FORWARD THE NEW STAGE OF
DEMOCRACY: PERCEPTIONS ON DISABILITY AND
EMPLOYMENT DISCRIMINATION AFTER THE
AMERICANS WITH DISABILITIES ACT OF 1990

by
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## TABLE OF CONTENTS

ABSTRACT ......................................................................................................................... v

1 INTRODUCTION ........................................................................................................ 1

2 THEORETICAL ARGUMENTS ..................................................................................... 4

   Ableism and Disability Perceptions .............................................................................. 4
   The Classical Market-Oriented Argument ................................................................. 9
   John Rawls and the Political Charity ......................................................................... 12
   Nussbaum and the Capabilities Approach .................................................................. 21
   Knight’s Participatory Parity ...................................................................................... 26

3 THE ADA, COURT CASES AND THE AMENDMENTS ............................................. 31

   The ADA of 1990 .................................................................................................... 31
   Court Cases ............................................................................................................ 38

   Mitigating measures? The definition of “substantially limits.” ............................ 38
   The major life activities .......................................................................................... 45

   The ADA Amendments Act of 2008 ................................................................. 46

4 IV. Forward the New Democracy ............................................................................. 51

   Revising the Market Argument .............................................................................. 51
   Knight’s Criticism of the ADA and Nussbaum Revisit ........................................... 53

5 Concluding Remarks ............................................................................................... 58

REFERENCES ............................................................................................................... 61
ABSTRACT

Despite decades of disability movement and the Americans with Disabilities Act of 1990, many people with disabilities are still excluded and discriminated in various areas of life, including the workforce. The primary reason for such exclusion is that our society is exposed to ableist standards, which often either undermine or exaggerate the life with a disability. Since this is more of structural discrimination, most people often unintentionally impose these standards and bias. As a result, reevaluation of disability is need for a more inclusive model of democracy. In many aspects, the Title 1 of ADA tries to remedy such ableism by explicitly prohibiting employment discrimination.

But what law can do is limited. It cannot always penetrate into our cultural and social values. Given the limits of law, I examine how well the ADA corresponds to Martha Nussbaum’s capabilities approach and how it has progressed through the Supreme Court cases till the Amendments Act of 2008. This study mainly involves a theoretical analysis of different philosophers and a legal analysis of the court cases, hoping to sketch a new stage of democracy that can be more inclusive.
Chapter 1

INTRODUCTION

The Americans with Disabilities Act of 1990 (the ADA) is a significant legislation that resulted from decades of the disability movement that aimed to solve what Martha Nussbaum presents as the disability problem, namely the lack of inclusion of people with disabilities. Nussbaum presents the capabilities approach as a solution. Her theory is designed to be a set of broad guidelines in which many laws may adopt. While there had been several attempts to criticize or revise Nussbaum’s capabilities approach, no studies have applied her theory directly to employment discrimination that people with disabilities may experience.

The chief goal of my thesis, therefore, is to apply Nussbaum’s theory to the ADA and evaluate how closely the law exemplifies what Nussbaum proposes. In doing so, I will also examine alternative arguments to Nussbaum, including John Rawls’s political charity and Amber Knight’s participatory parity, laying out both the strengths and weakness of Nussbaum’s theory. The inquiry involves examining how our perceptions of people with disabilities in work have progressed from the original ADA to the amended version of 2008.

The ADA’s Title I, which deals with the matter of employment, is the main scope of my research. Even after more than two decades of the ADA, people with disabilities still suffer from low employment levels. According to the Bureau of Labor, Only 32% of working-age people with disabilities were employed on average in the 2010-2012 period, compared to 72.7% of people without disabilities. Besides, people
with disabilities often suffer from limited options of employment in high paying jobs, adding to the growing poverty levels for them.¹

A recent study, Ameri et al. (2015), shows that the ADA is not doing enough to significantly shorten the employment gap. The study suspects that people’s biases, stereotypes, and misinformation about disabilities and their accommodation costs as the causes of the persisting gap between the normal and the disabled. The same study, however, shows that the ADA still has some positive effects on reducing employment discrimination in the hiring process, in comparison to similar state anti-discriminatory legislations.

That being said, this paper, while I employ several statistical findings and a very few data analysis, the majority of my thesis revolves around philosophical and legal discussions. I also want to stress that my study is primarily the review of Nussbaum’s theory while using the ADA as a significant example and a case study. I will analyze the language of the ADA, the court decisions, and the ADA Amendments Act of 2008. The central legal question I will present is whether the ADA should be read more narrowly or broadly. I conclude that the law has gradually moved towards what Nussbaum envisions in her capabilities approach. Even the same recent data from the Bureau of Labor indicates that there is substantial potential for job growth among people with disabilities over the coming decade despite the current persistent gap between people with disabilities and without disabilities.²

² Ibid.
The study of disability rights is not only important for people with disabilities but also for those who value democracy. I contend that studying how to make society more inclusive for people with disabilities will help us tackle other structural social problems. If we can conceptualize more mature perceptions of disability, then we should be able to translate that to envision of a new stage of democracy. Essentially, this is the study of necessary conditions to have a new type of democracy, if it is possible at all. I argue that it is possible at least if we apply Nussbaum’s theory carefully. Lastly, I want to stress that the goal of this study is not to sketch the full image of the new stage of democracy in details. Rather, I plan to point out what needs to be done before we can advance to this seemingly ideal society.
Chapter 2
THEORETICAL ARGUMENTS

If an individual were willing and capable of working, should he or she be allowed to work? Even when the person has a disability? People with disabilities often experience exceptionally low levels of employment and high levels of discrimination, highlighting the disability problem, namely the lack of inclusion of people with disabilities.

In discussing people with disabilities’ rights to work, four distinct arguments can be made against or for implementing measures that protect their rights—the classical market-oriented argument, John Rawls’s political charity, Martha Nussbaum’s capabilities approach, and Amber Knight’s participatory parity. Before reviewing each argument, I will define ableism and explain what kinds of perceptions are associated with it.

Ableism and Disability Perceptions

Ableism is a structural discrimination of people with disabilities when ordinary people without disabilities falsely, and often unintentionally, assess actual challenges of having a disability either by exaggerating or underestimating them through ordinary able-bodied standards. This is also known as “the disability paradox,” a term coined by Gary Albrecht and Patric Devlieger.3 A recent poll found that 52% of the

Americans prefer to be dead than disabled. Yet, more than half of people with disabilities often report an excellent or good quality of life. What the paradox shows is that non-disabled people are unable to transcend their social privileges to imagine closely what it is like to live with a disability. As a result, when ableist standards are imposed, which often happens unintentionally, people are more likely to project their own fears and misconceptions about people with disabilities. Consequently, this leads to various discriminations people with disabilities face. The real horror of ableism, again, is that it can happen unintentionally despite one’s best efforts to avoid it because it is a structural problem of our society.

What such ableist standards generally endorse is a “Them vs. Us” mentality. It highly focuses on one’s impairments and the resulting disabilities that set the individuals with disabilities apart from the rest of society. George Orwell’s passage from his *Nineteen Eighty-Four* illustrates an example of how one may view individuals with disabilities:

The next moment a hideous, grinding speech, as of some monstrous machine running without oil, burst from the big telescreen at the end of the room. It was a noise that set one’s teeth on edge and bristled the hair at the back of one’s neck. The Hate had started.

From a historical stand point of view, such a sentiment, engaging in a hostile war on people with disabilities, is neither new nor foreign, even in the United States.

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4 Ibid.
6 https://www.jewishvirtuallibrary.org/jsource/Holocaust/disabled.html (accessed March 20, 2016). Even before the rise of the Nazi regime in Germany in 1930s, the United States practiced forced sterilization on people with certain disabilities. More than 30,000 people in 29 states, mostly in California, were sterilized, unknowingly or against their wills, while they were incarcerated in jails or mental institutions. The
Michel Foucault’s notion of human monster describes the core of ableism. According to his notion, human monsters, or people with disabilities, are seen not only as a violation of the laws of society but also a violation of the laws of nature. These individuals combine “the impossible and the forbidden.” When these individuals, so-called the human monsters, violate the laws of nature with their existence, “it provokes either violence, the will for pure and simple suppression, or medical care or pity.”

In many aspects, the violent aspect of the persisting ableism is an outdated illustration because our society has generally moved away from employing violence since it is generally viewed as a negative thing. What is more prudent, perhaps, is the notion of pity that non-disabled people often exhibit when they encounter people with disabilities. Ableism in this sense refers to viewing individuals with disabilities as someone to be pitied. On the surface, people without disabilities may be eager to help out those with disabilities, but their efforts are often based on the false assessment of the well-being of others. This type of perception is ultimately based on the idea that having disabilities are somehow inferior to being normal. It focuses on correcting or curing disabilities, rather than accepting people with disabilities as fellow humans. Even when non-disabled people try their best to surpass their initial reactions to people with disabilities, having a disability is highly stigmatized in our society. As a result, people with disabilities may experience further isolation and alienation. The fact that

Nazi regime, of course, performed the biggest sterilization program for people with disabilities in a scale that had never been seen before, sterilizing around 300,000 to 400,000 people since 1934 in a short period of time.

8 Ibid.
one’s best efforts to help people with disabilities can unintentionally isolate them further is the true strength of ableism. It hides in the back of our mind and persists.

Foucault also refers to people with disabilities as “the individuals to be corrected.”9 Though the disabled are not necessarily seen as monsters, these individuals are ultimately considered “incorrigible.”10 Yet, society constantly attempts to cure these individuals without addressing their actual needs. The result, therefore, is a never-ending conflict and persisting discrimination. Instead of letting them to grow as fellow citizens, ableism persists and insists on keep them in a child-like state eternally.11 This is a structural problem, which means that it is normally hard for us to pinpoint the exact source of the problem, let alone remedy it.

