



2019

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### **Recommended Citation**

Kanter, Arlene S. (2019) "Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities," *Touro Law Review*. Vol. 35: No. 1, Article 12. Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol35/iss1/12>

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## LET'S TRY AGAIN: WHY THE UNITED STATES SHOULD RATIFY THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES

*Arlene S. Kanter\**

### INTRODUCTION

The Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”) was adopted by the United Nations in 2006 and entered into force in 2008.<sup>1</sup> Since then, 177 countries have ratified it, but not the United States. This is not the first time that the United States has failed to ratify a human rights treaty. The United States is one of only a few countries that has not ratified the 1979 Convention on the Elimination of Discrimination Against Women (hereinafter “CEDAW”) and the only country that has not ratified the 1989 Convention on the Rights of the Child (hereinafter “CRC”).<sup>2</sup> Moreover, of the nine core human rights treaties that the United Nations has adopted, the United States has ratified only three.<sup>3</sup> Based

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<sup>1</sup> U.N. GAOR, 61st Sess., 76th plen. mtg., U.N. Res. A/RES/61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006), [https://treaties.un.org/doc/source/docs/A\\_RES\\_61\\_106-E.pdf](https://treaties.un.org/doc/source/docs/A_RES_61_106-E.pdf) [hereinafter CRPD].

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination against Women, Sept. 3, 1981, 1249 U.N.T.S. 13 (or G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 at 193 (Sept. 3, 1981)). The other jurisdictions that have not ratified the CEDAW are the Holy See, Iran, Niue, Palau, Somalia, Sudan and Tonga. See UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, RATIFICATION STATUS FOR CEDAW—CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx) (last visited Feb. 19, 2019) [hereinafter CEDAW RATIFICATION LIST]. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (or G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., U.N. Doc. A/44/49 at 16 (Nov. 20, 1989)). For the list of countries that have ratified the CRC, see [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (last visited Mar. 10, 2019).

<sup>3</sup> The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1994, the International Covenant on Civil and Political Rights in

on this record, the United States has one of the worst treaty ratification records in the world. Some commentators have gone so far as to suggest that the failure of the United States to ratify human rights treaties not only reflects poorly on the United States, internationally, but also adversely affects the ability of the United States to conduct foreign policy.<sup>4</sup>

Given the human rights treaty ratification record of the United States, it may come as no surprise that the United States has failed to ratify the CRPD. Yet the CRPD is modeled after our own Americans with Disabilities Act (hereinafter “ADA”), which was adopted with bipartisan support.<sup>5</sup> The ADA promises to improve the lives of people with disabilities by ending discrimination against them in the workplace and by ensuring their equal access to public places, transportation, and state and local programs and services.<sup>6</sup> The ADA also has become a model for domestic disability laws in other countries, as well as for the CRPD, itself.

Although the CRPD is modeled after the ADA, the CRPD goes beyond the ADA in several areas, as discussed below. However, even with the additional protections that the CRPD provides, there is no good reason why the United States should not ratify the CRPD.<sup>7</sup> In fact, the best reason why the United States should ratify the CRPD is to realize the promise of the ADA. Accordingly, the author concludes that the United States Senate should ratify the CRPD without any further delay.

The first section of this article provides an overview of the CRPD, followed by the second section, which includes a discussion of the ways in which the CRPD differs from the ADA of 1990 as well as

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1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1987. See UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, STATUS OF RATIFICATION INTERACTIVE DASHBOARD, <http://indicators.ohchr.org/> (last visited Mar. 4, 2019). The United States signed the International Covenant on Economic, Social and Cultural Rights in 1977, the Convention on the Elimination of All Forms of Discrimination against Women in 1980, the Convention on the Rights of the Child in 1995, and the CRPD in 2009; however, these treaties are not in full force and effect in the United States because they were not ratified. *Id.*

<sup>4</sup> See David Kaye, *Stealth Multilateralism*, FOREIGN AFF. (Sept./Oct. 2013), [http://cf.linnbenton.edu/artcom/social\\_science/clarkd/upload/David%20Kaye,%20Stealth%20Multilateralism.pdf](http://cf.linnbenton.edu/artcom/social_science/clarkd/upload/David%20Kaye,%20Stealth%20Multilateralism.pdf).

<sup>5</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b), 104 Stat. 328 (codified as amended in 42 U.S.C. § 12101(b) (2018)).

<sup>6</sup> *Id.*

<sup>7</sup> See Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819 (2015).

the ADA Amendments Act of 2008. The third section of this article discusses the process that led to the failure of the United States Senate to ratify the CRPD, including responses to the arguments against ratification presented by a group of “Tea Party” Republican Senators. The article concludes with a call for the Senate to ratify the CRPD in order to realize the goals of the ADA. The author also recognizes that given the current composition of the United States Senate and the isolationist policies of the Trump administration, ratification of the CRPD may not occur any time soon.

#### **I. AN OVERVIEW OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES**

On December 13, 2006, the United Nations General Assembly adopted the CRPD and its Optional Protocol.<sup>8</sup> The CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities. Prior to the CRPD, the United Nations had adopted other documents that protected some rights of certain groups of people with disabilities, but none of them were binding.<sup>9</sup>

For example, throughout the 1950s and 1960s, the United Nations’ Economic and Social Council adopted a series of resolutions, including the Resolution on Social Rehabilitation of the Physically Handicapped of 1950. These resolutions sought to provide rehabilitation for people with disabilities.<sup>10</sup> Eventually, the United Nations adopted the Declaration on the Rights of Mentally Retarded Persons in 1971.<sup>11</sup> In 1975, the United Nations adopted the Declaration on the Rights of Disabled Persons,<sup>12</sup> which sought to extend the reach of the non-discrimination provisions of then-existing international human rights treaties to people with disabilities. For instance, it included for the first time, in an international document, the right of people with disabilities to equality and dignity on an equal basis with others as well as their “inherent right to respect for their human dignity . . . [and] the same fundamental rights as their fellow-

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<sup>8</sup> CRPD, *supra* note 1.

<sup>9</sup> For a comprehensive discussion of international documents prior to the CRPD, see ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 21-35 (2015) [hereinafter KANTER].

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.* at 32.

<sup>12</sup> *Id.*

citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.”<sup>13</sup> The Declaration of Disabled Persons as well as the Declaration of Mentally Retarded Persons were merely laudatory statements; they had no legally binding effect under international law.<sup>14</sup>

Throughout the 1980s and the 1990s, the United Nations continued to adopt a series of non-binding disability-related documents, including the 1982 World Programme on Action Concerning Disabled Persons. This Programme required “the general system of society, such as the physical, cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational activities, are made accessible to all.”<sup>15</sup> The World Programme also provided the impetus for the United Nations Decade of Disabled Persons, from 1983-1993, which was followed by the 1991 Principles for Protection of Persons with Mental Illness and the Improvement of Mental Health Care. Soon thereafter, in 1993, the United Nations General Assembly adopted a resolution entitled the Standard Rules on the Equalization of Opportunities for Persons with Disabilities. Although the Standard Rules sought to ensure “positive and full inclusion of persons with disabilities in all aspects of society,”<sup>16</sup> the Standard Rules, like all the other United Nations declarations and documents prior to the CRPD, were not binding and therefore, unenforceable.

### A. The Significance of the United Nations Convention on the Rights of People with Disabilities

On May 3, 2008, after more than 100 countries had ratified it, the CRPD entered into force and became the first human rights treaty of the 21st century.<sup>17</sup> The CRPD is not only the most rapidly

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<sup>13</sup> G.A. Res. 3447 (XXX), Declaration on the Rights of Disabled Persons (Dec. 9, 1975), <https://www.ohchr.org/Documents/ProfessionalInterest/res3447.pdf>.

<sup>14</sup> KANTER, *supra* note 9, at 21.

<sup>15</sup> U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51, World Programme of Action for Concerning Disabled Persons (Dec. 3, 1982), <https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html#text>.

<sup>16</sup> U.N. GAOR, 48th Sess., 85th plen. mtg, U.N. Res. A/RES/48/95, Positive and Full Inclusion of Persons with Disabilities in All Aspects of Society and the Leadership Role of the United Nations Therein (Dec. 20, 1993), <http://www.un.org/documents/ga/res/48/a48r095.htm>; *see also* KANTER, *supra* note 9, at 34.

<sup>17</sup> CRPD, *supra* note 1.

negotiated human rights treaty in the history of the United Nations, but it also garnered more signatories on its opening day at the United Nations than any other treaty.<sup>18</sup> Since its adoption, 177 countries have ratified it. The United States is not one of those countries. In fact, as soon as the United Nations announced the formation of a United Nations Ad Hoc Committee to draft the CRPD in 2001, the President at the time, George W. Bush, stated that the United States would not support the CRPD—even though the CRPD was modeled after the ADA, a law which the President’s own father, George H.W. Bush, signed into law in 1990.<sup>19</sup>

The purpose of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>20</sup> The obligation of the State to respect one’s “inherent dignity” is included in most other human rights treaties.<sup>21</sup> It is also especially important in the CRPD because people with disabilities, as a group, are routinely denied their dignity, through state policies of exclusion, segregation, mistreatment and neglect.<sup>22</sup>

To address such discrimination and mistreatment of people with disabilities, the CRPD includes 50 separate articles.<sup>23</sup> Overall, this treaty requires States Parties to protect the rights of people with

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<sup>18</sup> KANTER, *supra* note 9, at 1. The CRPD took a mere five years to draft, from 2001-2006. It was also the most inclusive drafting process, with people with disabilities participating directly in the drafting of the CRPD. *Id.* at 40.

<sup>19</sup> See Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYR. J. INT’L L. & COM. 249 (2003). Early on in the CRPD drafting process, the Bush Administration went on record stating that it would not sign the CRPD. In the Administration’s view, there was no need for an international treaty because of the existence of national laws prohibiting discrimination on the basis of disability. The Administration’s representative also referenced the long history of the United States’ commitment to equal rights for people with disabilities, and suggesting that such a convention may be viewed as an unwelcome intrusion into national sovereignty. The United States testified during the Ad Hoc Committee Meeting in June 2003. See Statement of Ralph F. Boyd, Jr., *Second Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE (June 18, 2003), <http://www.un.org/esa/socdev/enable/rights/contrib-us.htm>.

<sup>20</sup> CRPD, *supra* note 1, at art. 1.

<sup>21</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, United Nations, Jan. 3, 1976, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, United Nations, Mar. 23, 1976, 999 U.N.T.S. 172; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, June 26, 1987, 1465 U.N.T.S. 1987.

<sup>22</sup> KANTER, *supra* note 9, at 29-30.

