. See *Albertson’s*, 527 U.S. at 572-73 (setting out FHWA pronouncements through the years and concluding that “affirmative determinations that the selected standards were needed for safe operation were indeed the predicates of the DOT action”).

142. See *id.* at 574-75.

143. See *id.*

144. *Id.* at 575.

145. *Id.* at 574. The Court further stated, “As proposed, therefore, there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter.” *Id.* at 575.

## III. EXPLAINING THE DEPARTURES

A. *Limiting Civil Rights Law to Irrational Discrimination?*

One way of reading the Court's move to accept rational discrimination in *Albertson's* and *Chevron* is to see those decisions as reflecting an evolving view of civil rights law generally. The Court that issued rulings like *Manhart* and *Johnson Controls, Inc.*, after all, was a very different Court from the current one. And the current Court's tendency (though not *uniform* tendency) to take a narrow view of civil rights protections is well documented.<sup>146</sup> Perhaps the Court, as currently composed, is no longer of the view that rational discrimination should be prohibited.

As I will discuss in a bit, I have my doubts that this explanation fully accounts for *Albertson's* and *Chevron*. But if the Court really is beginning a general retreat from the prohibition of rational discrimination it previously staked out, that move deserves serious normative criticism. The prohibition on rational discrimination is deeply ingrained in our antidiscrimination doctrine. The most compelling coherentist account of current antidiscrimination law, I have argued, squarely forbids rational discrimination: "The moral wrong of discrimination inheres in an employer's placing his or her own interests ahead of the moral imperative to avoid participating in the system of subordination and occupational segregation."<sup>147</sup> And a normative argument for departing from that current position is fraught with difficulties. Because "[v]irtually *all* discrimination is 'rational' in the sense that the discriminator effectively seeks to advance some goal by discriminating," an antidiscrimination law limited to "irrational" discrimination either covers nothing or picks and chooses, applying some hidden normative principle, *which* interests of employers to treat as "rational."<sup>148</sup> One might think that the notion of "irrational" discrimination could easily be limited to the obvious cases of animus-based actions. But it is very hard to construct a rationale for prohibiting animus-based discrimination that simultaneously (1) limits antidiscrimination law to any given set of forbidden classifications (e.g., race, sex, disability) and (2) does not also justify non-animus-based discrimination on the basis of those classifications.<sup>149</sup>

The difference between Title VII cases like *Manhart* and *Johnson Controls, Inc.*, and ADA cases like *Albertson's* and *Chevron* can surely be explained in part by the shift in the composition and civil-rights-friendliness of

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146. See, e.g., Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002). Two decisions in the Supreme Court's 2002 term prove that the Court does not adopt a *uniformly* restrictive view of civil rights law, even in close cases. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding race-conscious admissions program at the University of Michigan Law School against an equal protection challenge); *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1983-84 (2003) (upholding the family-care leave provision of the Family and Medical Leave Act as proper legislation under section 5 of the Fourteenth Amendment).

147. Bagenstos, *Rational Discrimination*, *supra* note 20, at 858.

148. *Id.* at 899.

149. See *id.* at 846-48, 901.

the Court. But it seems to me unlikely that the move to defend rational disability discrimination in *Albertson's* and *Chevron* portends a more general doctrinal shift toward acceptance of rational discrimination outside of the ADA context. In neither *Albertson's* nor *Chevron* did the Court rely on Title VII precedents to justify its decisions, nor did the Court state that the principles established in those cases would have any relevance in the race or sex discrimination area. Indeed, in *Chevron*, the Court expressly *distinguished* the (seemingly on-point) sex discrimination precedent on grounds that quite plausibly limited the case's holding to disability discrimination alone.<sup>150</sup>

Moreover, the unanimity of the *Albertson's* and *Chevron* opinions is a significant clue that those decisions do not reflect a more general loosening of the prohibition on rational discrimination. Although a majority of the Court frequently takes a narrow view of the meaning of civil rights statutes and Congress's power to adopt them, four justices (Justices Stevens, Souter, Ginsburg, and Breyer) have generally dissented from the Court's narrowing rulings in this area.<sup>151</sup> The fact that every single one of these justices went along with *Albertson's* and *Chevron* without expressing any public doubt—and that Justice Souter wrote the Court's opinion in both cases—suggests that those four justices, at least, did not understand the cases to be a battleground in a more general campaign regarding the breadth of civil rights law.

### B. Disability Discrimination as Uniquely Rational?

If the departures from established Title VII principles in *Albertson's* and *Chevron* do not (or do not only) reflect a general shift in the Court's thinking about civil rights law, then they must reflect some way in which the Court sees disability discrimination law as different from race and sex discrimination law. This, of course, is the argument that disability-rights-oriented critics have been making about the Court's ADA decisions in general: the Court's narrow reading of the statute indicates that the Justices do not appreciate that disability rights are full-fledged civil rights.<sup>152</sup> As I have argued, *Albertson's* and *Chevron* in many ways provide *better* evidence of

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150. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85 n.5 (2002) (distinguishing *Dothard* and *Johnson Controls, Inc.* because “they, like Title VII generally, were concerned with paternalistic judgments based on the broad category of gender”).