Another aspect of ableism that follows directly from its inclination to correct disabilities is that overcoming a disability is seen somehow praise-worthy. Here, it adopts a mentality of “This person succeeded despite his disability.” This mentality can indirectly pressure people with disabilities to feel ashamed if they failed to overcome their disabilities. This kind of perception still assumes that disability is inherently a harm. But even if this claim about disability being a harm were to be true, it still does not explain the disability paradox. How can someone with a harm ever be happy? The answer to this question is simple: human lives are exposed to all kinds of

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10 Ibid. 58.
11 This is a reference to an article discussing the ongoing debate about whether parents stopping children with disabilities from growing is ethical. In a way, society does a similar thing. http://www.nytimes.com/2016/03/27/magazine/should-parents-of-severely-disabled-children-be-allowed-to-stop-their-growth.html?smid=fb-nytimes&smtyp=cur&_r=0 (assessed March 27, 2016).
harms. Ordinary people have a high tolerance of pains and other inconveniences.\textsuperscript{12} If so, why is disability more harmful than other harms? Disability as a harm, therefore, does not adequately solve the disability paradox. Without explaining why disability is more harmful than other harms, it only concludes that we should have enormous amounts of paradoxes considering every aspect of harms we experience daily. Ableism assumes that there is something special about disability that is more harmful and dangerous, which is why it requires our utmost efforts to fix it.

One obvious problem with this mode of thinking is that there is too much emphasis on overcoming impairment on personal efforts, but not enough on social issues. Here, a new type of discrimination emerges:

No longer does the master say: ‘you will think as I do or you will die’; he says: ‘you are free no to think like me, your life, property. Everything will be untouched but from today you are a pariah among us. You will retain your civic privileges but they will be useless to you, for if you seek the votes of your fellow citizens, they will not grant you them and if you simply seek their esteem, they will pretend to refuse you that too. You will retain your place amongst men but you will lose the rights of mankind. When you approach those who believe in your innocence will be the very people to abandon you lest they be shunned in their turn. Go in peace; I grant you your life but it is a life worse than death.\textsuperscript{13}

Whereas Tocqueville is not directly referring to ableism, his description of the tyranny of the majority illustrates how an ableist society may mistreat people with disabilities despite its best efforts to make it better for them. On the surface, we assume people with disabilities deserve equal respect and access to life. Deep down,

\textsuperscript{12} E.g., traffic jams, noises from your neighbors, fire alarms in a dorm, etc. My special thanks goes to Dr. Aguirre who presented me this point.
ableist standards persist. People with disabilities are granted with their lives but these are, as Tocqueville says, worse than death. I do not mean to conclude that people with disabilities are actually suffering from what is worse than death. What they are suffering from is that people without disabilities automatically presume this conclusion without actual facts. This type of irrational perception is especially problematic for people with disabilities when they seek employment.

**The Classical Market-Oriented Argument**

The classical market-oriented argument generally goes against employing people with disabilities and implementing any legal, antidiscrimination measure to protect them. Not all reasoning is purely cold-hearted. The market-oriented argument arises from its concern for the high, unreasonable burdens on business entities. Even the ADA prohibits imposing an “undue hardship” on employers.\(^\text{14}\) The market-oriented argument also criticizes an anti-discriminatory legislation such as the ADA for its adverse effects on the disabled, as employers are forced to avoid hiring people with disabilities. Overall, the market-oriented argument leaves little room for the inclusion of workers with disabilities. At best, it can offer a limited pledge of not excluding workers with disabilities insofar as their disabilities do not interfere with their job performance.

The last part, especially, can be highly problematic under ableist society. It is often easy to exclude people with disabilities from work because of what employers

\(^{14}\) *42 USC 12111(10).* “The term ‘undue hardship’ means an action requiring significant difficulty or expense, when considered in light of the factors” such as, but not limited to, the nature and cost of the accommodation needed; the overall financial resources of the facility; the overall size of the entity; and the functions of the workforce.
assume about having to specially accommodate potential employees with disabilities. Many of these accommodation costs are not as costly as some employers fear after a close look, but the ableist standards persist nonetheless.

Having to accommodate people with disabilities is generally considered a burden, or harm, for business entities, interfering with what should be best left for the market to decide. Thus, mandating for such a burden is equivalent to asking an entity to self-inflict harm. John Harris defines disabilities as “physical or mental conditions that constitute a harm to the individual, which a rational person would wish to be without.”

This definition includes both the harm to the disabled individual and others around him. Tristram Engelhardt claims that, “[To see] a disability is to see something wrong with it.” In fact, many employers cite having to provide for work disability income, such as Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI), and not fully knowing other accommodation costs as challenges in hiring people with disabilities.

In response to the contention that the accommodation costs are unnecessarily burdensome, Justice Brennan’s words present a moral argument:

From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all person within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty . . . Welfare, by meeting the basic demand of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the


\[16 \text{Ibid.} \]

\[17 \text{Ameri, Mason et al. (2015). "THE DISABILITY EMPLOYMENT PUZZLE: A FIELD EXPERIMENT ON EMPLOYER HIRING BEHAVIOR". Working Paper Series. 21560: 3-4.} \]
community . . . public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity.'

While this may not be an applicable criticism since the market-oriented argument concerns with the burdens on private entities, not government or its taxpayers, but if a taxpayer as an individual can handle the burden, why couldn’t private entities do the same? Justice Brennan suggests we have an absolute moral responsibility in helping others in needs of help, not matter the costs. How much of that is translatable for the work environment remains for a further debate. Even in the disability context, what if the burden is not really a burden? In fact, most accommodations required from the ADA cost less than $500 and many do not have a monetary cost. On the contrary to what most employers automatically assume, employers who actually experienced actual benefits and the costs of hiring reported that the benefits of accommodations outweighed the costs. This kind of data suggests that there is a possible discrepancy between what employers initially fear and the actual costs and benefits.

Not only are the costs often a lot lower than what employers initially anticipated, the existing costs often exist because of societal discriminatory measures against people with disabilities at work. Of course, the costs exist. But much of that cost often subdues after the initial accommodation. Even when their disabilities do not


\[19\] Ameri et al. (2015): 4

\[20\] Nussbaum. (2006): 112. E.g. Of course, it will cost to build a wheelchair ramp in a place that did not have the ramp. But the reason why it cost is because the work place centered on employees and employer that did not need a wheelchair.
interfere with the workers’ ability to perform their tasks, these workers are often still discriminated in the job hiring process.

Another criticism against the market-oriented argument is that employers often miscalculate the worth of people with disabilities in terms of their skills and abilities. For instance, when one’s ability to perform accounting jobs were not hindered by one’s reliance on wheelchairs, most employers still showed a higher interest in individuals without such disabilities, even when those with disabilities were more qualified in other areas including education.\(^\text{21}\) This supports the idea that ableism endures in society.

With employers’ prejudices and fears, justified or not, the market-oriented argument does not leave much room to accommodate potential workers with disabilities. Instead, employers are at their liberty to favor certain physical characteristics of workers over others, including, to some extent, one’s impairments. For the market-oriented argument, one’s impairments that limit certain aspects of one’s life do not significantly differ from other physical characteristics such as heights and hair or eye colors.\(^\text{22}\)

\textit{John Rawls and the Political Charity}

Since we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have all the capacities that enable them to be cooperating members of society . . . [G]iven our aim, I put aside for the time being these temporary disabilities and also permanent

\(^{21}\) Ameri et al. (2015).
disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense.\textsuperscript{23}

Unlike the market-oriented argument, Rawls’s justice as fairness and other social contract theories leave a room for political charity, though he does not call it this way, as an alternative to deal with the disability problem. Rawls acknowledges that his social contract, justice as fairness, does not initially include people with disabilities that are out of normal range and insists that it cannot include them because these individuals fail to be “free, equal, and independent”.\textsuperscript{24} The disability problem, therefore, can only be addressed at a later political stage with the consents of the active members of society, in a form of charity. By appealing to his social contract theory at a later political stage, Rawls argues, one can transcend our personal, ableist perceptions and eventually become more inclusive for all.

The social contract theories generally aim to provide a remedy to the brutality of the state of nature prior to any establishment of a state. The remedy is, of course, a contract, an agreement to give up one’s use of force and ability to take another man’s property in exchange for “peace, security, and the expectation of mutual advantage.”\textsuperscript{25} Such a contract is made in a hypothetical, initial situation, or Original Position as Rawls names it, in which people are assumed “free, equal, and independent.”

Furthermore, Rawls argues that “free, equal, and independent” individuals are representatives of the rest of population in a society, all driven by self-interests. He assumes that these members possess abilities, physical and mental, that are within the

\textsuperscript{25} Ibid. 10.
normal range, resembling the rest of citizens in the society, and can produce mutual advantage.\textsuperscript{26} One underlying assumption is that human cooperation is only achievable when members are “free, equal, and independent.”

The “Free, equal, and independent” requirements entail specific conditions. First, a person in the original position must be free to pursue his or her conceptions of happiness insofar that he or she has the capacity for rational moral choice.\textsuperscript{27} Second, a person must possess rough equality of powers and resources as others.\textsuperscript{28} Third, a person must not be asymmetrically dependent on others. Kant, for instance, claims that people who are not independent cannot participate in the contract because they lack civil personality. This separates people into two categories: active citizens and passive citizens. The first is entitled to basic rights, including the right to vote while the latter lacks them. I take that Kant’s notion can be extended to the right to work as well. Though this restriction is only temporally for Kant, it can be devastating for people with disabilities who are permanently stuck in the passive category.\textsuperscript{29} Rawls assumes this Kantian definition of personhood in his theory.