<sup>23</sup> CRPD, *supra* note 1.

disabilities by prohibiting all types of discrimination “on the basis of disability.”<sup>24</sup> But the CRPD is more than an anti-discrimination law. The CRPD seeks to ensure substantive equality for all people with disabilities. Such substantive equality requires States to affirmatively act to ensure not only the right to be free from discrimination, but also the right to equality which requires the removal of barriers that prevent people with disabilities from realizing their rights. As such, the CRPD represents a paradigm shift in the view of people with disabilities from those in need only of State protection, charity or medical treatment, to a view of people with disabilities as rights holders, capable of enforcing their own rights under international law.<sup>25</sup> In this way, the CRPD adopts what is termed the social model of disability, infused with a human rights approach.<sup>26</sup>

The social model of disability rejects the medical model’s pathologization of disability. In contrast to the medical model of disability, the social model views disability as part of human diversity, and places responsibility on society to remove the physical, environmental, attitudinal, and legal barriers that prevent people with disabilities from exercising their rights to equality, inclusion and participation in society.<sup>27</sup>

The first formal statement of the social model appeared in a document entitled *The Fundamental Principle of Disability*, published by the British Union of the Physically Impaired against Segregation in 1975. This statement reads: “In our view, it is the society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.”<sup>28</sup>

More recently, the social model has been described as “a strategy of barrier removal, or education to remove prejudice, with the goal of inclusion.”<sup>29</sup> According to the social model, a person’s

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<sup>24</sup> CRPD, *supra* note 1, at art. 5.

<sup>25</sup> KANTER, *supra* note 9.

<sup>26</sup> *See id.* at 7-8; Arlene S. Kanter, *The Law: What’s Disability Studies Got To Do With It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RIGHTS L. REV. 403 (2011).

<sup>27</sup> Kanter, *supra* note 26, at 426-29.

<sup>28</sup> THE UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION AND THE DISABILITY ALLIANCE, FUNDAMENTAL PRINCIPLES OF DISABILITY 4-5 (1975), <https://disability-studies.lead.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf>.

<sup>29</sup> *See* Tom Shakespeare, *Disability, Identity and Difference*, in EXPLORING THE DIVIDE 94, 102 (Colin Barnes & Geof Mercer eds., 1996); *see also* MICHAEL OLIVER, THE POLITICS OF

disability does not diminish the person's right to exert choice and control over their lives or to fully participate in and contribute to society in the way that they so choose. The social model affirms the view of people with disabilities as rights holders and members of our respective societies who are often more disabled by the physical and attitudinal barriers of societies that exclude and stigmatize them than by their own physical or mental condition. Thus, the social model, as embodied in the CRPD, requires States Parties to remove barriers and to provide whatever supports, services and accommodations are necessary to enable people with disabilities to participate fully in society, and on an equal basis with all others.<sup>30</sup>

### B. The Scope and Coverage of the CRPD

The scope and coverage of the CRPD is unprecedented.<sup>31</sup> It recognizes unequivocally the right of people with disabilities to live in the community, to exercise their legal capacity, and to ensure their full and equal enjoyment of the rights recognized as a matter of law. The CRPD establishes the right of people with disabilities to enjoy the inherent right to dignity, to liberty and security, to access justice, and to be protected from deprivations of liberty and freedom, either unlawfully or arbitrarily.<sup>32</sup> It prohibits all forms of discrimination against persons with disabilities, including both direct and indirect

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DISABLEMENT (1990). Michael Oliver, who is attributed with the founding of the social model of disability, cautioned that "if we are not careful we will spend all of our time considering what we mean by the medical model or the social model, or perhaps the psychological or more recently, the administrative or charity models of disability," and that such semantic discussions "will obscure the real issues in disability which are about oppression, discrimination, inequality and poverty." Michael Oliver, *The Individual and Social Models of Disability* (July 23, 1990), <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf> (paper presented at the Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians); see also Mike Oliver, *The Social Model of Disability: Thirty Years On*, 28 *DISABILITY & SOC'Y* 1024 (2013). Irving Kenneth Zola, who defines impairment as a loss of sight, hearing, mobility, etc., argues that an impairment becomes a disability when the society creates environments with barriers. See Irving Kenneth Zola, *Medicine as an Institution of Social Control*, 20 *SOC. REV.* 487 (1972).

<sup>30</sup> For a critique of the social model, see TOM SHAKESPEARE, *DISABILITY RIGHTS AND WRONGS* (2006); Bill Hughes, *The Constitution of Impairment: Modernity and Aesthetic of Oppression*, 14 *DISABILITY & SOC'Y* 155 (1999); ARGUING ABOUT DISABILITY: PHILOSOPHICAL PERSPECTIVES (Kristjana Kristiansen et al. eds., 2009); Am Samaha, *What Good Is the Social Model of Disability?*, 74 *U. CHI. L. REV.* 1251 (2007).

<sup>31</sup> Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 *SYR. J. INT'L L. & COM.* 287, 289 (2007).

<sup>32</sup> CRPD, *supra* note 1, at arts. 5, 12, 13, 14.



discrimination, and ensures substantive equality and equality of opportunities.<sup>33</sup>

The CRPD covers most, if not all, aspects of the daily lives of children and adults with disabilities, such as their right to privacy, to vote, to own and inherit property, to have a job, and to enjoy an acceptable standard of living. It ensures the right not only of education for all people with disabilities but also the right to an inclusive education in neighborhood schools. It also requires States to provide rehabilitation, vocational education, and health care at the same range, quality, and standard of free or affordable health services to children and adults with disabilities, as is provided to persons without disabilities.<sup>34</sup> As to the issue of access, the CRPD requires States Parties to identify and eliminate obstacles and barriers to access in order to ensure that persons with disabilities may access their environment, transportation, public facilities, services, information, and communications on an equal basis with all others.<sup>35</sup> The CRPD also affirms the equal rights and advancement of women and children with disabilities and protects their right to be free from violence, abuse and exploitation.<sup>36</sup> Of particular importance to many children with disabilities who live in institutions, the CRPD recognizes, for the first time under international law, the right of children with disabilities to not be separated from their parents on the basis of the disability of either the child or a parent.<sup>37</sup>

Further, the CRPD upholds the right of people with disabilities to an adequate standard of living and social protection, to equal participation in public and cultural life, and to parent, marry, establish families, decide on the number and spacing of children, have access to reproductive and family planning education, and to enjoy equal rights and responsibilities in family life, including the adoption of children.<sup>38</sup>

Perhaps as important as the enumeration of these specific rights, however, are the underlying values of the Convention as stated in its Preamble and Article 3, entitled General Principles.<sup>39</sup> These articles exemplify the CRPD's commitment to a human rights

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<sup>33</sup> *Id.* at art. 5. For a discussion of the difference of formal equality and substantive equality of the equality of opportunities, see KANTER, *supra* note 9, at 48-49.

<sup>34</sup> CRPD, *supra* note 1, at arts. 12, 16, 22, 24, 25.

<sup>35</sup> *Id.* at art. 9.

<sup>36</sup> *Id.* at arts. 7, 9.

<sup>37</sup> *Id.* at art. 7.

<sup>38</sup> *Id.* at arts. 23, 28, 40.

<sup>39</sup> *Id.* at arts. 1, 3.

approach to disability.<sup>40</sup> According to the human rights approach, a person with a disability is seen as an autonomous and capable human being, entitled to human rights protections on an equal basis with all others.

The CRPD also includes, what may be considered, several “new rights.”<sup>41</sup> Although the CRPD drafting committee did not intend to create any new rights, the CRPD includes such new rights as the right to “reasonable accommodations,” “inclusive education,” “communication access” and “support.”<sup>42</sup> Moreover, with this new right to “support,” the CRPD makes clear not only that States Parties have an obligation to provide whatever support a person may need to participate fully in society, but also that dependency is not a ground to deprive a person of the right to participate.<sup>43</sup> Unlike other prior human rights treaties, the CRPD values, as a social good, the idea that people may need help from time to time, and that such help in no way diminishes their entitlement to dignity, autonomy, and equality, as a matter of international human rights law. The CRPD, therefore, expands our view of dependence, by specifically challenging the legal consequences of viewing people with disabilities as dependent.

The CRPD’s view of dependency is especially relevant for people with disabilities who are subject to state guardianship laws. Article 12 of the CRPD calls for an end to guardianship laws.<sup>44</sup> As a result, several countries, including Austria, Australia, Argentina, Costa Rica, Colombia, Croatia, Georgia, Hungary, Israel, Ireland, India, Peru, and Sweden, as well as jurisdictions within the United States and Canada are working to abolish guardianship laws entirely, or are introducing alternatives to guardianship, such as supported decision making. It remains to be seen exactly how the CRPD’s entitlement to support, as an alternative to guardianship, will improve the lives of people with disabilities in different countries throughout the world. But the new “right to support,” included in Article 12 is already resulting in changes in domestic laws.

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<sup>40</sup> See KANTER, *supra* note 9, at 46.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.*

<sup>43</sup> Kanter, *supra* note 31, at 302.

<sup>44</sup> CRPD, *supra* note 1, at art. 12; see also Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 594-603 (2017).

In sum, the CRPD is one of the more comprehensive and innovative human rights treaties. It requires States Parties to affirmatively act to remove barriers that have prevented people with disabilities from participating fully in society. The CRPD also imposes obligations on societies as a whole, requiring awareness raising about disability inclusion, and about the need to enable all people—with and without disabilities—to contribute to their societies to the best of their abilities, and with the accommodations and supports they may need, and without discrimination. Moreover, unlike most other human rights treaties, the CRPD combines civil, political, social, economic, and cultural rights, thereby affirming the Vienna Declaration, which recognizes the importance of human rights as “indivisible and interrelated and interconnected.”<sup>45</sup>

The real impact of the CRPD on the lives of people with disabilities, however, will not be realized unless and until countries act to incorporate it into their own domestic laws and enforce its mandates. Many countries have begun this process of implementing the CRPD, with the notable exception of the United States. The next section of this article will compare the approaches of the CRPD and the ADA, respectively. This section also addresses the claim that the United States does not need the CRPD because the ADAAA already provides adequate protection for people with disabilities. As explained in the following section, although the CRPD includes some additional provisions not included in the ADAAA, ratification of the CRPD by the United States could vastly enhance the rights of Americans with disabilities by moving from the purely anti-discrimination mandate of the ADA to a more comprehensive view of substantive equality, as envisioned in the CRPD.

## II. A COMPARISON OF THE ADA AND THE CRPD

The ADA was a great accomplishment for the disability rights movement in the United States.<sup>46</sup> Prior to the ADA, Section 504 of the Rehabilitation Act was enacted to prohibit discrimination against

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<sup>45</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23, (June 25, 1993), <http://www.refworld.org/docid/3ae6b39ec.html>.

<sup>46</sup> See, e.g., JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993, 1994); LENNARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS (2015).

“qualified” people with disabilities, but only by programs and activities that receive federal financial assistance.<sup>47</sup> Until the ADA, individuals, businesses, and state and local governments were free to discriminate in employment, access to public services, transportation, telecommunications, and in places of public accommodations.<sup>48</sup> As Congress declared in the preamble to the ADA, “despite some improvements, . . . discrimination against individuals with disabilities continue[s] to be a serious and pervasive social problem.”<sup>49</sup> Accordingly, upon its enactment in 1990, the ADA was seen as a powerful statement of the nation’s commitment to equality of opportunity, full inclusion, and economic self-sufficiency for people with disabilities.

On July 26, 1990, President George H.W. Bush signed the ADA on the White House lawn, declaring that with “today’s signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>50</sup> He went on to state that the ADA will ensure that people with disabilities are “given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally in to the rich mosaic of the American mainstream.”<sup>51</sup> President Bush concluded his remarks by declaring: “Today’s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness. . . . Let the shameful wall of exclusion finally come tumbling down.”<sup>52</sup>

In 2008, Congress amended the ADA to provide even greater protections for people with disabilities. Between the time President Bush signed the original ADA into law in 1990 and the enactment of the ADAAA in 2008, the Supreme Court decided several cases which significantly narrowed the definition of disability.<sup>53</sup> Congress’s

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<sup>47</sup> 29 U.S.C. § 794 *et seq.* (2018).