151. See, e.g., *Hibbs*, 123 S. Ct. at 1984 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring) (reaffirming dissents from the Court's earlier decisions that read Congress's section 5 power narrowly); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 622-23 (2001) (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting) (disagreeing with Court's rejection of the “catalyst theory” for attorneys' fee awards); *Alexander v. Sandoval*, 532 U.S. 275, 293-95 (2001) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (disagreeing with Court's rejection of a private right of action to enforce disparate impact regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 376-77 (2001) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) (disagreeing with Court's holding that Title I of the ADA exceeded Congress's section 5 power); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341-42 (2000) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., concurring in part and dissenting in part) (disagreeing with Court's narrow construction of section 5 of the Voting Rights Act of 1965).

152. See *supra* note 5.

the critics' theory of judicial backlash than do the cases on which the critics have typically focused.

The Court's emphasis on the reasonableness of the discrimination in *Albertson's* and *Chevron* also gives a clue to *why* the Court sees disability discrimination law as so different from race and sex discrimination law. The reason, I would suggest, is that because of the way disability is constructed in our culture, the notion that disability discrimination might be rational is far more salient than the notion that race or sex discrimination might be rational. This is because disability is frequently seen as inherently depriving one of the ability to work and contribute to society. The assumption, in much academic and popular work, is that when employers discriminate on the basis of disability, they are often determining "hardheadedly—and perhaps hardheartedly"—that disability impairs productive ability.<sup>153</sup>

Michael Kinsley perfectly expressed this point of view in a recent op-ed article in the *Washington Post*. "Making it illegal to discriminate against people with disabilities," he argued, "is a noble idea, but a peculiar one."<sup>154</sup> For "[t]he opposite of disability is ability," and "discrimination based on ability usually does make sense."<sup>155</sup> Although recognizing that racial discrimination might also "sometimes" make sense from an employer's perspective, Kinsley argued that it is "at its heart . . . irrational, whereas prejudice in favor of ability is not."<sup>156</sup> To Kinsley, even in its pure antidiscrimination aspects, the ADA is therefore a "radical exercise in social engineering"—though one that "is noble" and "can do much practical good."<sup>157</sup>

For one who believes in the principles articulated by the disability rights movement, there are some obvious problems with arguments like these. For one thing, it is clear that disability does not always translate into inability (or even lesser ability) to perform job tasks. It is only the "spread effect"—the widely held assumption that a disability that affects some functions will typically affect other functions—that leads people to assume that, as Kinsley says, disability is the "opposite" of ability.<sup>158</sup> When there *is* a connection between disability and inability, moreover, that connection does not result from the disability *itself*, but from a set of contingent social decisions that make particular jobs incompatible with particular disabilities.<sup>159</sup> On the flip

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153. *Garrett*, 531 U.S. at 367-68. For examples from academic work on disability and employment, see Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 233 (1994) (arguing that public policy should "clearly admit[] that the disabled are not as able as the able"); Carolyn L. Weaver, *Incentives Versus Controls in Federal Disability Policy*, in DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 3, 15-16 (Carolyn L. Weaver ed., 1991) ("Unlike race or sex, disability (or the underlying physical or mental impairment) generally places a limitation on work ability—either by reducing productivity on a particular job or by limiting the jobs the individual is capable of performing.").

154. Michael Kinsley, *Impractical and Ideal*, WASH. POST, July 1, 2002, at A17.

155. *Id.*

156. *Id.*

157. *Id.*

158. See Bagenstos, *Subordination, Stigma, and "Disability," supra* note 8, at 423-25; Kinsley, *supra* note 154, at A17.

159. *Id.* at 426-32.



side, it should be clear that if much disability discrimination is rational, much race and sex discrimination is rational as well.<sup>160</sup> It is plausible to believe that race and sex discrimination is *less frequently* rational than is disability discrimination, but even if that is true, the difference is one of degree. It cannot explain why race discrimination, though often rational, is “at its heart” irrational while disability discrimination, though often irrational, is at *its* heart rational.

So why the persistent emphasis on the rationality of disability discrimination? Any answer is necessarily speculative, but in my view the repeated statements in the literature that disability inherently limits the ability to work are telling. There simply seems to be a widespread belief that disability is relevant to one’s merit in a way that the other triggers for antidiscrimination protection—race, sex, etc.—are not. Even if it is *rational* to discriminate on the basis of race, that is really society’s problem—it is the result of discriminatory attitudes, society’s inability to create effective ways of predicting an individual’s true abilities, or the like. But disability, in this view, is as much the individual’s problem as society’s—disability creates “real differences” between people, and those differences may properly be taken into account in determining individuals’ relative merit.<sup>161</sup>

The historian Douglas Baynton highlights this problem in an insightful essay.<sup>162</sup> As he demonstrates, at various points in this country’s history, people have sought to justify discrimination against many different groups—most notably minority racial groups, immigrant ethnic groups, and women—on the ground that there are “real differences” between members of those groups and of advantaged classes. In particular, those who have sought to justify discrimination have asserted that the disadvantaged classes possess traits commonly associated with disability—that African-Americans have “inherent physical and mental weaknesses” that have made them “prone to become disabled under conditions of freedom and equality;”<sup>163</sup> “that women had disabilities that made them incapable of using the franchise responsibly, and that because of their frailty women would become

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160. See Bagenstos, *Rational Discrimination*, *supra* note 20, at 846-52.