Amber Knight criticizes that Rawls unfairly dismisses people with disabilities who have as much stake in the basic structure. This creates ablest criteria for participation.\textsuperscript{30} In addition, Knight points out that the underlying assumption about disability is perhaps misguided:

\begin{itemize}
\item\textsuperscript{26} Ibid. 17.
\item\textsuperscript{27} Ibid. 29.
\item\textsuperscript{28} Ibid. 30.
\item\textsuperscript{29} Ibid. 52.
\item\textsuperscript{30} Knight. (2015): 100.
\end{itemize}
The fact that [mainstream philosophy have] rarely addressed disability is hardly surprising since it is often represented as something that should be overcome instead of accommodated.\textsuperscript{31}

No policy should ever be adopted without the full and direct inputs of the groups affected by the policy, including the people with disabilities. This is promoted by the disability rights movements’ new mantra: “Nothing About Us Without Us.”\textsuperscript{32} In another example, Halvor Hanisch suggests that some would argue that living a good life for people with disabilities is limited to overcoming “social and internalized prejudice.”\textsuperscript{33} But when the emphasis is on overcoming impairment, instead of focusing on providing the proper accommodations, we can easily overlook the daily challenges people with disabilities experience. This relates back to Rawls’ initial hesitation from including people with certain disabilities in his account of justice as fairness. He assumes that individuals with disabilities must be corrected eventually when he suggests the idea of political charity.

Nussbaum has three main issues with Rawls’ theory. First, she finds Rawls’s account of primary goods and its commitment to measuring relative social positions, with respect to only income and wealth problematic.\textsuperscript{34} This exposes Rawls’s commitment to methodical simplicity, which prevents his theory from using more complicated, multilayer indices to assess one’s well-being.\textsuperscript{35} Rawls’s notion of primary goods, limited to income and wealth, automatically excludes the needs of

\begin{flushleft}
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{34} Nussbaum. (2006): 64.
\textsuperscript{35} Ibid. 107.
\end{flushleft}
people, for example, “who are blind, deaf, [and] wheelchair users,” by miscalculating their well-being. A person in a wheelchair can have the same income and wealth as a normal person, but his overall well-being may be much lower in terms of his mobility.

Second, the personhood in Kantian sense requires a high level of both moral and prudential rationality. Within the same level of rationality, people are roughly equal. Both Kant and Rawls assume that proper reciprocity between active and passive citizens is impossible because passive citizens lack such rationality. Rawls, therefore, rejects the possibility of reciprocity existing in a different form. Not only does this pose a threat to people who were born with disabilities, but for people who may fall into various categories of disabilities at some point as they age, either through accidents or natural causes. If a person were entitled to certain rights, could he or she ever lose those rights simply after an accident that was not his or her fault? How about elderly people? Of course, Rawls does not mean to say that no one ever suffers from illness or accident, but he admits that his theory cannot address the issue immediately.

Lastly, since the contract theories insist that people form a contract for the mutual advantage, there is no practical benefit or value to extending the contract to people with far severe disabilities than the average, normal range because they are deem incapable to participate in social cooperation. This leads to the distinction

36 Ibid. 108.
37 Ibid. 114.
38 Ibid. 104-105. This is an issue that needs to be dealt in details in the future. My thesis, however, does not go into too much detail on this point but I want to stress importance of such a distinction. There seems to be some discrepancy on how society treats between older people and younger people with disabilities.
between normal variants among normally productive citizens and the sort of variation that put some people, such as the ones with disabilities, into a new, special category.\textsuperscript{39}

This irrefutable tendency to form a distinction is what constantly separates the normal from the abnormal. Without changing the notion that the goal of society is mutual advantage, it would be very hard for society to include people who are in the abnormal category because the potential costs of accommodating those individuals always outweigh their potential benefits. But this is not even an accurate account since not everyone correctly estimates the cost of accommodations.\textsuperscript{40} The conclusion is rather illuminating: the social distinction between normal and abnormal; between Kant’s active and passive citizens; between people without and with disabilities are arbitrary.

Nussbaum, like Knight’s criticism against Rawls, accurately points out that the relative lack of productivity, or economic benefits, of people with disabilities under the current conditions, is not natural, that it is the “product of discriminatory social arrangement.”\textsuperscript{41} With certain accommodations, such as, but not limited to, wheelchair friendly environment; varied audio technologies; and visual technologies; wheelchair-bound, blind, or deaf can still work. Thus, they can be far more productive than what employers initially assess. The failure to recognize the true values of one’s abilities highlights how ableism persists and grows on the pre-existing exclusory measures.

Nussbaum refutes the notion that the principles of justice must secure the mutual advantage. Instead of being solely driven by self-interests, people often feel

\textsuperscript{39} Ibid.
\textsuperscript{40} Ameri et al. (2015).
\textsuperscript{41} Nussbaum. (2006): 112.
compassion for other people. When other people suffer, some feels compassion for them “as a part of her own good.” If she were right, then helping others have further implication than what contractarians argue. Helping others is inescapable part of who we are. What she eventually suggests, as part of her capabilities approach, is that we inherently pursue “mutual recognition,” not mutual advantage. To achieve this type of recognition, we must then use a different starting point to assess the human nature and include people with disabilities, who have as much stake as others in this social arrangement. Like Knight, Nussbaum believes that addressing the needs of people with disabilities is in everyone’s best interest.

Against all these criticism, Rawls must find a way to defend his political charity idea. He never dismisses a possibility of incorporating people with disabilities and their needs in the social contract in the future though. Whereas he handles the problem of extension for people with low incomes and wealth, Rawls insists that we cannot properly accommodate people with disabilities right away. Instead, it is up to the future political stages to determine, in accordance to the will of the majority, to extend such political rights to a specific group, including people with disabilities.

Rawls can argue that if disability is narrowly defined by the ADA, then it can actually fall under the extended normal range of all abilities of the active citizens. This implies that we may still be able to apply Rawls’s theory to most people with disabilities. Alternatively, so-called the disability problem suggested by Nussbaum can be addressed through focusing on a person’s income and wealth without having to

42 Ibid. 91.
focus on their disabilities. The rest of people can be accommodated through political charity. Rawls can further justify the use of political charity rather than a more direct approach because charity needs to be applied only to a small portion of people who suffer from severe disabilities.

But even if we give that Rawls’s justice as fairness aims to shorten the income and wealth gaps between people, including most people with disabilities, his theory still cannot properly include the needs of the disabled, for people with disabilities often fall under the poverty line, regardless of the severity of their disabilities, and scholars have not agreed on why this is the case. Rawls’s model does not help us explain why and how people with disabilities are more likely to suffer from the constant cycle of poverty than those without disabilities. Without a specific explanation for such a phenomena, Rawls’s theory fails to address the needs of people with disabilities, at least not in the way that Rawls proposes. This undermines his justification for the use of political charity. Why leave it up to mere charity when the needs of millions of people are at stake?

Justice Brennan’s comment earlier also brings out another criticism against Rawls’s political charity idea. In the passage, Justice Brennan stresses the importance welfare and how it cannot be a form of charity. Instead, he proposes that helping

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44 Knight. (2015): 104. Knight argues that marginalization within the capitalist system and high unemployment rates contribute to the fact that people with disabilities disproportionately live under the poverty level. According to the US Census Bureau in 2010, 27.9% of people with disabilities in between 18-64 fell under the poverty line in contrast to 12.5% of people without disabilities.
fellow citizens in need of advances the goals of the Constitution and our prosperity. His argument, however, needs to be backed by another set of argument that one’s right to work is an essential part of a democratic institution.

The main problem with Rawls’s theory is that it does not adequately equip us to identify and criticize ableist biases that underlie supposedly neutral measures favoring employers’ discretion. Since ableism manifests not always intentionally, Rawls fails to address how we can deal with the persisting discrimination that results from employers’ seemingly sound arguments against employing people with disabilities. Is preferring an employee without glasses necessarily immoral when airline company is hiring a global pilot? How is that any different from hiring someone because employers personally prefer their heights and eye colors? These seemingly sound arguments often feed on the persisting ableist biases that are not necessarily true of people with disabilities, structurally increasing the discrimination against them. Rawls does not go as far as endorsing ableism, but he has no effective ways to distinguish neutral, non-systematical favoritism from ableism, which entails a structural discrimination of people with disabilities.

In fairness, Rawls’s approach tries to resolve the disability paradox. Within in his model, as soon as one’s disability falls within the normal range of disabilities, justice as fairness covers the individual. This implies that if society and individuals work on overcoming one’s disability, the disability problem can be fixed. Once a person overcomes his or her disability to a point that it does not affect his or her ability to work, minimizing the accommodation costs, the person should be praised and awarded. Celebrities or famous people with disabilities, such as Stephen Hawking, become the beacon of this newly emerging perception of disabilities. But for most
other ordinary disabled, who are less likely to ever fully overcome their disabilities, Rawls’s theory does not give a satisfying way to resolve the disability problem and cannot get rid of ableism because it underestimates the impact of ableist biases and is ineffective in countering ableist practices.

**Nussbaum and the Capabilities Approach**

Rawls argues that the disability problem, infused by persisting ableism, can be addressed through his theory at a later political stage. To do so, we have to simplify our assessment of one’s wellbeing to primary goods—income and wealth—and focus on shortening the gap between different groups of people. Even if what we could do are limited to a form of charity, Rawls believes we eventually transcend our personal biases. But, Nussbaum argues that it is important to emphasize the connection among work, as one of the major life activities, human dignity, and mutual recognition that cannot be reduced to Rawls’s account of primary goods. Martha Nussbaum, therefore, has a different starting point and different assumptions about the fundamental nature of human cooperation.

Nussbaum emphasizes the notion of the human dignity and offers a solution to the disability problem. She calls this the capabilities approach. She argues that every person deserves a bare minimum threshold that guarantees “a life that is worthy of the dignity of the human being.” For her, this includes “having the right to seek employment on an equal basis with others.” The right to work, therefore, forms a key component of Nussbaum’s capabilities approach. The social goal, therefore, should be

46 Ibid. 76-78
about getting each citizen, including people with disabilities, above that threshold to treat everyone as an end and not as a tool for the ends of others. Nussbaum’s notion of the human dignity partially comes from Marx, who insists that people are entitled to opportunities for activity too, not just quantities of resources. These opportunities or freedom are what Nussbaum refers as capabilities. She suggests that “one way of thinking about the capabilities list is to think of it as embodied in a list of constitutional guarantees.”