<sup>48</sup> 42 U.S.C. §§ 12101-12213 (2018).

<sup>49</sup> *Id.* § 12101(a)(2).

<sup>50</sup> *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, [https://www.eeoc.gov/eeoc/history/35th/videos/ada\\_signing\\_text.html](https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html) (last visited Feb. 17, 2019).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

purpose in enacting the ADAAA, therefore, was to overturn these Supreme Court decisions which, in Congress's view, inappropriately limited the "broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."<sup>54</sup> The result of the ADAAA is to make it easier for many individuals with a disability to meet the definition of disability in the statute.

The ADAAA includes several significant changes in the definition of "disability." The ADAAA states explicitly that the definition of disability should be interpreted broadly. In this way, Congress made it clear that the focus of the ADAAA, like other civil rights statutes, should be on whether discrimination occurred, not on an exhausting analysis of whether or not the person qualifies for protection. Yet despite the laudable goals of the ADA and its 2008 Amendments which sought to expand coverage of the law, the statute fails to provide the comprehensive protections promised in the CRPD. The following section summarizes some of the key differences between the ADA, the ADAAA, and the CRPD.<sup>55</sup>

#### **A. The Definition of Disability in the ADA, the ADAAA and the CRPD**

The first significant difference between the ADA and the CRPD is their respective definitions of disability. The ADA's definition of disability protects people with many different types of impairments as well as people who are alcoholics and people who have a history of drug abuse.<sup>56</sup> However, unless a person can prove, with medical evidence, that he or she meets this definition, the person is not covered by the law. Indeed, during the first decade after the original version of the ADA was adopted, the United States Supreme Court as well as lower federal courts denied the right of countless plaintiffs to bring cases alleging discrimination because they did not meet the

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<sup>54</sup> 42 U.S.C. § 12101(a)(3).

<sup>55</sup> For a comprehensive discussion of the differences between the CRPD, the ADA, and Canadian law with respect to employment rights, see Arlene S. Kanter, *A Comparative View of Equality Under the UN Convention on the Rights of People with Disabilities and the Disability Laws of United States and Canada*, 32 WINDSOR Y.B. ACCESS TO JUST. 65 (2015).

<sup>56</sup> Title I of the ADA protects people with a history of drug abuse but who have successfully completed or who are currently enrolled in a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs as well as people who are alcoholics. 42 U.S.C. § 12114(b)-(c) (2018).

restrictive statutory definition of disability contained in the original version of the law. After a series of Supreme Court cases in which the Court limited the definition of disability, however, Congress amended the ADA to become the ADA Amendments Act of 2008.<sup>57</sup> The purpose of the ADAAA is specifically to “reject the Supreme Court’s reasoning” and to “reinstat[e] a broad scope of protection to be available under the ADA.”<sup>58</sup>

However, even with the change in the law, the ADAAA continues to rely on a medical approach to disability. In order to qualify for protection from discrimination under the ADAAA, the person must show “a physical or mental impairment” that “substantially limits a major life activity,” “a record of such an impairment,” or that the person is “regarded as” having such an impairment.<sup>59</sup> To meet the first two prongs of the definition, the person must typically provide medical evidence to support a finding of disability. By requiring medical evidence to establish eligibility for coverage under the ADAAA, the law continues to locate the “problem of disability” in the person rather than on the elimination of barriers.

Moreover, the ADA as well as the ADAAA exclude from coverage under the law people with certain types of impairments, including those with “transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders,” as well as people who suffer from “compulsive gambling, kleptomania,

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<sup>57</sup> See the cases listed *supra* note 53.

<sup>58</sup> Pub. L. No. 110-325, 122 Stat. 3553 (2008). In enacting the ADAAA, Congress found that persons with many types of impairments—including epilepsy, diabetes, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression and bipolar disorder—had been unable to bring ADA claims because they were found not to meet the ADA’s definition of “disability.” By enacting the ADAAA, Congress chose to create presumptions in favor of protection for most groups of people with disabilities who were not specifically excluded. The EEOC also created a list of presumptive disabilities. A person with any of the conditions on this list will be presumed to qualify for coverage under the ADA. These conditions would include blindness, deafness, intellectual and developmental disabilities, partially or completely missing limbs, mobility impairments, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic syndrome and schizophrenia. See 42 U.S.C. § 12102 (2008); 29 C.F.R. § 1630.2(h), (j) (2008). The EEOC promulgated regulations intended to give effect to these changes in 2011. The most significant changes for the purpose of our discussion is the EEOC’s decision to greatly expand the list of recognized “major life activities” and to expressly reject the of mitigating treatments or therapies as a relevant factor in assessing whether an individual is disabled. See 29 C.F.R. § 1630.2(i) (2018) (listing several major life activities and describing criteria for identifying others).

<sup>59</sup> 42 U.S.C. § 12102 (2018).

pyromania . . . or psychoactive substance use disorders resulting from current illegal use of drugs.”<sup>60</sup> Because these conditions may be as disabling as other conditions that are covered under the law, these exclusions are more likely the result of a political compromise rather than a decision based on modern medicine or the absence of discrimination experienced by people with these impairments. Further, no other civil rights law excludes certain categories of people.<sup>61</sup> By specifically excluding some people with disabilities from protection, the ADAAA cannot be seen as promoting equality for *all* people with disabilities.

The ADAAA also fails to include within its protection all people who self-identify as disabled. Like the ADA, the ADAAA protects only “qualified” individuals.<sup>62</sup> Thus, in the employment context, for example, an employer would not violate the ADA by refusing to hire a person with a disability if the employer believes, based only on subjective judgment, that the person is not qualified to do the job. As a result, the issue of who is and who is not covered by the law continues to be the subject of litigation, even after the clarifying amendments of 2008.<sup>63</sup>

Even if a person with a disability is able to find a lawyer to bring a case under the law, additional legal barriers may exist to prevent a successful outcome for the plaintiff. For example, the

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<sup>60</sup> 42 U.S.C. § 12211; 29 C.F.R. § 630.3(d).

<sup>61</sup> Title VII cases are never analyzed based on whether or not the plaintiff in a case was “actually a woman,” or “actually black.” A claimant in a Title VII case need only establish that she suffered an adverse action on the basis of race or gender; she does not have to prove that she has a race or a gender nor does she have to provide that she is a particular race or one gender and not another. Of course, that may change as issues of multiple identities and the mutability of gender is reflected in the law.

<sup>62</sup> 42 U.S.C. § 12111(8).

<sup>63</sup> *See, e.g.,* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that an applicant was not an “otherwise qualified” person with a disability because he could not pass a DOT driving test, which was determined to be an “essential function” of the job); *Jones v. Walgreen Co.*, 679 F.3d 9 (1st Cir. 2012) (holding that an employer was justified in terminating the employment of an individual who was no longer “otherwise qualified” due to a knee replacement surgery when the employer possessed a letter from the employee’s orthopedist stating that she could no longer perform her job); *Keith v. Cty. of Oakland*, 703 F.3d 918 (6th Cir. 2013) (holding that a county swimming pool wrongfully determined a deaf applicant was not “otherwise qualified” when there was evidence that the applicant could perform the “essential communication functions of a lifeguard”); *Bates v. United Parcel Serv., Inc.*, 465 F.3d 1069 (9th Cir. 2006) (holding that when plaintiffs challenge a safety-based qualification standard, they do not have to establish that they can perform the essential function of “doing the job safely,” but they are required, however, to show that they are “qualified” by showing that they satisfy the prerequisites for the position, including safety-related prerequisites, not connected to the standard they are challenging).

application of the rules on standing may cause the case to be thrown out of court, even before the person can present the merits of the case.<sup>64</sup> Or, if an individual succeeds in convincing a court that he or she is a qualified person with a disability who experienced discrimination, a myriad of defenses are available to defendants, any of which may preclude a successful outcome for an aggrieved plaintiff.

In contrast to the ADA, the CRPD does not include a specific definition of disability nor one that must be proved with medical evidence. The CRPD avoids definitional disputes by relying on the social model of disability. According to this model, it becomes the obligation of States Parties to protect the rights of people with disabilities by removing the structural, legal, attitudinal, environmental, communication, and physical barriers that prevent their inclusion and participation in society.<sup>65</sup> Article 1 of the CRPD, therefore, states that a person with a physical, mental, intellectual or sensory impairment is a protected because of the person's "interaction with various barriers [that] may hinder their full and effective participation in society on an equal basis with others."<sup>66</sup>

This statement is included in Article 1 because there was no agreement regarding whether or not the CRPD should even include a definition of disability. Some delegates and Disabled People's Organizations feared that without including a specific definition of disability in the CRPD itself, States would feel free to exclude people with certain disabilities from their laws' protections. In fact, the Seventh Ad Hoc meeting was devoted nearly exclusively to a discussion of the proposed definitions of disability.<sup>67</sup>

On the other hand, those who argued against including a specific definition of disability, including the Chair of the Ad Hoc Committee on the CRPD, ultimately prevailed.<sup>68</sup> They argued that including a single definition of disability, no matter how broadly it was worded, would necessarily include some people and not others. Further, any definition of disability could change over time, and in a way that could exclude people who, at the time of the drafting, were

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<sup>64</sup> See, e.g., *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135 (11th Cir. 2014); *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069 (7th Cir. 2013); *Levine v. Nat'l R.R. Passenger Corp.*, No. 13-1696 (CKK), 2015 WL 674073, at \*1 (D.D.C. Feb. 18, 2015).

<sup>65</sup> KANTER, *supra* note 9, at 8; Kanter, *supra* note 26, at 426-29.

<sup>66</sup> CRPD, *supra* note 1, at art. 1.

<sup>67</sup> KANTER, *supra* note 9, at 49.

<sup>68</sup> *Id.*



considered as disabled. In addition, including a definition of disability in the CRPD itself was seen as potentially undermining the CRPD's commitment to the social model of disability and its focus on society's responsibility for eradicating the unequal treatment of people with disabilities.<sup>69</sup> In short, the CRPD, unlike the ADAAA, protects the rights of all people with disabilities, not some of them, some of the time.

### **B. The Meaning of Equality in the ADAAA and the CRPD**

The second way in which the CRPD differs from the ADA and the ADAAA is its embrace of a substantive equality model. Although the anti-discrimination approach of the ADA is the same approach used in prior civil rights laws, this model fails to deliver on the promise of equality for people with disabilities.<sup>70</sup>

There are various models of equality.<sup>71</sup> The formal equality model requires that like cases be treated alike, regardless of the presence or absence of individual differences.<sup>72</sup> The equality of opportunities model, contained in our civil rights laws, requires equal treatment of all people, once the barriers that prevent people—for whatever reason—from participating equally in society are removed.<sup>73</sup> Indeed, the right to equality of opportunities has long been recognized as an appropriate model with which to advance the rights of people with disabilities. It is the model of equality upon which the ADA is based.<sup>74</sup>

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<sup>69</sup> Kanter, *supra* note 31, at 292 (citing Press Release, General Assembly, Disability Convention Drafting Committee Discusses International Monitoring, International Cooperation, Definition of Disability, U.N. Press Release SOC/4709 (Aug. 15, 2006)).