161. Sex is an interesting intermediate case here. There seems to be a widespread belief in our legal culture that there are some “real differences” between the sexes—though fewer than many might think—and that those differences may properly be taken into account in deciding how to treat men vis-à-vis women. See *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (“‘Inherent differences’ between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”) (citations, footnotes, brackets, and internal quotation marks omitted).

162. See Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 33 (Paul K. Longmore & Lauri Unmanský eds., 2001).

163. *Id.* at 37.

disabled if exposed to the rigors of political participation;”<sup>164</sup> and that “certain ethnic groups were mentally and physically deficient” and thus undesirable to admit as immigrants.<sup>165</sup> Fighting against the inequalities imposed on them, representatives of disadvantaged groups have sought to deny any association between their group status and disability.<sup>166</sup> But in so doing, they have only further entrenched the notion that people who *really* have disabilities *should* be treated unequally.<sup>167</sup>

The *Albertson's* and *Chevron* cases suggest that the notion of disability as justifying inequality continues to have a substantial hold on the Supreme Court. If that is so, then it reflects a failure of the ideas of the disability rights movement to penetrate our culture, including our legal culture. To this extent, I think the critics of the Court's ADA jurisprudence are entirely correct. But the critics may have overlooked one aspect of the ADA that may perversely encourage the very attitudes that the disability rights movement has sought to attack: The centrality of “reasonable accommodation” to the ADA's nondiscrimination scheme sends the message that disability is different from other forbidden classifications precisely because it is often relevant to one's ability to do the job.<sup>168</sup> The ADA, then, can too readily be seen as a charitable effort in which everyone must make a “reasonable” contribution to advance the interest of people with disabilities. As cases like *Albertson's* and (particularly) *Chevron* show, such a perception may exert such a powerful influence that courts use reasonable-accommodation-type analysis even when they are considering straightforward disparate treatment claims.<sup>169</sup>

I am not urging that disability rights activists abandon accommodation as a strategy for obtaining integration. Quite the contrary. What disability rights activists must do is to fight the tendency (among members of society, judges, and disability rights activists themselves) to treat accommodation requirements as fundamentally distinct from antidiscrimination requirements. As I have argued at length elsewhere, accommodation requirements have the same justifications, impose the same costs, and likely lead to the

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164. *Id.* at 41-42.

165. *Id.* at 47.

166. *See id.* at 51.

167. *See id.* (“This common strategy for attaining equal rights, which seeks to distance one's own group from imputations of disability and therefore tacitly accepts the idea that disability is a legitimate reason for inequality, is perhaps one of the factors responsible for making discrimination against people with disabilities so persistent and the struggle for disability rights so difficult.”).

168. This is just an example of Professor Minow's “dilemma of difference,” in which the disadvantages attached to socially constructed differences can be reinforced *either* by ignoring *or* by calling attention to those differences. *See* MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 20 (1990).

169. *Garrett* provides another example of the point. As I have previously noted, the notion that the Equal Protection Clause does not require accommodation was the fulcrum of the Court's analysis in that case—even though one of the two companion cases before the Court was a straightforward case of intentional discrimination. *See* Bagenstos, *Rational Discrimination*, *supra* note 20, at 914; *see also* 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. REFORM 81, 125 n.266 (2001) (making a similar point).

same effects as antidiscrimination requirements.<sup>170</sup> Disability rights advocates should be neither too shy about invoking accommodation requirements nor too bold in claiming that those requirements represent a dramatic expansion of traditional civil rights law. In the end, accommodation requirements are fundamentally continuous with antidiscrimination requirements.

#### CONCLUSION

My major purpose here has been to call attention to the *Albertson's* and *Chevron* cases—cases that have been overlooked in the avalanche of criticism provoked by the Supreme Court's ADA decisions. These decisions are exceedingly problematic when considered in their own terms. And in many ways they provide *better* evidence of how the Supreme Court does not understand disability rights to be civil rights than the cases about which disability rights activists have most frequently complained. What connects these two cases, I have argued, is how both reflect an implicit understanding that—at least in the disability discrimination area—the law ought not readily be read to prohibit rational discrimination. Such an understanding marks a major break from established race and sex discrimination principles; to the extent that the Justices (unanimously) hold to it, disability rights advocates have a great deal of work to do.

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170. See Bagenstos, *Rational Discrimination*, *supra* note 20, *passim*. See also Christine Jolls, *Anti-discrimination and Accommodation*, 115 HARV. L. REV. 642, 645-46 (2001) (arguing that antidiscrimination and accommodation requirements impose the same sorts of costs and likely cause the same effects).