Her capabilities approach does not move too far away from Rawls’s rights theory. Instead, it is better to regard her theory as an extension of Rawls’s with a new starting point. Each capability she lists entails a necessary condition to guarantee fair opportunities of a good life for all persons. What she offers is a list of ten capabilities that accounts for minimum core social entitlements. Once a society provides this minimum threshold, Nussbaum holds, Rawls’s social contract theory is still applicable, if not preferred, because her theory does not provide a complete account of social justice.

Out of those ten capabilities, I identify the ones that are especially relevant to the issues of employment discrimination:

7. Affiliation

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation.)

47 Ibid. 74-75.
48 Ibid. 155
49 Ibid. 76-78.
B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over One’s Environment

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Since Nussbaum does not hold that the state of nature compels people to join a contract for the mutual advantage, she does not have to limit the parties to the contract in the Original Position to be “free, equal, and independent.” The implication, according to the capabilities approach, is that people choose cooperation because human beings are social and political animals, who find fulfillment in relations with others. Nussbaum assumes that one’s asymmetrical dependency on others is inevitable given the nature of human beings. Subsequently, Nussbaum rejects the requirements of the rough equality in powers and resources to participate in the initial situation and claims that reciprocity among all kind of people is possible. This, I believe, is a key difference between Nussbaum’s theory and Rawls’s theory. Nussbaum’s theory allows employers, for instance, to take into consideration of the latent benefits of hiring people with disabilities. What needs to be stressed here is that

50 Ibid. 87.
51 Ibid. 85.
52 Ibid. 88.
Nussbaum insists that employers view people with disabilities as fellow human beings who are entitled to a life worthy of the human dignity. Her theory aims to include as many people as possible.

The core difference between Rawls and Nussbaum is not just a matter of the scope of inclusion. She maintains how important work is for a life worthy of the human dignity. She implies that by simply being able to work, people with disabilities can often display talents and skills that are otherwise impossible to be observed until they start working. If ableism persists and systematically prevents employers from hiring people with disabilities even when employers do not mean to intentionally discriminate them, these employees automatically lose their chance to show what they are capable of doing. Because the right to seek employment is essential in achieving other capabilities, a failure of work capability can be disastrous for Nussbaum’s theory. Without these capabilities, these people are deprived of their human dignity.

The capabilities approach recognizes the equal citizenship of people with disabilities, supports providing the accommodation for those people, and recognizes the varieties of disabilities that normal human beings experience. The capabilities, however, are not instruments to a life with the human dignity. They are understood, instead, as ways of realizing a life with the human dignity. In order to achieve this goal, society must provide good care and accommodation. Such accommodation include various ranges of things: the stimulation of imagination; the freedom from overwhelming fear and anxiety; the capacity for practical reason and choice; the capacity for social and political affiliations; the protection of self-respect; the control

53 Ibid. 99.
54 Ibid. 161.
over one’s material environment. These are essentially the capabilities I have listed earlier. The basic and important assumption is that being able to pursue employment on an equal basis with others crucially guarantees various capabilities, while being able to pursue employment is a capability of its own.

People with disabilities are citizens worthy of the human dignity who have the natural claims to things like the right to seek employment. While employment might not be appropriate for people with certain severe disabilities, if the person has the capacity to work, then it would be very essential for the person to have the right to work or at least the equal opportunity as other people to pursue the employment. Nussbaum, ultimately, argues for individualized accommodation, given from the government, for people with disabilities.

Nussbaum’s capabilities approach provides a new type of perception, or at least close to it. Instead of praising the special, few individuals who succeeds despite their disabilities, her approach lays out ways to address the needs of ordinary people with disabilities. Unlike Rawls’s theory, Nussbaum’s theory covers a broader range of disabilities, both physical and mental, with the exception of very severe cases in which the individuals are completely unable to participate in social life including the workforce. While her theory does not go as far as promoting a disability identity, she offers more extensive and inclusive way to deal with the disability problem whereas Rawls’s political charity lacks sufficient means to tackle the issue.

55 Ibid. 168-169
56 Ibid. 171.
**Knight’s Participatory Parity**

One might argue that neither Rawls nor Nussbaum pays enough attention to specific experiences of people with disabilities. Although Nussbaum argues for mutual recognition, she does not fully consider that it might be difficult to achieve such mutual recognition before we actually listen to people with disabilities and guarantees that they can politically mobilize. Amber Knight’s participatory parity specifically aims to ensure that the voices of these individuals are properly heard in our society.

In fact, Knight argues that the sole pursuit of anti-exclusion measures is never enough. For her, securing more direct and active inclusion measures, in addition to anti-exclusion measures, for people with disabilities is in democracy’s best interest since diversity, including cognitive and physical diversity—enriches deliberations.57 Whereas Nussbaum ultimately argues for the inclusion of people with disabilities, Knight can argue that her approach focuses only on the premise of getting rid of exclusive measures against people with disabilities.58 One reason for this criticism is that Nussbaum does not think capabilities approach tells, and should not tell, people how to live their lives. Rather than telling individuals what a good life should be, she insists, the capabilities approach offers a chance for people to live a good life, if they chose to live it so. It certainly does not offer a full guidance to what a good life is for people with disabilities. This can be seen as the refusal to actively listen to what people with disabilities have to say. Knight, on the hand, stresses on the need for deliberative inclusion. She also believes that people with disabilities should be

58 In many ways, this is a criticism of the limits of law, which cannot accomplish a broader inclusion until cultural recognition is already established. This, however, does not differ significantly from Nussbaum’s position either.
included even if their ways of communication is substantially limited.\textsuperscript{59} This idea can be extended to work as well.

Many proponents of her view argue that impairment is a physiological condition whereas disability is largely socially constructed through exclusionary policies and practices.\textsuperscript{60} Disability is often represented in society as something to be fixed, instead of accommodated, so most mainstream philosophy have rarely addressed the persistent marginalization that people with disabilities experience.\textsuperscript{61} She argues that we need a theory of inclusion that does not require assimilation of culture as a prerequisite for either people with or without disabilities.\textsuperscript{62} A just theory, according to Knight, must preserve differences of groups by securing external conditions and structures that will allow diverse citizens to participate on a relatively equal level. Knight believes this must be the only way to remedy ableism in a fundamental way.

How do we implement such a theory of inclusion? A certain threshold of social and economic equality is necessary. For instance, one can be guaranteed of the freedom of speech, but without necessary conditions to sustain her mobility to the place of speech, the freedom of speech is an empty gesture.\textsuperscript{63} Jürgen Habermas assumes that the public sphere is accessible to all. Nancy Fraser, whose inclusion theory Knight relies on, criticizes him by stating that this is not the case:

\textsuperscript{60} Ibid.
\textsuperscript{61} Ibid.
\textsuperscript{62} Ibid. 101.
\textsuperscript{63} Ibid. 101-102
Discursive integration within the bourgeois public sphere was governed by protocols of style and decorum that were themselves markers of status inequality. These functioned informally to marginalize women, people of color, and members of the plebeian classes and to prevent them from participating as peers . . . Social inequalities can infect deliberation, even in the absence of any formal exclusions.  

Using Fraser’s words, Knight points out that unequal social and cultural statuses create informal barriers to inclusion. The implication is that since it is impossible to separate political processes from structural inequality, a democratic state must intervene in the social realm to ensure that certain minority groups in society are not unfairly disadvantaged. Another implication from Knight is that gender, race, sexuality, class, and disability are not too isolated from each other, for “one dimension of a person’s social status intersects with other aspects of structural power.”  

Dealing with the disability, therefore, may have bigger consequences for other major societal problems.  

Knight does not believe that her theory requires a minimum ability of communication that complies with certain expressive norms; in other words, they do not have to have an actual, physical voice to fully participate in the decision-making process. She argues that such a requirement would discriminate people with certain disabilities affecting their speech. Because our expressive norms are centered towards those without disabilities, they mostly follow the ableist norms.  

Communicative diversity also requires thinking about people with disabilities as a social group. She essentially calls for the need to establish disability as an identity.

64 qtd. in Ibid. 102  
65 Ibid.  
66 Ibid. 103. Fraser, on the other hand, argues that we need a minimum ability to speak to deliberate our thoughts. Knight modifies this theory by allowing alternative forms of deliberation that does not need an actual voice.
For Knight’s theory to work, some measures of economic redistribution\(^{67}\) are necessary, but they are not enough. Sometimes, scattered entitlement programs fail to lift people with disabilities over the poverty line. What is more important, perhaps, is cultural recognition. Degrading cultural representations of people with disabilities are a social construction.\(^{68}\) To remedy this, we must revalue disrespected identities, recognize cultural diversity, transform the ways everyone defines social identities, and redesign institutionalized value patterns. Stereotypes affect political deliberation of people with disabilities and their chance of being employed. Non-disabled people often “exhibit fear, pity, fascination, revulsion, or any combination of the above when faced with people with visible impairments.”\(^{69}\) As a result, people with disabilities often become anxious, sad, and angry after encountering the reactions of people without disabilities. Many disability scholars and activists have struggled to convince the world that disability is a difference worth preserving because disability is often associated with “deviancy, abnormality, and pathology.”\(^{70}\) Knight argues that such stereotypes must be recognized and transformed before any participation by people

\(^{67}\) Ibid. 104-105. Various redistributive measures may include redistributing income and wealth, reorganizing the division of labor, changing the structure of property ownership, democratizing the procedures by which investment decisions are made, and transforming other basic economic structures. Many laws including the ADA and the Ticket to Work and Work Incentives Improvement Act of 1999, along with entitlement programs such as SSDI and SSI, are examples of societal efforts to offset the exclusion of workers with disabilities. In addition, Knight suggests that the workforce needs to restructure itself to accommodate people with limited work capacities. She also calls for more generous entitlements and cash assistance programs.