<sup>70</sup> See, e.g., CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 241 (Marcia H. Rioux et al. eds., 2011).

<sup>71</sup> KANTER, *supra* note 9, at 48.

<sup>72</sup> ARISTOTLE, NICOMACHEAN ETHICS (F.A. Paley trans., 1872), <http://classics.mit.edu/Aristotle/nicomachaen.5.v.html>; ARISTOTLE, POLITICS (C.D.C. Reeve trans., 1998), <http://my.ilstu.edu/~jkshapi/Aristotle%20-%20Politics.pdf>.

<sup>73</sup> CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW, *supra* note 70, at 42-44. Rioux has observed that the formal equality approach to disability places its emphasis on “the tragedy of being disabled and individuals [being] viewed as anomalies albeit worthy of society’s charity and benevolence. Disability is viewed as a natural occurrence and luck based, emphasizing the requirement of a private and not societal, approach to addressing disability.” *Id.*

<sup>74</sup> See 42 U.S.C. § 12101(a)(7) (2018) (discussing “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation,

Like other civil rights laws, the ADAAA prohibits discrimination on a case-by-case basis. It provides a cause of action for persons seeking to gain access to a building, to receive accommodations on the job, or physical and communication access to public events. However, the law fails to address the underlying causes of different treatment and the extent that such causes may relate to power or privilege within any given society.<sup>75</sup> Further, the anti-discrimination model does not resolve how to ensure equality for all groups of people with disabilities. For example, it does not ensure protections for those who ask for but are denied accommodations. The ADAAA also does not protect those who are unable to ask for accommodations in the first place, or those who may choose not to receive any accommodations but still wish to be treated with respect and dignity by their fellow workers or neighbors. In such cases, even the right to equality of opportunities that the ADAAA promises will not alter the social marginalization and devaluation of people with disabilities.<sup>76</sup> Indeed, no law can actually change minds and hearts. However, the law can play a role in creating greater equality. As Martin Luther King observed on December 18, 1963:

Now the other myth that gets around is the idea that legislation cannot really solve the problem and that it has no great role to play in this period of social change because you've got to change the heart and you can't change the heart through legislation. You can't legislate morals. . . . But we must go on to say that while it may be true that morality cannot be legislated, behavior can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. It may be true that the law cannot make a man love me but it can keep him from lynching me and I think that is pretty important, also. So there is a need for . . . judicial decrees . . . [and] civil rights legislation on the local

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independent living, and economic self-sufficiency for such individuals"); 20 U.S.C. § 1400(c)(1) (2018) (discussing how "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities").

<sup>75</sup> See, e.g., Beth Ribet, *Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities*, 14 YALE HUM. RTS. & DEV. J. 101, 105 (2011).

<sup>76</sup> *Id.*

scale within states and on the national scale from the federal government.<sup>77</sup>

The ADAAA recognizes the need to change attitudes as well as practices in order to provide greater equality for people with disabilities. For that reason, Congress included the third prong of the definition that protects people who are “regarded” by others as disabled, but who, themselves, do not have an impairment.<sup>78</sup> Nonetheless, even with the third “regarded” prong of the definition in the ADAAA, the CRPD may have a greater potential to change minds because it takes a broader view of equality, as explained in the following paragraphs.<sup>79</sup>

As discussed above, the purpose of the ADA (and the ADAAA) is “to provide clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>80</sup> The purpose of the CRPD, however, is not merely to prohibit discrimination. The purpose of the CRPD, as stated in Article 3, is to promote the “[f]ull and effective participation and inclusion [of people with disabilities] in society.”<sup>81</sup> Accordingly, the CRPD goes beyond the anti-discrimination model of equality contained in the ADAAA.

The CRPD seeks to ensure substantive equality for all people with disabilities. It does so by focusing not only on the need for accommodations as a way to ensure equal treatment in individual cases, as in the ADAAA. Rather, under the CRPD, unequal treatment is seen as the result of state action and long-held societal views that require systematic in addition to individual responses. Substantive equality in the CRPD is not about treating everyone the same or

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<sup>77</sup> Martin Luther King Jr., Address at Western Michigan University (Dec. 18, 1963), <https://wmich.edu/sites/default/files/attachments/MLK.pdf>.

<sup>78</sup> The inclusion of the “regarded as” prong of the definition, as is known, does not rely on medical evidence and extends the reach of the ADA to people who are not disabled but may be considered disabled by others. This prong was added to raise awareness about the stigma attached to the label of disability and how one’s attitudes about others may be disabling. The ADA also protects individuals who are “associated” with persons with disabilities, but persons who are associated with persons with disabilities as well as those regarded as persons with disabilities are not entitled to “reasonable accommodations.” See 42 U.S.C. § 12112 *et. seq.*

<sup>79</sup> For a discussion of the various models of equality as applied to people with disabilities, see Kanter, *supra* note 56.

<sup>80</sup> 42 U.S.C. § 12101(b) (2018).

<sup>81</sup> CRPD, *supra* note 1, at art. 3.

ensuring only equal opportunities.<sup>82</sup> It is about treating people in such a way that the outcome for each person is equal. In order to ensure equal outcomes, societies must act to provide whatever “special” treatment, accommodations or modifications are necessary. In fact, the substantive model of equality actually demands unequal or different treatment for those people who may or may not be equally situated. It also recognizes the limits of legal justifications for different treatment by acknowledging that inequitable treatment, discrimination, and inequality, itself, are not the individual’s responsibility. Nor can they be remedied one individual at a time.

Further, under the substantive equality model contained in the CRPD, accommodations for people with disabilities become not merely a way for one person to gain entrance to a building; it is about requiring structural changes in society so that inaccessible buildings are not built in the first place. For example, the CRPD’s preamble acknowledges that “full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty.”<sup>83</sup> Such statements clearly go beyond the traditional non-discrimination language of the ADA, which seeks to eliminate only certain barriers, for one individual at a time.

### C. The Right to Reasonable Accommodations in the CRPD and the ADAAA

A third way in which the CRPD and the ADAAA differ is with respect to the right to reasonable accommodation. Both the ADAAA and the CRPD include the specific right to reasonable accommodations, but not in the same way. Title I of the ADAAA includes denial of reasonable accommodation as an example of discrimination.<sup>84</sup> Under this law, an accommodation is not reasonable

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<sup>82</sup> This model of equality reminds us that disability and ability—as well as difference and sameness—are all relational. Without comparison, these terms mean nothing. No one is “different” without a basis for comparison, and no one is disabled as long as there is one who, by comparison, is considered “abled.” Thus, whom we call different or “not normal” depends on whom we call “normal.” Disability Studies has taken on this issue of who is normal and who is not, and challenges the notion that normal is a fixed state. Instead, normalcy is considered a social construction, defined by those in power to reinforce adherence to the current power hierarchy. See Kanter, *supra* note 31, at 243, 248-53, 268.

<sup>83</sup> CRPD, *supra* note 1, at pmb1(m).

<sup>84</sup> Discrimination under Title I includes

if the employer can show that providing an accommodation would result in an “undue hardship.”<sup>85</sup> Undue hardship is defined as an action that would require “significant difficulty or expense”<sup>86</sup> or one that would pose a “direct threat to the health or safety of others in the workplace.”<sup>87</sup> Moreover, the ADAAA does not require the employer to accept an employee’s proposed accommodation. At all times, the employer retains the right to provide an alternative accommodation, even one which the employee neither requests nor prefers.<sup>88</sup> Thus, under the ADAAA, a reasonable accommodation is not a right *per se*; it is something that an employee or prospective employee may request

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not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or . . . denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5)(A)-(B). Title I defines reasonable accommodation as making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

*Id.* § 12111(9).

<sup>85</sup> *Id.* § 12112(b)(5)(A).

<sup>86</sup> *Id.* § 12111(10)(A). The factors to be considered in finding undue hardship include

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

*Id.* § 12111(10)(B)(i)-(iv).

<sup>87</sup> See 29 C.F.R. § 1630.2(r). See also *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 75 (2002) (extending “direct threat” defense to harm to self).

<sup>88</sup> See 42 U.S.C. § 12113.

and which the employer may grant or deny, depending on whether or not the employer concludes that the accommodation constitutes an undue hardship or a health or safety risk.

In other sections of the ADAAA, the right to reasonable accommodations is not even mentioned. Titles II and III of the ADAAA, which address the right of people with disabilities to be free from discrimination by state and local governments and privately owned places of public accommodations, respectively, include no mention of a right to reasonable accommodation.<sup>89</sup> Instead, the provider or operator of services under Titles II and III are required to provide a requested “modification,” but only if such modification does not constitute an “undue burden” or cause a “fundamental alteration” of the entity’s program.<sup>90</sup> Further, even if the state or locality, under Title II, and the owner or operator of the public accommodation, under Title III, are required to provide a reasonable modification, such a modification is available only to those persons who make the request and have standing to do so. Moreover, once the state or locality or provider or the place of public accommodation agrees to the requested modification (under Titles II and III), the same modification is not required to be made available to the next person who may need it. This is also true under Title I. Once an employer agrees to an accommodation for one employee, the next employee must prove that that he qualifies for the accommodation, as would the next person after that, and so on. In this way, the requirement of reasonable accommodation and modification in the various titles of the ADAAA seem to perpetuate the very stereotype that the ADAAA was intended to eradicate. The goal of reasonable accommodations and modifications is to help one individual do his job, enter a building, or receive services; it does not, however, eliminate the factors that contribute to the barriers in the first place. Thus, under the ADAAA, the requirement of reasonable accommodations and modifications may open the door for some qualified people with disabilities to get jobs and access services and public life, sometimes, but it does not require that those doors remain open to anyone else.

The CRPD, by contrast, affirms the right to reasonable accommodation as a human right for all. It recognizes not only that discrimination can include the refusal to provide a reasonable

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<sup>89</sup> Private clubs and religious entities are exempt from coverage under Title III. *See id.* § 12187.

<sup>90</sup> 28 C.F.R. § 35.130(b)(7) (2018).

accommodation, as in the ADA, but also that the right to reasonable accommodation as a free standing human right. The right to reasonable accommodation in the CRPD is not unlimited, however. It also requires only those accommodations that do “not impos[e] a disproportionate or undue burden, where needed in a particular case.”<sup>91</sup> However, unlike the ADAAA, the CRPD places responsibility for ensuring the provision of such accommodations and modifications on the State Party rather than on the judgment of an individual employer, provider, or owner or operator of a place of public accommodation.<sup>92</sup>

For example, CRPD’s Article 5, entitled “Equality and non-discrimination,” states that “[i]n order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>93</sup> Therefore, States Parties may not hide behind the argument of undue burden. The ADAAA, on the other hand, includes no such affirmative obligation by the State. As a result, under the ADAAA, the government has no role in monitoring or enforcing compliance with the ADAAA’s reasonable accommodation requirement. The only method of enforcement for the aggrieved person with a disability is to find a lawyer and sue, or to convince the United States Justice Department to investigate and pursue a civil action, which it will do so only in the rarest of cases.<sup>94</sup>

Moreover, the CRPD recognizes that there are different ways to ensure equal access and inclusion of people with disabilities other than the ADAAA’s requirement of individual requests for accommodations and modifications. Article 9 of the CRPD, for example, recognizes a right to accessibility to enable persons with disabilities to live independently and participate fully in all aspects of life. As it states:

States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to

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<sup>91</sup> CRPD, *supra* note 1, at art. 2. “Reasonable accommodation” is defined in Article 2 of the CRPD as the “means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at art. 5.