\(^{68}\) Ibid.

\(^{69}\) Ibid. 106.

\(^{70}\) Ibid. 107.
with disabilities can happen. Establishing disability as an identity is vital for cultural recognition.

Ultimately, though indirectly, Knight criticizes Nussbaum’s capabilities approach because she thinks the human dignity focused approach may imply that normal people are doing a favor to people with disabilities.71 There must be a way of incorporating people with disabilities into the collective decision-making. Knight also rejects Rawls’s idea that we can transcend our personal identities to think about a political issue from the viewpoint of others. Communicating social differences through public space, therefore, is necessary to transform self-interested preferences into an understanding of what is just.72 This is the only way to get rid of ableism completely according to Knight.

One critique I have on Knight is that while she makes a good case on why we may need to view disability as a social identity, I do not think that human dignity-based approach automatically assumes that normal people are doing a favor for people with disabilities. In fact, Nussbaum argues that focusing on the human dignity is a way to ensure equality and mutual recognition among different citizens. Much of this will be revisited and discussed in Chapter 4.

71 Ibid. 109.
72 Ibid. 110.
Chapter 3
THE ADA, COURT CASES AND THE AMENDMENTS

In this chapter, I evaluate the ADA in the lens of Nussbaum’s capabilities approach. In doing so, I assess whether the ADA essentially embodies Nussbaum’s theory. The answer to this question heavily depends on how narrowly or broadly we should interpret the ADA. For this, I turn to the court cases following the enactment of the ADA in 1990. Finally, I will compare the Court’s rulings to the most recent ADA Amendments Act of 2008. I hope to show how the ADA has progressed since its inception.

The ADA of 1990

The chief purposes of the ADA are following. First, it is “to provide a clear and comprehensive” federal mandate for the elimination of discrimination against people with disabilities. Second, the ADA provides standards addressing discrimination against people with disabilities. Third, it ensures that the federal government plays a role in enforcing the law on behalf of people with disabilities. Lastly, the ADA invokes the congressional authority to address the major areas of discrimination that people with disabilities face daily.

In many ways, this law can be seen as actualization of Nussbaum’s listed capabilities. Ideally, if the ADA successes in providing those four goals, not only

73 42 U.S.C. §12101 (b)(1-4). The ADA lays out its four goals in light of what the Congress has found prior to 1990.
people with disabilities would be brought above the minimum threshold of various aspects of life, the law also justifies the big role federal government must play daily in order to implement such truly equal and fair environments for people with disabilities. If the ADA successfully mandates what Nussbaum refers as individualized accommodation, we may finally refer people with disabilities as fellow citizens who are entitled to a life worthy of human dignity, rather than someone who are somehow inferior. To satisfy Nussbaum’s theory, the ADA does not have to actually require all citizens to live in a certain life. Instead, what it requires is that as many people as possible to have plenty real choices as to how to live a good life worthy of human dignity. Having the right to seek employment on the equal basis guarantees many aspects of life.

Prior to the enactment of the ADA, Congress had found “that some 43,000,000 Americans [had] one or more physical or mental disabilities and this number [was] increasing as the population as a whole [was] growing older.” These individuals historically suffered from isolation and segregation despite the recent improvements and Congress acknowledged that this was a pervasive social problem. Similar to Nussbaum and Knight’s conclusions, Congress concluded that discrimination against people with disabilities persisted in areas like employment. Unlike discrimination on the basis of race, color, sex, national origin, religion, or age, individuals with

75 Ibid. 172-173.
disabilities often did not have the same legal recourse to redress such discrimination. Discrimination entails the exclusion of individuals from various opportunities including “programs, activities, benefits, jobs.” Discriminated in the hiring process is an excellent example of discrimination. The word “opportunities,” which is explicitly stated in the ADA, is important because it resembles what Nussbaum refers as capabilities. Congress acknowledged that people with disabilities often lacked essential opportunities, or capabilities in Nussbaum’s term.

One of the core arguments Congress used in favor of enacting the ADA is that if unfair and unnecessary discrimination and prejudice persist, thereby preventing people with disabilities from pursuing certain opportunities, it would result in unnecessary dependency and expenses for all. In other words, if we let the ableist standards to persist, we would always trap people with disabilities in a tedious cycle of systematic discrimination, adding to already existing expenses society endures. So, if a person were able otherwise, that person should be able to pursue opportunities, for the end outcome is better for society as a whole, reducing unnecessary expenses. The ADA defines people with disabilities as minority who are “subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”

80 42 U.S.C. §12101 (a)(5).
So far, the ADA seems to comply what Nussbaum requires in her theory, a visible movement away from ableist standards.

The ADA of 1990 provides some crucial definitions in understanding disability. The term disability means, “with respect to an individual a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” Unfortunately, the 1990 version of ADA does not explain, for instance, does not specify whether one’s disability should be defined in reference to mitigating measures such as medications. Should such an individual, whose disabilities are mitigated, be covered under the ADA? Such a question can lead to either a narrow or broad reading of the ADA. This is, of course, a crucial question in cases like *Sutton v. United Airlines* (1999) and *Murphy v. United Parcel Service, Inc.* (1999). In each case, the justices have disagreed on how narrowly or broadly we should interpret the ADA.

There are other controversies due to the lack of more specific definitions. The ADA does not explicitly state what “major life activities” specifically entail. Who decides these? Without further clarification, the whole process of defining disability remains a very arduous task, if not controversial. This is a core issue in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002), in which the Court decided the definitions of these ambiguous terms over the EEOC’s interpretation of the ADA.

But why does it matter that the Court interprets the ADA either narrowly or broadly? It matters substantially not only because it determines the scope of the ADA, but also because it gives us a clue to whether the ADA reflects what Nussbaum envisions. Can it provide people with disabilities a life worthy of human dignity?

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83 42 U.S.C. §12102 (2)(A-C)
Again, the chief goal of Nussbaum’s capabilities approach is to get as many people as possible above the threshold of every capability. To some extent, Rawls’s theory also aims at this goal but does not address the need to embrace human dignity concept in addition to Kantian notion of citizenship and its autonomy.

The lack of specific definitions by itself can be problematic for Nussbaum because her capabilities distinctly state various aspects of life that cannot be compromised if we were to pursue a life worthy of human dignity. The ambiguous language of the ADA might result in situations in which the law may wrongly assess the wellbeing of a person with disabilities on the ableist standards. For instance, going back to Nussbaum’s example when she criticizes Rawls’s assessment of one’s wellbeing in terms of economic resources, the law without clear definitions may regard a person on a wheelchair to be better off despite her immobility that inhibits her access to a social event such as get-together party at work. Even if this individual earns the same income as other employees without disabilities, if the company hosted events in such a manner—holding a work party in a place that is virtually inaccessible by the wheelchair-users—the worker with disabilities is deprived of her affiliation capability, which includes the right to engage in various forms of social interaction.\footnote{This is not to claim that employers should always pick a setting for the work party that can accommodate everyone’s needs, for that is impossible, and it misses the point. The heart of the issue is that employers and coworkers of people with disabilities often accidently neglect the daily struggles these individuals experience because they cannot properly assess what it is like to live with a disability despite their best efforts understand and help. A simple acknowledgement to show that they are aware of the struggles may be a small thing that can make big differences.} For Nussbaum, one’s simple accommodated access to work environment may not be enough to ensure one’s other relevant capabilities.

\footnote{This is not to claim that employers should always pick a setting for the work party that can accommodate everyone’s needs, for that is impossible, and it misses the point. The heart of the issue is that employers and coworkers of people with disabilities often accidently neglect the daily struggles these individuals experience because they cannot properly assess what it is like to live with a disability despite their best efforts understand and help. A simple acknowledgement to show that they are aware of the struggles may be a small thing that can make big differences.}
Another issue at stake is that the lack of clarification can leave to employers’ liberty to define disability based on the ableist standards. If the ADA means that the employers can determine specific “major life activities” and what considers to be “substantially” limiting these activities to some extent, it may still be possible for employers to create, either intentionally or unintentionally, special, discriminatory standards that are unfair to certain people with disabilities. The EEOC has its own, broad interpretation of the law, along with the Department of Justice’s similar guidelines to prevent this exact possibility.\(^\text{85}\)

Justice O’Connor, however, correctly points out that no government agency has been given the sole authority to interpret the term “disability” according to the ADA.\(^\text{86}\) This means that while the Court would consider the guidelines from the government agency on implementation of the ADA, it is not bounded by their interpretations. As a result, how the Court interprets the ADA plays a significant role. If we were to interpret the ADA narrowly, far fewer people would be covered by the ADA, failing to uphold Nussbaum’s goal to include as many people with disabilities as possible. For Nussbaum, this is not just a matter of quantity. Since the right to seek employment is strongly embedded with other capabilities, depriving one’s proper

\(^{85}\) Sutton v. United Air Lines, Inc. 527 U.S. 478 (1999). The EEOC defines the term “substantially limits” to mean “unable to perform a major life activity that the average person in the general population can perform.”\(^\text{85}\) In addition, the EEOC states that the determination of whether or not one is substantially limited in a major life activity must be made on case-by-case basis without reference to mitigating measures such as “medicines, or assistive or prosthetic devices.”\(^\text{85}\) The Department of Justice issued a similar guideline.

\(^{86}\) Ibid. 479.
protections and guarantees to pursue employment instantly becomes the matter of quality of one’s life.

But on the other hand, if the ADA were to be read more broadly, interpreting that the law has meant to cover far more people than 43 million, then it can possibly address certain aspects of life that are not always palpable, including substantial struggles people with disabilities experience daily that may not seem as limiting to the eyes of the abled. If such an interpretation can lead to an eventual consideration of different aspects of life, other capabilities, the ADA can still easily embody what Nussbaum envisions and can even lessen the persisting ableism.

One difference between Nussbaum’s theory and the ADA is the ADA’s omission “the human dignity.” The legislation does not invoke Nussbaum’s language in its original 1990 version. Whereas Rawls’s theory adopts the Kantian definition of citizenship, the ADA does not necessarily endorse the idea of the two categories citizenship. What the ADA focuses instead is the notion of “Americans with disabilities,” indicating equal citizenship for people with disabilities as the Civil Rights Act of 1964 has once expanded the notion of citizenship to African Americans and others. Nussbaum’s goal is to establish that Kantians’, such as Rawls’s, unwillingness to expand the active citizenship status to people with disabilities is unsubstantiated. Unless the ADA somehow allows a special, more limited category of citizenship for people with disabilities purely on the basis of their disabilities, which seems to be on the contrary to its stated purpose, the ADA can still reflect Nussbaum’s conceptualized personhood with the human dignity.

One noticeable similarity between the ADA and Nussbaum’s theory is that both focus on the notion of “qualified individual with a disability.” The ADA defines
“qualified individual with a disability” as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”

The essential functions of the jobs includes what is on the written job descriptions used by the business entities before advertising or interviewing applicants for the job. Otherwise, it is up to the employers to decide what are essential functions of the job. Similar to this notion of “qualified individual with a disabilities,” Nussbaum argues that a person who is capable of performing a selected job, with or without accommodations, should be given with equal opportunities to obtain the employment because her disabilities do not hinder her ability to perform the proposed employment as well as others without disabilities. This similarity, however, needs to be reevaluated depending on whether the ADA should be interpreted more narrowly or broadly. For a further clarification, I turn to what the Court has said about the ADA.

Court Cases

Mitigating measures? The definition of “substantially limits.”

One of interesting, if not highly controversial, issues after the enactment of the ADA was whether or not the determination of one’s disability should be made in reference to mitigating measures. This debate was the first major battle to decide how

87 42 U.S.C. §12111 (8)

88 This, however, is misleading. According to the EEOC’s interpretation of the “essential functions,” essential functions are not be confused with “qualification standards,” which employers are at liberty to decide. Whereas “essential functions” are vital for performing the given job, the lack of “qualification standards” do not necessarily make it impossible to perform the job. For further distinction, look §1630.2(n) of the EEOC’s Interpretive guidelines.
narrowly or broadly we should interpret 42 U.S.C. §12102 (2) of the ADA. Again, disability under the ADA means, with respect to an individual,

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; (C) or being regarded as having such an impairment.89

What becomes tricky with these provisions is that it is often hard to determine one’s disability when their supposed disabilities can be mitigated with medications and other auxiliaries such as glasses and prosthetics. No one would argue that most impairments permanently disappear simply because one uses mitigating measures, but one can still argue that mitigating measures for certain disabilities allow the individual to function without substantially limiting the major life activities. If so, one’s impairments would not be considered “disabled” under the ADA.

So it seems obvious that “substantially limits” must be interpreted clearly. The Majority in both Sutton v. United Airlines (1999) and Murphy v. United Parcel Service, Inc. (1999) decided that because the phrase “substantially limits” appeared in the present indicative verb form, a person must be “presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability.”90 This meant that the Court rejected the notion of one’s disability claim on the basis of how the person’s impairments “might,” “could,” or “would” “be substantially limiting if migrating measures were not taken.”91 The Court also interpreted that substantially meant “considerable or specified to a large degree.”92 For the purpose of being

89 42 U.S.C. §12102 (2)(A-C)
91 Ibid.
92 Ibid. 490- 491.
qualified as disabled under the ADA, the impairments must be severe. A mere medical
diagnosis of impairment is not enough. It must be supported by evidence on an
individual basis, “taking into account the individual’s ability to compensate for the
impairment.”

In addition, because the ADA’s definition of disability requires that disabilities
are to be assessed with respect to an individual, the Court decided that whether or not
an individual has a disability under the §12102 (2) must be based on an individualized
inquiry. The Majority concluded that we must look at the ADA as whole and take
mitigating into account to assess one’s disability. Otherwise, the Majority warned that
we might end up focusing too much on how an uncorrected impairment affects
individuals, not on the individual’s “actual condition.”

The Majority criticized the EEOC’s directives, for instance, because, in
general, they tend to group different individuals into the same group, rather than as
individuals. This, the Court concluded, violated the spirit of the ADA, which should
focus on assessing one’s disability in terms of their actual experiences. So what is at
stakes? The Majority in both Sutton and Murphy argued that the ADA should be read
rather narrowly to provide proper protections for people with disabilities, who were
clearly defined under the ADA. If disability were to be defined so broadly, it might,

93 Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 190 (2002.)
Citing Albertson’s Inc. V. Kirkingburg, 527 U.S. 565 (1999).
decided that the determination of a disability is not necessarily based on the name or
diagnosis of the impairment the person has but rather on the effects of that impairment
on the life of the individual.
95 Ibid. 483.
96 Ibid. 483-484
for example, mistakenly group an individual with a severe, disabling blood pressure condition with others who have either minor or almost no blood pressure problem. This particular example was discussed in *Murphy*\(^97\). In addition, the Majority argued that taking mitigating measures into account was the only way to ensure that the ADA could include people with disabilities who may be suffering from the side effects of certain mitigating measures if the negative effects ended up substantially limit their major life activities.\(^98\)

The controversies of these cases come from the fact that in each case employers’ refusal to hire the petitioners was influenced by the very existence of their impairments that normally limit various major aspects of their lives. For instance, in *Sutton*, two twin sisters had severe myopia and could not effectively see to conduct several daily activities without contact lens or glasses. “But with corrective measures, such as glasses or contact lenses, both function identically to individuals without a similar impairment.”\(^99\) When they both applied for the position of global pilot at United Air Lines, Inc., they were both dismissed during their interviews due to their low, uncorrected eyesight despite the fact that they were otherwise qualified to perform the job when their disabilities were mitigated.\(^100\) But under the Court’s interpretation of the ADA, these twins were not disabled with reference to their mitigating measures. This meant the Air Lines’ decision to not hire them was not disability discrimination.

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\(^98\) *Sutton* (1999): 484-487
\(^99\) Ibid. 475.
\(^100\) Ibid. 475-476. Petitioners met “the respondent’s basic age, education, experience, and Federal Aviation Administration certification qualifications.”
The sisters argued that they were discriminated on the basis of their disability and that the respondent regarded them as having a disability.\footnote{Ibid.} They accused that the United Air Lines was biased and had discriminatory standards against them because of the existing stereotypes and fears of myopia. The Court dismissed this argument by insisting that even under the EEOC’s general regulations an employer might make employment decisions on the basis of physical characteristics alone. Having a certain criteria, therefore, does not automatically make it a form for discriminatory action. Some limiting, but not substantially limiting, impairments can be used as a basis to not hire someone.\footnote{Ibid. 490-491.} According to the Majority, the Air Lines’ decision to not hire someone who does have the necessary visions without mitigating measures, therefore, was no different from the decision to not hire an employee with certain physical characteristics like their heights or eye colors.

The Court’s reasoning in \textit{Sutton} raises an important legal issue. If we were to employers’ preferences of an employee without mitigating measures for her vision as same as employers’ preferences over one’s physical characteristics, should the law still do something about it to protect employees’ right to seek employment on the equal basis? If so, why not extend the protection for every profession such as modeling, which depends on the looks and height. Following this logic, we may end up with a conclusion that we should ban all these professions insofar as they rely on employer’s discretion and preferences. If we were to somehow protect the two sisters from \textit{Sutton}, we have to address what sets apart their case from models whose looks get constantly judged. The narrow reading of \textit{Sutton} circumvent this potential dilemma

101 Ibid.
102 Ibid. 490-491.
by affirming that there is no difference, for instance, between the two sisters and other professionals whose employers rely on their physical characteristics to assess their values.

Another example of the Court giving employers more discretion with their qualification standards are shown in *Chevron U.S.A., Inc. v. Echazabal* (2002), in which the Court decided that employers could establish certain standards to prevent harms to oneself or others. Similarly, the Majority stated in *Suttons* that the global pilots’ visions were important for the safety of the pilots and the passengers. This should grant employers the ability to create qualification standards that address the eyesight.

Justice Stevens and Justice Breyer dissented in both *Sutton* and *Murphy* and argued that the determination of disability should be made without reference to mitigating measures such as “rehabilitation, self-improvement, prosthetic devices, or medication.” Justice Stevens that 42 U.S.C. §12102 (2)(B) of the ADA defines disability as “a record of having such an impairment.” Under this provision, one should be defined as having a disability even when his or her impairments were “completely cured.” The “present and actual” doctrine, established by the Court, seems to undermine this provision. Even in the Senate Report of 1989, it states that whether a person has a disability should be assessed without regard to mitigating measures, such as reasonable accommodations or auxiliary aids. The House of Representatives, before passing the bill, made an adjustment by clarifying in their

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104 Ibid. 496.
1990’s report that even correctable or controllable disabilities were covered under the ADA.\textsuperscript{106} If this were not the intention of Congress, why would Congress make such changes before passing the legislation?