<sup>94</sup> *See* 42 U.S.C. § 12117 (2018).

transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures . . . shall include the identification and elimination of obstacles and barriers to accessibility.<sup>95</sup>

By including the right to accessibility as one of the human rights enumerated in the CRPD, individuals are not required to show that they have a right to access a particular building or service and to sue if denied access, as the ADA requires. Instead, States Parties are required to ensure accessibility of all roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces. States Parties also must ensure that information, communications and other services, including electronic services and emergency services, are accessible.<sup>96</sup>

In addition, the CRPD goes beyond reliance on accommodations by promoting the use of universal design. Universal design requires buildings and spaces to incorporate a wide range of needs early in the design stage so that places, products, and information will be accessible and usable by the widest range of users without after-the-fact adaptation.<sup>97</sup> Although the United States has one of the most comprehensive accessibility standards in the world, these standards do not require universal design.<sup>98</sup>

Article 2 of the CRPD defines universal design as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.”<sup>99</sup> In addition, Article 4 of the CRPD requires States Parties to “undertake or promote research and development of universally designed goods, services, equipment and facilities . . . which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with

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<sup>95</sup> CRPD, *supra* note 1, at art. 9.

<sup>96</sup> *Id.*

<sup>97</sup> Bettye Rose Connell et al., *The Principles of Universal Design*, N.C. ST. U. (Apr. 1, 1997), [http://www.ncsu.edu/ncsu/design/cud/about\\_ud/udprinciplestext.htm](http://www.ncsu.edu/ncsu/design/cud/about_ud/udprinciplestext.htm).

<sup>98</sup> See 36 C.F.R. §§ 1190, 1191 (2018) (“Accessibility Guidelines”).

<sup>99</sup> CRPD, *supra* note 1, at art. 2. The CRPD also recognizes, however, that “universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed. *Id.*



disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.”<sup>100</sup> Universal design reduces the need for many individual accommodations since access is assured at the outset for all. In this way, people with disabilities are not singled out and required to ask for their own, individual accommodations or modifications. With a commitment to universal design, the CRPD removes the very stigmatization and exclusion that the ADAAA is intended to, but does not, eliminate.

Article 4 of the CRPD also requires States Parties to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise” recognizing, too, that such much measures may be achieved “to the maximum of its available resources.”<sup>101</sup> Although the regulations promulgated under the ADAAA provide examples of how reasonable accommodations may be calculated, there is little guidance on how to interpret these provisions.<sup>102</sup> The CRPD, however, could fill this gap by clarifying that States Parties must “take measures to the maximum of its available resources” in order to protect the rights recognized by the law.<sup>103</sup> As one scholar has observed, if the United States, as one of the world’s wealthiest nations, were to use the “maximum of its available resources,” to eradicate discrimination against people with disabilities and to ensure their inclusion in American society, it could allocate significantly more resources than it currently does to achieve the level of inclusion that the CRPD envisions.<sup>104</sup>

In short, under the ADAAA, no employer, state or local government, or owner or operator of a place of public accommodation is required to permanently change their practices or policies in order to ensure equality for people with disabilities, at least not unless and until they are sued, lose, and ordered to do so by a judge or in a settlement of an individual case. Moreover, even if an individual with a disability is able to find an attorney, bring suit, and win, damages are generally not available under the ADAAA. Although Title I may provide limited

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<sup>100</sup> *Id.* at art. 4(f).

<sup>101</sup> *Id.* at art. 4.

<sup>102</sup> 29.C.F.R. §1630.2(o)(2)(2018).

<sup>103</sup> This requirement may conflict with United States recent policies of reducing “entitlement spending.” Megan Flynn, *Olmstead Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities*, 28 *LAW & INEQ.* 407, 435 (2010).

<sup>104</sup> *Id.* (citing CRPD, *supra* note 1, at art. 4 (describing the lengths to which States Parties should incorporate the Convention’s protections into their legislation)).

damages, Title III does not permit any economic damages against private entities that discriminate against their customers.<sup>105</sup> Nor does Title II currently provide damages for violations, unless the plaintiff can prove discriminatory intent to deprive the person of a constitutionally protected right.<sup>106</sup> Therefore, even those individuals with disabilities who qualify for protection under the ADAAA may not receive any compensation for their injuries. Without the possibility of compensation, contingency arrangements for attorneys are not possible, nor are most individuals with disabilities willing to go through the difficulties, delay, and expense of pursuing litigation. Thus, by relying solely on voluntary compliance with the ADAAA, many workplaces, public and private buildings, services, and programs in the United States will remain inaccessible.<sup>107</sup> The CRPD, on the other hand, does not rely on litigation to enforce the mandate of equality for people with disabilities. Rather, it requires States Parties to take all necessary steps to ensure the right to equality, access and inclusion.

#### **D. The Right to Independence and Support in the CRPD**

A fourth example of how the CRPD goes beyond the ADAAA is the way in which the CRPD embraces not only the rights of people with disabilities but also their needs. The goal of the ADAAA is ultimately to get people with disabilities off the “public dole” and back to work.<sup>108</sup> As President Bush stated when he signed the original version of the ADA, this law gives people with disabilities “the opportunity to be independent, they will move proudly into the economic mainstream of American life, and that’s what this legislation is all about.”<sup>109</sup>

This goal is consistent with the deeply held American values. In the United States, each American is encouraged to “pull yourself

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<sup>105</sup> 42 U.S.C. § 12188(b)(2)(B), (4) (2018).

<sup>106</sup> See *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004).

<sup>107</sup> The ADA includes comprehensive standards for building accessibility. See *ADA Standards for Accessible Design*, U.S. DEP’T JUST.: C.R. DIVISION, [https://www.ada.gov/2010ADAAstandards\\_index.htm](https://www.ada.gov/2010ADAAstandards_index.htm) (last visited Feb. 17, 2019). However, compliance with these standards is voluntary since the only way to enforce them is through litigation.

<sup>108</sup> See 42 U.S.C. § 12101(a)(7).

<sup>109</sup> *Remarks of President George Bush at the Signing of the Americans with Disabilities Act*, *supra* note 50.

up by your own bootstraps.”<sup>110</sup> The ADAAA clearly reflects this ideal of the independent and self-reliant individual. Further, the decision to focus on the ADA’s role in achieving independence for people with disabilities was a deliberate strategy to win the support of politicians and the “broader public.”<sup>111</sup> According to the legal scholar, Sam Bagenstos, “the presentation of disability rights law as a means of achieving independence resonated strongly with the ascendant conservative ethics of individualism, self-reliance, and fiscal restraint.”<sup>112</sup> However, no person, with or without a disability, is truly independent.<sup>113</sup> All people need help at various times, and some people, with and without disabilities, may need more help and more often.

Although the CRPD recognizes autonomy and independence as key core values,<sup>114</sup> it also challenges the ideal of independency, itself. The CRPD recognizes that people with disabilities (like people without disabilities) are not entirely independent and that success in life need not be measured by one’s level of independence. Thus, the CRPD refuses to portray dependency as a negative value; instead, it includes a new right to interdependence and support.

This new “right to support” is particularly evident in Article 19 of the CRPD, which affirms the right of all people with disabilities to live in the community. Article 19(b) requires States Parties to ensure that “[p]ersons with disabilities have access to a range of in-home, residential and other community support services, including personal

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<sup>110</sup> The origin of the phrase is not known, but its meaning is well known. It refers to the idea that if a person succeeds based on his or her own efforts, it is as if the person lifted him or herself up off the ground by pulling at one’s bootstraps (or today, shoelaces). In *Ulysses*, James Joyce referred to a similar concept when he wrote: “There were others who had forced their way to the top from the lowest rung by the aid of their bootstraps.” JAMES JOYCE, *ULYSSES* 532 (prtg. 2013).

<sup>111</sup> See generally SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 27 (2009).

<sup>112</sup> *Id.* at 29.

<sup>113</sup> Dependency also provides the legal justification for state interventions such as involuntarily committing people to institutions for their care, enacting mental health laws that deprive them of their liberty, authorizing medical treatment without their consent, and creating other legal mechanisms to “assist” people with disabilities by making decisions for and about them, without their input, thereby denying their right to exercise their own agency and will. For a discussion of infringements on the liberty and autonomy interests of people with disabilities under the CRPD, see KANTER, *supra* note 9, at 125-58.

<sup>114</sup> See CRPD, *supra* note 1, at art. 3(a).

assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.”<sup>115</sup>

Noticeably absent from the original ADA as well as its amendments is the right to live in the community and the corresponding right to support. Although the regulations promulgated pursuant to Title II of the ADA have been interpreted to require integration of people with disabilities into the community, there is no corresponding right to support which may be essential to enable the person to exercise the right to live in the community.<sup>116</sup> Often referred to as the “integration mandate,” the Title II regulations require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>117</sup> This provision has been interpreted to mean that “individuals with disabilities [are entitled] to interact with nondisabled persons to the fullest extent possible.”<sup>118</sup> However, this integration mandate is not included in the law, itself, nor has the Supreme Court ever declared an unequivocal right of people with disabilities to live in the community.

The Supreme Court came close to declaring a right to live in the community, but it chose not to do so. In *Olmstead v. L.C.*, the Supreme Court interpreted the “integration mandate” to require access to the community, but only if certain conditions are met.<sup>119</sup> Under these conditions, a person is allowed to leave an institution and return to live in the community, only if the treating physician agrees, and only after evidence establishes that releasing the person into the community would not “fundamentally alter” the state’s mental health system.<sup>120</sup> The Supreme Court could have required changes in the mental health system to eliminate or at least reduce the use of institutionalization, generally, but it did not. Accordingly, in the United States today, there is no right to live in the community for all people with disabilities. The CRPD, by contrast, recognizes the right of all people with disabilities

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<sup>115</sup> *Id.* at art. 19(b).

<sup>116</sup> For a comprehensive analysis on the right to community living under the CRPD and the laws of the United States and Israel, see Arlene S. Kanter, *There’s No Place Like Home: The Right to Live in the Community For People with Disabilities, Under International and Domestic Laws of the United States and Israel*, 45 *ISR. L. REV.* 181 (2012).

<sup>117</sup> 28 C.F.R. § 35.130(d) (2018) (the “integration mandate”).

<sup>118</sup> 28 C.F.R. pt. 35, App. B (addressing § 35.130).

<sup>119</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

<sup>120</sup> *Id.* at 597.

to live in the community as well as their right to receive whatever supports they may need to realize that right.