In terms of the intended scope of the ADA, the Majority relied on a different provision of the ADA and argued against Justice Stevens’ dissent that findings in the ADA showed that the Congress did not intend to include all uncorrected conditions. \textit{42 U.S.C. §12101 (a)} states that roughly 43 million Americans have disabilities. While the Act implies that the numbers of these people with disabilities are projected to increase, the Majority used this figure to argue that the law has not intended to include unmitigated impairments. If it meant to cover more people, then the law would have indicated more people though different measurements.\textsuperscript{107}

Everyone can agree that the ADA is intended to provide basic protection from irrational and unjustified discrimination, resulting from irrational fears and stereotypes, because of a characteristic that is beyond one’s control. So, naturally, the question becomes, assuming that the person is fully qualified for the job otherwise, the following: do employers, like the United Air Lines, have a duty to explain that their refusal to hire someone because of their uncorrected vision has less to do with their fears and stereotypes of one’s impairments? The narrowed reading of the ADA does not require employers to justify their qualification standards as long as they are applied fairly to everyone applying for the job and do not target the impairments that are substantially limiting. But this still leaves a possibility of employers

\textsuperscript{106} Ibid. 499.
\textsuperscript{107} Ibid. 484-487.
unintentionally neglecting certain employees on the basis of irrational fears and stereotypes.\textsuperscript{108}

The major life activities

The next equally controversial aspect of the ADA is its lack of clear definition of the “major life activities.” Major life activities, according to the EEOC, include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{109} In \textit{Sutton}, petitioners unsuccessfully argued that their impairments substantially limited their major life activity of working. The Majority dismissed this type of definition by stating that working could not be considered as a major life activity under the ADA unless one is significantly excluded from “more than one type of job, specialized job, or a particular job of choice.”\textsuperscript{110} If other jobs utilizing an individual’s skills are available, one is not excluded from a substantial class of jobs. For instance, being excluded from only the position of a global pilot should not be considered substantially limiting when there are other domestic pilot positions that may be available under workers’ skills and conditions.

Similarly, in \textit{Murphy}, the Majority concluded that failing to meet Department of Transportation (DOT) regulations in driving a commercial motor vehicle was not sufficient to establish whether “petitioner is regarded as unable to perform a class of jobs utilizing his skills.”\textsuperscript{111} For instance, the petitioner could easily still apply to other

\begin{itemize}
\item \textsuperscript{108} Ibid. 504.
\item \textsuperscript{109} Ibid. 480.
\item \textsuperscript{110} Ibid. 492.
\item \textsuperscript{111} \textit{Murphy (1999)}: 523-524. The particular mechanic job at the United Parcel Service, Inc. required the petitioner to drive commercial vehicles. The DOT
\end{itemize}
mechanic jobs that did not require driving the commercial vehicles. In fact, he was able to get another job as a mechanic after leaving the UPS. ¹¹²

In terms of defining the major life activities, the Court also hesitated from counting working as a basis of determining one’s disability unless one’s impairments substantially limited another major life activity despite the fact that it explicitly acknowledged that one’s impairment did not have to substantially limit more than one major life activity. In another incident, the Court unanimously held that to be considered substantially limited with respect to manual tasks, an individual must have a manual impairment that prevents or severely restricts the individual from doing activities “that are of central importance to most people's daily lives.”¹¹³ In Toyota v. Williams (2002), the Court decided that petitioners failed to show that her impairments prevented or restricted her from performing tasks that was more than a limited class of manual tasks. Overall, the Court has refused to fully adopt the EEOC’s definition of “major life activities.” This move resulted in an overall narrow interpretation of the ADA.

The ADA Amendments Act of 2008

In 2008, Congress passed the latest amendments to the big legislation. Why? First, Congress wanted to redefine the scope of the ADA, especially the troublesome regulations required drivers to not have clinical diagnosis of high blood pressure. He was fired the UPS after failing to meet the DOT standards.

¹¹² Ibid.
¹¹³ Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 187 (2002). This was a case in which a petitioner claimed that Toyota, Inc., failed to fully accommodate her disabilities resulting from her carpal tunnel syndrome and other related impairments.
clause 42 U.S.C. §12101 (a), which seems to narrow down the scope of the law to roughly 43 million Americans. Though the original language of the law does not strictly limit its scope to just 43 million Americans, the Court had argued several times in favor of more narrowed reading of the ADA precisely because of this clause stating roughly how many people were disabled. Second, it was restate a clear set of ADA’s objectives of providing “a clear and comprehensive national mandate for the elimination of discrimination [and] clear, strong, consistent, enforceable standards addressing discrimination”114 Essentially, Congress insisted on a broad scope of protection for people with disabilities.

Congress also did something remarkable. In its findings, the Amendments Act explicitly states that “physical or mental disabilities in no way diminish a person’ right to fully participate in all aspects of society.”115 What is so remarkable about this revision is that the ADA now specifies how essential one’s rights are regardless of their disabilities. It matters not on the severity of disabilities; every person is entitled to fundamental rights or capabilities on the basis that they are humans and equal of their fellow citizens. The carefully altered language mirrors Nussbaum’s voice even closer. The new ADA fully embraces the notion that disabilities do not necessarily inhibit one’s rights, including the right to pursue employment that the individual can pursue in accordance to her actual skills and characteristics. It also acknowledge Nussbaum’s point that the right to seek employment plays a vital role for an individual in many other aspects of life.

114 42 U.S.C.A §12101 (b)(1).
115 42 U.S.C.A §12101 (a)(1).
Congress came to strongly reinstate this goal of the ADA due to some of the major Supreme Court cases on the ADA. In the same Sec. 2 of the ADA Amendments Act, it rejects the holdings and particular reasoning from *Sutton* (1999), *Murphy* (1999), and *Toyota* (2002), including the Court’s conclusion that one’s disability should be determined with reference to mitigating measures. In doing so, Congress redefined the terms like “major life activities” and “substantially limits” in the definition of disability under the ADA. Congress also added an explicit list of activities the ADA considers to be “major life activities.” This Amendments Act strongly tries to clarify the rules regarding how to define disability under the ADA.

This is, in many ways, a significant revision to the ADA since it attempts to directly challenge what the Court has assumed for nearly two decades to be the intention of Congress when it enacted the ADA in 1990. The emergence of this Amendments Act shows the long overdue need for evolving and expanding the definition of disability. Congress took Justice Stevens’ argument that the ADA should be interpreted more broadly. This opens up to new possibilities of future decisions of the Court and how employers may act in general.

This chief goal of Congress parallels Nussbaum’s capabilities approach far more closely. If all citizens are entitled to a life worthy of the human dignity, it makes no sense to leave out a significant numbers of people according to Nussbaum. As stated in the previous chapter, she argues against Rawlsian and the classical market-oriented justifications for such exclusions. What the new ADA entails is a more elaborated stance against such justifications. In one way, the new ADA manages to be broader but more specific as it includes clearer definitions that applied to various aspects of life.
The amended ADA states that disability means, with respect to an individual, “a physical or mental impairment that substantially limits one or more major life activities” including, but not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, and working.” This definition of major life activities is identical to the EEOC’s definition, which the Court has rejected in *Sutton*. On the surface, it may seem like the law now is more limited than before since it became more specific. But this is an unfair conclusion. The new language of the law has not limited major life activities to what is explicitly stated, but shows the examples of some diverse activities that were not previously considered by the Court as major life activities. This inclusion also weights more in favor of what people with disabilities experience daily rather than what is perceived by people without disabilities.

The ADA as amended still does not allow an individual to claim they are disabled for any minor impairment, people with disabilities have more say in determining whether or not simple activities like eating to more sophisticated activity like working are substantially limited by their impairments. In order for an impairment to be considered a disability, it does not have to substantially limit more than one activity. It only requires to substantially limit one of the major life activities listed above. To some extent, this expansion takes into the account the disability paradox, in which the non-disabled incorrectly assess the actual experiences of a life with disabilities. Being substantially limited in one aspect of life can have a deeper

116 Amended ADA 42 U.S. §12102 (1)-(2)(A).
implication about other aspects, often imposing more latent challenges for the individual.

Whether or not the new ADA would be more effective in getting rid of ablest biases than the original ADA is yet to be determined as time passes. No major Supreme Court cases have come up since the ADA Amendments Act of 2008. How the Court is to react also remains unknown. In my analysis, I conclude that the new ADA makes it harder for the Court to apply narrower interpretation of the ADA because Congress has specified their purposes in enacting this law. One thing is clear: Congress’s main objective was to cover as many individuals with disabilities as possible. The determination of one’s disability has to include the voices of those who struggle with disabilities daily. Congress ultimately endorsed the idea that broader reading of the ADA was vital to accomplish the law’s supposed goals.
Chapter 4

IV. Forward the New Democracy

Revising the Market Argument

It is only fair to re-examine the market argument because I dismissed one reasonable aspect of the argument too hastily. According to this revised market-oriented argument, employers often do not intentionally discriminate employees on the basis of their disabilities. Instead, the low level of employment for people with disabilities has more to do with the correlated low levels of education and skills than their disabilities. Especially if their last claims were true, the lack of workers with disabilities is not as problematic since it can be fixed through different measures broadly addressing workers’ education and skills. Eventually, if society aimed at expanding the levels of education and skills of people with disabilities, those individuals would be employed more. According to this argument, employers do not violate the ADA. In fact, the law is even unnecessary.

One way to address this new argument is to point out that the access to education and enrichment of skills is based on the ableist standards, excluding people with disabilities, again, purely on the basis of their disabilities regardless of their otherwise perfectly qualified abilities to obtain such education and skills. In fact, that is one of points Nussbaum and Knight both point out. This way, however, does not fully address what kind of challenges people with disabilities experience in the work environment. A recent experiment shows that employers in accounting jobs tend to
show more interests in job candidates without disabilities even when other candidates’ listed disabilities did not hinder their abilities to perform accounting tasks.\textsuperscript{117}

This study contradicts the revised market argument and hints that we may still impose ableist standards, even unintentionally. Various psychological studies show that “stereotypical attitudes of supervisors and co-workers can affect the workplace experience of employees with disabilities”\textsuperscript{118} People without disabilities tend to negatively assume about the future employment prospects and job growth for people with disabilities. Conversely, according to a study published in 2007, it is highly possible that the “more individuals come in contact with persons with disabling conditions in social settings [such as workforce], their perceptions of disability may change.”\textsuperscript{119} The major finding of this kind of studies is that “objective perceptions of what constitutes a disability do not exist, but are shaped by factors associated with both the medical and social model of disability.”\textsuperscript{120} The study concluded with a remark that having people with disabilities to work in jobs that they are otherwise qualified can have a positive effects on changing perceptions on disability, for both

\textsuperscript{117} Ameri et al. (2015). The experimenters sent out fictitious resumes to 6,016 advertised accounting positions. Each applicant had one of three different conditions: one without any mention of disability, one with Asperger’s Syndrome, and one with a spinal cord injury. Each candidate’s educational or skill levels systematically and evenly varied between high and low levels. The result showed that the applicants with disabilities, regardless of which type, received 26\% fewer expressions of employer interests than those without disabilities and the educational or skill levels did not help reducing the disability gap. In fact, in some cases, disabled persons with high levels of education and skills had fewer expressions of employer interests.