In sum, as the previous discussion illustrates, there are several differences between the CRPD and the ADAAA. However, both laws share the common goal of increasing opportunities for people with disabilities. Further, none of the differences between the ADAAA and the CRPD justify the Senate's failure to ratify the CRPD.<sup>121</sup> As the National Council of Disability observed, there was no legal impediment to United States signature to and ratification of the CRPD since "in large measure, the legal standards articulated in the CRPD align with U.S. disability law."<sup>122</sup> Nonetheless, the Senate has failed to ratify the CRPD on two separate occasions. As explained in the next section, the Senate's failure to ratify the CRPD was less about any potential differences between the ADAAA and the CRPD and more about domestic politics.

### III. FAILURE OF THE UNITED STATES TO RATIFY THE CRPD

#### A. The United States and its Treaty Ratification Record

President George H.W. Bush signed the ADA into law in 1990 while his son, George W. Bush, became president the same year that the United Nations began considering the CRPD. During the drafting process at the United Nations, George W. Bush made it clear that he had no intention of signing the CRPD.<sup>123</sup> Of course, it is the prerogative of any president not to sign a treaty; nor is any country obligated to ratify a treaty. Yet of the 193 member states of the United Nations, most have signed and ratified some, if not all, human rights treaties.

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<sup>121</sup> See Luisa Blanchfield & Cynthia Brown, *The United Nations Convention on the Rights of Persons with Disabilities: Issues in the U.S. Ratification Debate*, CONG. RES. SERV. at 17-18 (Jan. 21, 2015), <https://fas.org/sgp/crs/misc/R42749.pdf>; Jason Scott Palmer, *The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities*, 43 SETON HALL L. REV. 551 (2013).

<sup>122</sup> NAT'L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 10 (2008), <http://www.ncd.gov/publications/2008/May122008> [hereinafter FINDING THE GAPS].

<sup>123</sup> See KANTER, *supra* note 9.

The mostly widely ratified human rights treaty is the Convention on the Rights of the Child, which has been ratified by literally every member state, except for the United States.<sup>124</sup> Even Somalia, the only other country that had failed to ratify the CRC for over twenty years, recently ratified it. Moreover, of the nine core human rights treaties adopted by the United Nations, the United States has ratified only three.<sup>125</sup> This number is strikingly low, especially in relation to the ratification record of other countries to which we compare ourselves. Australia, the United Kingdom, France, Germany, and Canada have all either ratified or acceded to all or most human rights treaties as well as their optional protocols.<sup>126</sup> As a result, the United States is now considered the country with the “poorest record of ratification of human rights treaties among all industrialized nations.”<sup>127</sup> Some commentators have gone so far as to suggest that

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<sup>124</sup> The United States has ratified two optional protocols of the CRC but only signed the CRC. According to Philip Alston, a leading international human rights legal expert, the United States reluctantly signed the CRC. The fact that “this treaty contained a number of provisions giving effect to [the Convention on Economic, Social, and Cultural Rights] was often cited as a reason for not proceeding with ratification. This was rather ironic since most of the relevant formulations had in fact been significantly watered down at the insistence of the Reagan administration during the process of drafting the CRC in the 1980s.” Philip G. Alston, *Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States*, in *THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA* 120, 123 (William F. Schulz ed., 2008).

<sup>125</sup> Of the nine core human rights treaties adopted by the United Nations prior to the Convention on the Rights of Persons with Disabilities in 2006, the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social, and Cultural Rights (1966); the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the Convention Relating to the Status of Refugees (1951); the Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the United States has ratified only the International Covenant on Civil and Political Rights (1992), the Convention on the Elimination of All Forms of Racial Discrimination (1994) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1994).

<sup>126</sup> See Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97 (2011).

<sup>127</sup> Janet E. Lord & Michael Ashley Stein, *Ratify the UN Disability Treaty*, FOREIGN POL’Y IN FOCUS (July 9, 2009), [http://fpif.org/ratify\\_the\\_un\\_disability\\_treaty/](http://fpif.org/ratify_the_un_disability_treaty/). The following are some of the treaties the United States has not ratified: The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention for the Protection of all Persons from Enforced Disappearance, the Landmine Ban Treaty, the Convention on Cluster Munitions and the Optional Protocol to the Convention against Torture. Lord & Stein, *supra*.

the failure of the United States to ratify human rights treaties not only reflects poorly on the United States, internationally, but also adversely affects our relationships with other countries.<sup>128</sup>

At the very least, the commitment of the United States to international human rights enforcement may be best described as paradoxical. On the one hand, the United States was one of the primary architects of the entire international human rights system, including the creation of the United Nations in 1945. On the other hand, the United States has, in various times in its history, adhered to a policy of exceptionalism, resulting in its failure to endorse various international human rights treaties.<sup>129</sup> As to ratification of the CRPD, in particular, the United States Senate failed to garner the votes necessary for ratification on two occasions.

### B. The CRPD in the United States Senate

The first time the Senate failed to ratify the CRPD occurred on December 4, 2012. Prior to that vote, then-President Obama had affirmed his commitment to the CRPD during the 2008 Presidential campaign. Within a year after his election, President Obama fulfilled his campaign promise and signed the CRPD.<sup>130</sup> At the signing, Ambassador Susan Rice (on behalf of the President) stated that the United States “once again confirm[s] that disability rights are not just civil rights to be enforced here at home; they are universal human rights to be promoted around the world. So we proudly join the international community in protecting the human rights of all.”<sup>131</sup> By the time President Obama signed the CRPD on July 30, 2009, more than 150 other countries had already signed and/or ratified it.

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<sup>128</sup> See Kaye, *supra* note 4.

<sup>129</sup> See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 39 (2d ed. 2015)

<sup>130</sup> Ambassador Susan Rice, on behalf of the President, signed the CRPD on July 30, 2009. See *Convention on the Rights of Persons with Disabilities*, CONGRESS.GOV, <https://www.congress.gov/treaty-document/112th-congress/7> (last visited Feb. 19, 2019).

<sup>131</sup> Kareem Dale, *Valerie Jarrett & Ambassador Rice at the U.S. Signing of the UN Convention on the Rights of Persons with Disabilities*, WHITE HOUSE BLOG (July 30, 2009), <https://obamawhitehouse.archives.gov/blog/2009/07/30/valerie-jarrett-ambassador-rice-us-signing-un-convention-rights-persons>. President Obama issued a statement praising the CRPD by referring to the “extraordinary treaty . . . [that] urges equal protection and equal benefits before the law for all citizens [and] reaffirms the inherent dignity and worth and independence of all persons with disabilities worldwide.” See *id.*; see also *The Signing of the United Nations Convention on the Rights of Persons with Disabilities*, ABILITY MAG., <http://abilitymagazine.com/un-ada.html> (last visited Feb. 19, 2019).

Although signing the CRPD does not bind the United States to its subsequent ratification, the signing did evidence the Obama Administration's commitment to the goals and principles of the treaty. Thus, three years later, on May 17, 2012, it came as no surprise when President Obama transmitted the CRPD to the Senate for advice and consent to ratification.<sup>132</sup>

Two months later, on July 12, 2012, the Senate Committee on Foreign Relations (hereinafter "SFRC") held its first hearing on ratification. Following the hearing, the SFRC reported the CRPD favorably to the full Senate by a vote of 13 in favor and 6 opposed, subject to certain conditions.<sup>133</sup> The SFRC noted that like other treaties, the CRPD is not self-executing and therefore does not give rise to individually enforceable rights in the United States.<sup>134</sup> However, the Committee went on to state that given the "comprehensive network of existing federal and state disability laws

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<sup>132</sup> See, e.g., Sally Chaffin, *Challenging the United States Position on a United Nations Convention On Disability*, 15 TEMP. POL. & C.R. L. REV. 121, 129 n.58 (2015) (citing Letter from Kim R. Holmes, Ass't Sec. of State for Int'l Org. Affairs, U.S. Dep't of State, to Lex Frieden, Chairperson, NAT'L COUNCIL ON DISABILITY (June 3, 2004), [http://www.usicd.org/StateDept\\_Letter\\_to\\_NCD.pdf](http://www.usicd.org/StateDept_Letter_to_NCD.pdf)). According to the Constitution once the President signs the treaty, he or she decides whether or not to transmit the treaty to the Senate. BRADLEY, *supra* note 129, at 33-35. Once transmitted, the full Senate must approve the treaty by a required two-thirds vote. However, it is the Foreign Relations Committee of the Senate which ultimately decides whether to send the treaty to the floor of the full Senate for a vote. *Id.* When a treaty is sent to the full Senate, the Senate may approve it, demand changes to it, or request the addition of Reservations, Understandings or Declarations (RUDs). RUDs have been attached to all four human rights treaties ratified by the United States. Venetis, *supra* note 126, at 98. Once a treaty is approved by the required two-thirds of the Senate, the Senate then sends to the President a resolution of "advice and consent" to the treaty. *Id.* at 116. At that point, the President has the option of ratifying the treaty or not. However, the Senate cannot constitutionally obligate the President to ratify a treaty. *Id.* at 101 (indicating that the United States has chosen disability experts to participate in the Ad Hoc deliberations before the United Nations).

<sup>133</sup> See Blanchfield & Brown, *supra* note 121, at 7; see also *The Convention on the Rights of Persons with Disabilities*, U.S. INT'L COUNCIL ON DISABILITIES, <http://www.usicd.org/index.cfm/crpd> (last visited Feb. 19, 2019).

<sup>134</sup> See S. REP. NO. 112-6, at 14 (2012), <https://www.congress.gov/congressional-report/112th-congress/executive-report/6> (last visited March 4, 2019); S. REP. NO. 113-12, at 23 (2014), <https://www.congress.gov/congressional-report/113th-congress/executive-report/12> (last visited March 4, 2019). Professor Harold Koh has criticized the United States' posture of attaching non-self-executing declarations to treaties: "[a]s Professor Louis Henkin likes to say, that in the cathedral of human rights, the United States is more like a flying buttress than a pillar- choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to scrutiny of that system." Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002).



and enforcement mechanisms . . . the vast majority of cases . . . meets or exceeds the requirements of the Convention.”<sup>135</sup>

Following that action, on the International Day of Persons with Disabilities, December 3, 2012, President Obama indicated his support for the ratification of the CRPD, by issuing the following Presidential Proclamation:

While Americans with disabilities already enjoy these rights at home, they frequently face barriers when they travel, conduct business, study, or reside overseas. Ratifying the Convention in the Senate would reaffirm America’s position as the global leader on disability rights and better position us to encourage progress toward inclusion, equal opportunity, full participation, independent living, and economic self-sufficiency for persons with disabilities worldwide. We have come far in the long march to achieve equal opportunity for all. But even as we partner with countries across the globe in affirming universal human rights, we know our work will not be finished until the inherent dignity and worth of all persons with disabilities is guaranteed. Today, let us renew our commitment to meeting that challenge here in the United States, and let us redouble our efforts to build new paths to participation, empowerment, and progress around the world.<sup>136</sup>

The following day, December 4, 2012, the CRPD came before the full Senate for a vote. The Senate voted down the CRPD, with 61 Senators in favor of ratification and 38 opposed.<sup>137</sup> With this vote, the Senate failed to achieve the required two-third majority vote for advice and consent to ratification, and by only five votes.<sup>138</sup> According to protocol, the Senate returned the CRPD to the SFRC.

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<sup>135</sup> S. REP. NO. 113-12, *supra* note 134, at 6.

<sup>136</sup> Barack Obama, *Presidential Proclamation—International Day of Persons with Disabilities, 2012*, WHITE HOUSE (Dec. 3, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/12/03/presidential-proclamation-international-day-persons-disabilities-2012>.

<sup>137</sup> See Ramsey Cox & Julian Pecquet, *Senate Rejects United Nations Treaty for Disabled Rights in a 61-38 Vote*, HILL (Dec. 4, 2012), <https://thehill.com/policy/international/270831-senate-rejects-un-treaty-for-disabled-rights-in-vote>

<sup>138</sup> 158 CONG. REC. S7365-79 (daily ed. Dec. 4, 2012), <https://www.congress.gov/crec/2012/12/04/CREC-2012-12-04.pdf>.

In July 2014, the SFRC reconsidered the CRPD, and again reported it favorably by a vote of 12 in favor and 6 opposed. This time, however, the full Senate chose not to provide its advice and consent to ratification. As a result, the CRPD was returned automatically to the SFRC at the end of the 113th Congress.<sup>139</sup> Since then, the Senate has not taken any further action on the CRPD.

The history of the Senate's action on the CRPD is interesting not only because of its impact on disability rights but also for what it says about the relationship between Senate Republicans and Democrats at that time. Leading the support for CRPD ratification was then-Senator Thomas Harkin, a Democrat, and long-time defender of disability rights. He was the primary architect and sponsor of the original version of the ADA of 1990, as well as the ADAAA of 2008.<sup>140</sup> The opposition to the CRPD was led by Tea Party Republican and former presidential candidate, Rick Santorum of Pennsylvania and Senator Rick Lee of Utah.

Senators Santorum and Lee, together with other Senator Republicans, claimed that ratification of the CRPD would threaten American sovereignty and intrude on the parental rights of Americans.<sup>141</sup> These Republican Senators were supported by the Homeschooling Legal Defense Association (hereinafter "HSLDA"), a United States-based non-profit organization established "to preserve and advance the fundamental, God-given, constitutional right of parents and others legally responsible for their children to direct their education."<sup>142</sup> The HSLDA mounted a vigorous campaign against ratification of the CRPD, led by its director, Michael Farris. Farris urged "all freedom-loving Americans to contact their U.S. senators and urge them to oppose this dangerous UN treaty."<sup>143</sup>

The Republican opposition to the CRPD was not inevitable, however. In the past, Republicans had worked together for passage of

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<sup>139</sup> See Blanchfield & Brown, *supra* note 121.

<sup>140</sup> A complete list of Senators and how they voted is found at: *Roll Call Vote 112th Congress – 2nd Session*, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=2&vote=00219](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00219) (last visited Feb. 19, 2019).

<sup>141</sup> Michelle Diamant, *Senate Rejects UN Disability Treaty*, DISABILITYSCOOP (Dec. 4, 2012), <http://www.disabilitycoop.com/2012/12/04/senate-rejects-treaty/16887/>.

<sup>142</sup> *Our Mission*, HSLDA, <https://www.hslda.org/about/mission.asp> (last visited Feb. 19, 2019).

<sup>143</sup> For the HSLDA position on the CRPD, see Michael Farris, *The U.N. Convention on the Rights of Persons with Disabilities: A Danger to Homeschool Families*, HSLDA (July 17, 2014), <https://hslda.org/content/docs/news/2014/201407180.asp>.

both the ADA in 1990 as well as the ADAAA in 2008. Indeed, it was the Republican President, George H.W. Bush, who signed the ADA into law. Moreover, two of the Senate's most prominent Republicans, Senators Bob Dole and John McCain, both former presidential nominees and both disabled as a result of military service, strongly and actively supported CRPD ratification. According to these Republican Senators, the CRPD posed no threat of intrusion into United States sovereignty nor any encroachment on federal or state rights.<sup>144</sup>

Given such bipartisan support for the ADA, including the outspoken support of the CRPD by two of the most prominent Republican Senators, one could have expected widespread Senate support for the CRPD. Since the ADA essentially codifies United States law, ratification of the CRPD seemed noncontroversial.<sup>145</sup> In fact, prior to the CRPD, the existence of a domestic law was typically a condition for United States ratification, not a reason to reject it.<sup>146</sup> Moreover, the existence of strong disability laws in other countries in Europe, the Americas, Asia and Africa as well as in Australia, Canada and Israel, became a reason for those countries to support the CRPD not a reason to refuse ratification, as in the United States.<sup>147</sup>

Supporters of the CRPD argued that ratification of the CRPD was not only consistent with the goals of the ADAAA, but also that the CRPD would bolster the ADAAA and other domestic laws by supporting the millions of individuals with disabilities in the United States as well as those who seek employment and other opportunities outside of the United States.<sup>148</sup> As one commentator noted, ratification of the CRPD would increase the ability of the United States to improve physical, technological and communication access in other countries and to play a role in the development of international standards that are

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<sup>144</sup> See Jim Lobe, *U.N. Disabilities Treaty Rejected by U.S. Senate*, GLOBAL ISSUES (Dec. 5, 2012), <http://www.globalissues.org/news/2012/12/05/15441>.

<sup>145</sup> KANTER, *supra* note 9.

<sup>146</sup> See Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37 (2007).

<sup>147</sup> In the United Kingdom, the Disability Discrimination Act 1995 (DDA) resulted from a campaign to adopt the language of the anti-discrimination civil rights approach of the ADA. See Agnes Fletcher & Nick O'Brien, *Disability Rights Commission: From Civil Rights to Social Rights*, 35 J.L. & SOC'Y 523; KANTER, *supra* note 9, at 37-39.

<sup>148</sup> See Blanchfield & Brown, *supra* note 121, at 17-18; Jason Scott Palmer, *The Convention on the Rights of Persons with Disabilities: Will Ratification Lead to a Holistic Approach to Postsecondary Education for Persons with Disabilities*, 43 SETON HALL L. REV. 551 (2013).

being developed on accessibility and technology access.<sup>149</sup> Since such protections are clearly in the interest of the United States, one would have expected widespread and bipartisan Senate support for ratification. As another scholar observed, “[r]atification will allow us simultaneously to serve as a model for the rest of the world, projecting our commitment to the rights of persons with disabilities outward, while ensuring that we are in fact living up to that projection as a nation and social community of equals at home. In doing so, we make ourselves a stronger democracy; there is no excuse not to ratify.”<sup>150</sup>

However, as the following overview of the debate on ratification reveals, the opposition to CRPD ratification had less to do with disability rights, and more to do with the refusal of some Senate Republicans to endorse any Democratic-led proposal.<sup>151</sup>

Following the transmission of the CRPD to the Senate in 2012, the Senate hearings and debates focused initially on the role of international law on United States domestic laws.<sup>152</sup> Opponents to ratification in the Senate argued that the CRPD, would threaten United States sovereignty by superseding United States law.<sup>153</sup> Oklahoma’s Senator Jim Inhofe lambasted the “cumbersome regulations and potentially overzealous international organizations with anti-American biases that infringe upon American society.”<sup>154</sup> Other Senators joined Senator’s Inhofe’s concern about intrusion into United States state sovereignty by the CRPD’s monitoring body, the Committee on the Rights of Persons with Disabilities.<sup>155</sup> However, as these Senators

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<sup>149</sup> Virginia Knowlton Marcus, *On Point: U.S. Can Lead on Rights for Those with Disabilities*, LEGALNEWS.COM (Aug. 30, 2013), <http://www.legalnews.com/detroit/1379870/>. For example, the Marrakesh Treaty provides an exception to domestic copyright law in order to make printed material available to visually impaired and print disabled people. It also allows for the import and export of accessible versions of books and other copyrighted works, without requiring copyright holder permission. WORLD INTELLECTUAL PROPERTY ORG., MARRAKESH TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED (2013), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_218.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_218.pdf).

<sup>150</sup> Melish, *supra* note 146, at 46.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Blanchfield & Brown, *supra* note 121, at 15.

<sup>154</sup> Stephanie Hacke, *StoryWise Program Lets South Hills Seniors Connect over Cherished Memories*, TRIBLIVE (Feb. 11, 2019), <https://triblive.com/neighborhoods/storywise-program-lets-south-hills-seniors-connect-over-cherished-memories/>.

<sup>155</sup> *Convention on the Rights of Persons with Disabilities*, CONGRESS.GOV, <https://www.foreign.senate.gov/hearings/hearing-convention-on-the-rights-of-persons-with-disabilities-treaty-doc-112-7/> (last visited Feb. 19, 2019).

knew but did not admit, the CRPD Committee's findings and observations have no binding authority under domestic law in any country, including in the United States.<sup>156</sup> As legal scholars have observed, "Where gaps arise between the two sets of legal mandates, they do so because U.S. domestic civil rights laws and international human rights laws operate from distinct, but not necessarily mutually exclusive, perspectives."<sup>157</sup>

Indeed, most Senator Republicans eventually agreed that the CRPD posed no threat to United States sovereignty, nor would ratification of the CRPD undermine existing United States laws.<sup>158</sup> In fact, the RUDs attached to the CRPD specifically addressed implementation of the CRPD in relation to United States law.<sup>159</sup> One

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<sup>156</sup> The CRPD Committee was created pursuant to Article 34 of the CRPD. CRPD, *supra* note 1, at art. 34. Today, it consists of 18 independent experts, mostly people with disabilities, who are elected by States Parties and serve in their individual capacities. *Id.* For the list of current CRPD Committee members, see <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx>. The CRPD Committee is charged with preparing reviews of country reports and providing "list of issues" and "concluding observations" in response to country reports. *Id.* The CRPD Committee's findings and responses to country reports are at all times, however, non-binding recommendations.

<sup>157</sup> Lord & Stein, *supra* note 127.

<sup>158</sup> Blanchfield & Brown, *supra* note 121, at 16.

<sup>159</sup> *Id.* at 6; Knowlton Marcus, *supra* note 149. The topic of RUDs is of particular interest in the debate over ratification of the CRPD because the Senate resisted ratification even with the RUDs. In addition to the reservation on federalism, the Obama Administration proposed two reservations, five understandings, and one declaration, including the following:

- a private conduct reservation, which states that the U.S. does not accept CRPD provisions that address private conduct, except as mandated by U.S. law;
- a torture, inhuman, or degrading treatment reservation, which states that persons with disabilities are protected against torture and other degrading treatment consistent with U.S. obligations under the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights;
- a first amendment understanding, which says that the U.S. understands that the CRPD does not authorize or require actions restricting speech, expression, or association that are protected by the Constitution;
- an economic, social, and cultural rights understanding, which says the U.S. understands that the CRPD prevents disability discrimination with respect to economic, social, and cultural rights, insofar as such rights are recognized and implemented under U.S. law;
- an equal employment opportunity understanding, which states that the U.S. understands that U.S. law protects disabled persons against

reservation, for example, referred to as the “federalism reservation,” states that the CRPD cannot affect state laws nor be enforced in any court without prior legislative implementation.<sup>160</sup> Thus, this RUD makes clear that the Republican’s “federalism-based comity concerns [were] simply not relevant to the ratification debate.”<sup>161</sup>

Another issue of concern, expressed most vehemently by Senator Santorum, was the potential impact of United States ratification on parental rights. Senator Santorum argued that the “best interest of the child” standard in Article 7 of the CRPD would undermine parental authority over their children.