\textsuperscript{118} Ibid. 5.


\textsuperscript{120} Ibid. 11.
disabled and non-disabled. This study hints at what Nussbaum advocates, a life worthy of human dignity.

The earlier study by Ameri et al. (2015) shows some positive effects of the ADA when compared to the cases of employers who are not covered by the ADA. These are employers with less than 15 employees. The study shows that the disability gap is largest among the smallest private-sectors whereas “there is a positive effect of disability on callbacks by employers with 15 to 99 employees.”

This should not be the case according to the market argument unless there was actual employment discrimination since the levels of education and skills were controlled in this experiment. The limitation of this study, however, is that it cannot pin point what specific biases and stereotypes particularly cause employment discrimination. The study points out our urgent need to further study the relationship between employers’ beliefs and their hiring behavior in order to locate specific ableist stereotypes we need to address to reduce employment discrimination.

**Knight’s Criticism of the ADA and Nussbaum Revisit**

Knight criticizes Nussbaum for her lack of inclusive measures and reliance of the notion of human dignity. Similarly, Knight criticizes the ADA for its lack for more direct inclusive measures. Knight claims that these informal barriers are the reasons why the ADA, for instance, fails to provide the full inclusion for people with disabilities as it only passively protects their civil rights by prohibiting discrimination but nothing further.

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121 Ameri et al. 2015: 16-18.
122 Ibid. 30-31.
While I think that she seems to neglect the positive effects of the ADA too much in her criticism of it, I concede that it is implausible to eliminate all employment discrimination until most of ableist biases disappear. The only way to ensure that is to expand the political deliberation of people with disabilities and establish a strong sense of cultural recognition.

Knight criticizes Nussbaum for focusing too much on keeping people with disabilities out of a special category of citizenship. Due to the persisting ableist biases and actual differences between people with and without disabilities, Knight essentially argues that we inevitably need to create a special category, namely a disability identity. Unlike Kantian’s notion of passive citizenship, Knight’s new citizenship requires active participation through her participatory parity. So why would Nussbaum still refuses to alter her capabilities approach in a way that would treat people with and without disabilities differently. This does not mean she is not willing to accept any revision of her theory. She urges, however, that the list of capabilities should be identical for both groups of people in order to ensure a life worthy of the human dignity for everyone.

Knight is not the only one calling for a disability identity. For some deaf people, “being deaf is just a way of life”\textsuperscript{124} and they consider deafness to be a “cultural identity, not a disability to be cured.”\textsuperscript{125} Though not all, but these individuals

\textsuperscript{124} qtd. in Sandel, Michael J. (2007). \textit{The case against perfection: ethics in the age of genetic engineering}. Cambridge, Mass: Belknap Press of Harvard University Press:1. This is a reference to a lesbian couple, who were both deaf, wanted to have a baby that was also deaf. Their son, Gauvin, was born deaf after they searched out a sperm donor with a long history of deafness in the family. This became an instant controversy and attracted numerous condemnations and stigmatization.

\textsuperscript{125} Ibid.
often accept their medical impairments as a part of their identity. In Chapter 2, I briefly discussed how many view disability as a harm but they often fail to show how it is supposedly more harmful than other harms we experience daily. Perhaps, what sets apart disability is that most disabilities last permanently while the harms we experience daily are usually short terms. Highlighting this difference, Thomas Schramme provides an argument against viewing disability as a harm. He argues that disability, by its nature, becomes a persons’ identity:

Disability is different from a passing disease. It is a condition a person was born with or will be in for a long time, maybe the rest of her life. This helps us to explain the apparent paradox that most people would deem disease absolutely harmful, though not everyone sees a disability, which can be described as a kind of chronic disease, as harmful in this way. This is because a chronic condition can become a part of one’s identity, whereas this seems more difficult with passing disease.126

Schramme’s rejection of the notion of disability as a harm explains why establishing disability as a cultural identity may be an important step to deal with the disability paradox and the disability problem. He argues that because one’s well-being is closely related to one’s identity, it is expected that “once a disability has gradually ‘internalized’, its absolute harmfulness also gradually decreases.”127

So how can Nussbaum respond to Knight’s criticisms? I believe one way to respond without having to create a special category of citizenship is to show that her theory can be expanded and actualized through specific legislations. The ADA was amended in 2008 is a great example of the actualization of Nussbaum’s theory as it further aims to eliminate the persisting ableism. The amended ADA clarifies that

127 Ibid.
mitigating measures do not necessary eliminate one’s disability that substantially limits one or more major life activities. This acknowledgement of disability ensures that the real needs of people with disabilities are properly addressed rather than on a ableist basis of one’s well-being. It still does not mean anyone can declare their difficulties in life as disabilities, but the new ADA aims more to give a voice to ordinary people with disabilities who still struggle daily despite improved laws and societal accommodations.

Knight is correct to point out that a change in the workforce cannot be fully achieved without improving the political deliberation and cultural recognition of people with disabilities. This is the fundamental limit of law; it can never fully penetrate into every aspect of society that is needed to change if we were to make it more inclusive. But, there are ways in which laws such as the ADA can influence a broader social change that both Knight and Nussbaum embrace. LoBianco et al. (2007) shows that the experience of working with people with disabilities, which the ADA promotes, tends to reduce people’s ableist biases and stereotypes. This suggests that we may be able to achieve cultural recognition or mutual recognition without necessarily having to endorse disability as a new identity.

The recent study by the department of the labor introduced in the Chapter 1 suggests that people with certain disabilities are projected to have higher employment rates and opportunities in the upcoming decades.\textsuperscript{128} I think this is a sign that our perceptions of disability are changing. One possible reason for this is, as suggested by

the revised market argument, people with disabilities are generally getting more education and skills than before. Another related possibility, which is what I am more inclined to believe, is that having more non-disabled members of society interact with people with disabilities on the daily basis gradually reduces ableism. This opens to many endless possibilities.
In my study of the ADA through the lens of Nussbaum’s theory, I have found that the amended version of the ADA shows that the law has evolved towards what Nussbaum suggests as a solution to the disability problem, namely the lack of inclusion of people with disabilities. Rawls’s theory, an alternative to Nussbaum’s capabilities approach, for instance, does not adequately address the disability problem. He assumes that disability is a special, infrequent incident of social justice. While his theory tries to eliminate discriminatory standards to extend his social justice to people with disabilities at a later political stage, Rawls’s hesitancy reflects the real horror of ableism: that people do not always impose their ableist biases intentionally. Ableism is a structural problem embedded in our society and can exist outside the reach of law.

In response to Knight’s criticisms of the ADA and the capability approach, I argue that Nussbaum can still insist on the human dignity-based approach without having to come up with a special category of citizenship for people with disabilities. Nussbaum urges that we have to extend the same existing notion of citizenship worthy of the human dignity to all. This is can be actualized through the laws such as the ADA as amended. The ambiguous language of the original ADA had created some situations in which the needs of people with certain disabilities were excluded from its scope. The ADA Amendments Act of 2008 precisely tries to amend these situations and ensured the broader interpretation of the ADA, closer to what Nussbaum envisions.
A law such as the ADA, however, as mentioned, can fail to address certain aspects of life including employers’ seemingly justifiable personal preferences of characteristics. But recent studies have shown that simply encountering people with disabilities at work daily may reduce our ableist biases and stereotypes. The key, therefore, is to provide these people with disabilities a fair and equal chance to interact with others. For Nussbaum, the right to seek employment on an equal basis with others plays a critical role to the possibility of greater interactions.

The lack of the Court’s reaction to the new ADA is one weakens my thesis. My study does not examine the actual results of the amended ADA in terms of reducing employment discrimination. Many studies I have looked at do not generally make a note of the distinction between the original ADA and the new ADA. In one way, the new ADA has kept the majority of the old ADA. But in many other ways, the amended ADA has re-conceptualized the notion of disability and expanded its scope significantly. What that shows is that the law is evolving to address the needs of people with disabilities that were previously ignored or overlooked, even after the enactment of the ADA in 1990. I argue that this kind of progress shows that the law is becoming more in-tune with Nussbaum’s theory.

Before I conclude my thesis, I want to stress the importance of disability studies for the study of democracy. Democracy, by its nature, must be able to endure diverse interests and needs. While other aspects of society such as race and gender have been addressed lately, the problem of disability enters the public discussions less frequently. The disability problem perhaps is one of most difficult challenges in a democratic society because the existence of impairments often appeals to seemingly sound arguments that are actually infused with ableist bias despite one’s best efforts to
avoid them. But as Knight points out. If we could be more inclusive towards people with disabilities, then tackling other similar structural issues such as gender and race would naturally become easier. After all, Knight insists that one’s disability does not depart too far away from one’s race and gender. It follows that our notion of democracy should also evolve if we are to properly address the diverse needs. Just as Nussbaum argues, just as how the ADA evolved from the original text, we can hopefully develop our notion of democracy further. Solving the persisting ableism that constantly alienates people with disabilities presents us a path in which we can pursue the new stage of democracy.
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**LIST OF CASES**