Article 7 of the CRPD, entitled “Children with Disabilities” states that “in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”<sup>162</sup> Senator Santorum, together with other Senate Republicans, argued that Article 7 would change United States law by requiring the “best interest of the child” standard to supersede parental interests.<sup>163</sup> The fallacy of their claim is obvious since courts in the United States have been using the “best interest of the child” standard since at least the 1970s. Therefore, the argument that the CRPD represented a change from current law with respect to parental rights was simply wrong. Although parental

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unequal pay, and that the CRPD does not require the adoption of a comparable framework for persons with disabilities;

- a uniformed military employee understanding, which states that the U.S. does not recognize rights in the Convention that exceed those under U.S. law in regards to military hiring, promotion, and other employment issues;
- a definition of disability understanding, which states that the CRPD does not define “disability” or “persons with disabilities,” and that the U.S. understands the definitions of these terms to be consistent with U.S. law; and
- a non-self-executing-declaration, which states that no new laws would be required as a result of U.S. ratification of the CRPD.

Blanchfield & Brown, *supra* note 121, at 6-7. The version of the treaty with these RUDs was reported out favorably to the full SFRC. The SFRC addressed these concerns by proposing additional RUDs. *Id.* at 7.

<sup>160</sup> *Id.* at 5.

<sup>161</sup> Melish, *supra* note 146, at 37. Tara Melish has argued that the federalism argument is misplaced. The CRPD itself is not self-executing. It can be implemented through the ordinary legislative process. State-elected House and Senate representatives can give expression to state interests with respect to each piece of implementing legislation. *Id.*

<sup>162</sup> Gail Collins, *Santorum Strikes Again*, N.Y. TIMES (Dec. 5, 2012), <http://www.nytimes.com/2012/12/06/opinion/collins-santorum-strikes-again.html>; see also CRPD *supra* note 1, at art. 7 ¶ 2.

<sup>163</sup> Blanchfield & Brown, *supra* note 121, at 8.

rights in the United States are not absolute, the United States Supreme Court has held consistently, that parents have a fundamental liberty interest in “the care, custody, and management” of their children.<sup>164</sup> Such rights, therefore, cannot be undone by ratification of any treaty, including the CRPD.

In addition to an unwarranted concern about the risk to parental rights posed by the “best interests of the child” standard in the CRPD, the Republican opponents of ratification claimed that Article 24 of the CRPD would undermine the rights of parents to make decisions about their child’s education.<sup>165</sup> The HSLDA, which had successfully mounted a campaign against ratification of the Convention on the Rights of the Child as well as the Convention on the Elimination of Discrimination Against Women, argued that ratification of the CRPD would prevent parents from deciding how and where to educate their children.<sup>166</sup> This argument, too, had no basis in fact or law.

Article 24 of the CRPD ensures the right to education for all children with disabilities.<sup>167</sup> Accordingly, this article is consistent with United States law, since at least 1975, when children with disabilities won their right to attend public school pursuant to the Education for All Handicapped Children Act. This law, whose current version is known as the Individuals with Disabilities in Education Improvement Act, guarantees all children with disabilities the right to a “free, appropriate public education.”<sup>168</sup> The argument against ratification on the grounds that the CRPD would undermine the choice and control of parents over their child’s education is especially spurious since, as the

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<sup>164</sup> See *Santosky II v. Kramer*, 455 U.S. 745, 753 (1982); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925); *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

<sup>165</sup> CRPD, *supra* note 1, at art. 24. See Carole J. Petersen, *Inclusive Education and Conflict Resolution: Building a Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific*, 40 HONG KONG L. J. 481 (2010).

<sup>166</sup> Farris, *supra* note 143.

<sup>167</sup> CRPD, *supra* note 1, at art. 24. For a discussion of Article 24 of the CRPD and its implementation in various countries, see Arlene S. Kanter, *The Right to Inclusive Education under International Human Rights Law*, in *THE RIGHT TO INCLUSIVE EDUCATION UNDER INTERNATIONAL HUMAN RIGHTS LAW* (Gauthier de Beco et al. eds., 2018).

<sup>168</sup> The Education for All Handicapped Children’s Act, was enacted in 1975, following two court decisions, in Pennsylvania and Washington, D.C., which established the right of children with disabilities to attend public school. *Penn. Ass’n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972). In 1997, the EAHCA was amended and renamed the Individuals with Disabilities in Education Act, and in 2010 it was amended and renamed again, the Individuals with Disabilities in Education Improvement Act. 20 U.S.C. §§ 1400-1482 (2018).

Senators are well aware, education is an issue for state, not federal law. The federal government has no authority over state educational programs. Since ratification of any treaty becomes part of federal law, and not state law, ratification of the CRPD would not nor could it affect the rights of students and their parents under state laws.<sup>169</sup>

Further, during the Senate debate on ratification, Senator Santorum argued that ratification of the CRPD would prohibit parents from choosing to homeschool their children. This, too, is simply wrong, as he must have known. Homeschooling has always been and remains an issue for state law. Moreover, neither the CRPD nor any federal law, including the Individuals with Disabilities in Education Improvement Act, even mentions homeschooling.<sup>170</sup> Accordingly, states are free to decide whether or not to cover homeschooled children with disabilities under their state education laws.<sup>171</sup> The federal government has no say whatsoever regarding a parent's decision to homeschool a child. Therefore, Senator Santorum's argument that ratification of the CRPD would somehow interfere with a parent's right to decide to homeschool their child was without any legal basis. Neither the CRPD, nor any treaty, can overturn state laws, including state education laws governing homeschooling.<sup>172</sup>

The homeschooling argument provoked a sharp rebuke by supporters of the CRPD. During the 2013 hearing on the CRPD, for example, Senator Robert Menendez stated that he was "dumbfounded" by how the Senate Republicans could take "noncontroversial language and twist it into something that's rather sinister."<sup>173</sup> In response to the specific assertion that the CRPD would threaten parental rights and the ability of parents to homeschool their children, Senator Menendez stated emphatically that "[t]he text says nothing about the state

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<sup>169</sup> Blanchfield & Brown, *supra* note 121, at 10, 18.

<sup>170</sup> *See supra* note 168.

<sup>171</sup> *See, e.g.,* Hooks v. Clark Cty. Sch. Dist., 228 F.3d 1036 (9th Cir. 2000); Lisa R. Knickerbocker, *The Education of All Children with Disabilities: Integrating Home-Schooled Children into the Individuals with Disabilities Education Act*, 62 OHIO ST. L.J. 1515 (2001).

<sup>172</sup> Blanchfield & Brown, *supra* note 121, at 18. This issue is also relevant to the difference between the CRPD and United States state laws on guardianship and involuntary mental health treatment. Article 12 of the CRPD may call into question the current substituted judgment standard included in most state guardianship laws. And, Articles 14 and 25 call into question the use of a mental health diagnosis as a reason for institutionalization. Although ratification affects only federal law, state guardianship and mental health laws, which arguably conflict with Articles 12, 14 and 25, may be reexamined. For a thorough discussion of Article 12, 14 and 25, see KANTER, *supra* note 9, at 125-58; 202-21; 235-90.

<sup>173</sup> S. REP. NO. 113-12, *supra* note 134, at 31.



stepping into the shoes of the parents. In fact, Article 23 (titled, Respect for Home and Family) describes in detail protecting parental rights and the rights of the extended family to care for and to make decisions for children with disabilities.”<sup>174</sup>

Former Attorney General of the United States, Richard Thornburgh, a Republican who served in the Bush Administration, also voiced his support for ratification. He addressed the homeschooling issue head on during the Senate hearing by declaring that “[n]othing in this treaty prevents parents from homeschooling or making other decisions about their children’s education.”<sup>175</sup> Moreover, contrary to the view of Senator Santorum, the CRPD “embraces the principles of our IDEA . . . , which emphasizes the importance of the role of parents of children with disabilities making decisions on behalf of their children.”<sup>176</sup>

Other Republican lawmakers raised additional unwarranted concerns about the CRPD’s possible impact on access to healthcare, and the extent to which the CRPD would promote abortions.<sup>177</sup> The right to reproductive health is an important issue, particularly for women with disabilities.<sup>178</sup> Research has shown that women with disabilities face insurmountable barriers to accessing healthcare in the United States and elsewhere.<sup>179</sup> Some scholars have argued that “[n]o group has ever been as severely restricted, or negatively treated, in respect of their reproductive rights, as women with disabilities.”<sup>180</sup> In fact, as recently as July 2017, the Special Rapporteur on the Rights of

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Article 10 of the CRPD, entitled “Right to Life,” provides that “States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.” CRPD, *supra* note 1, at art. 10. Article 25 entitled, “Health,” requires State Parties to “[p]rovide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes.” *Id.* at art. 25.

<sup>178</sup> Arlene S. Kanter & Carla Villarreal Lopez, *Violence Against Women and Girls with Disabilities: Ensuring Access to Justice Under International Human Rights Law*, 10 NE. U. L. REV. 583 (2018); *see also* Carolyn Frohmader & Stephanie Ortoleva, *The Sexual and Reproductive Rights of Women and Girls with Disabilities: Issues Paper*, ICPD BEYOND 2014—INT’L CONF. ON HUM. RTS., at 2 (2013), [http://wwda.org.au/wp-content/uploads/2013/12/issues\\_paper\\_srr\\_women\\_and\\_girls\\_with\\_disabilities\\_final.pdf](http://wwda.org.au/wp-content/uploads/2013/12/issues_paper_srr_women_and_girls_with_disabilities_final.pdf).

<sup>179</sup> *See id.*; *see also* FINDING THE GAPS, *supra* note 122.

<sup>180</sup> Frohmader & Ortoleva, *supra* note 178, at 4.

People with Disabilities condemned the violence, abuse and harmful practices which women with disabilities face, including forced sterilization, forced abortion and forced contraception.<sup>181</sup>

Because of the importance of the issue of access to healthcare, including reproductive healthcare, the CRPD includes Articles 23 and 25 which, together, ensure equal access to healthcare, including reproductive healthcare and family planning services, for men and women with disabilities.<sup>182</sup> The CRPD does not take a position on the issue of abortion, however.<sup>183</sup> Thus the Republicans' claim that the CRPD would create a new right to abortion was incorrect. This position was wrong not only because the CRPD does not even mention abortion, but also because women with and without disabilities in the United States currently enjoy a constitutional right to abortion, which cannot be undone by ratification of the CRPD, or any other treaty.

In sum, the claims by some Senate Republicans, led by Senator Santorum and the Homeschooling Legal Defense Association, regarding the alleged risks associated with United States' ratification of the CRPD, had no basis in fact or law. Not only does the CRPD not conflict directly with existing federal law, but if there were any lingering concerns about the risk of ratification of the CRPD to United States sovereignty, the "federalism reservation" attached to the CRPD addressed such concerns. This reservation makes clear that United States law supersedes the CRPD, and never the other way around. Yet even with this reservation, the Senate Republican majority refused to ratify the CRPD in 2012 and, again, in 2014. On September 17, 2014, Senator Harkin, citing the "false claims of those who object to this treaty," asked for a unanimous consent vote on the CRPD.<sup>184</sup> The

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<sup>181</sup> U.N. Special-General, *Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities*, U.N. Doc. A/72/133 (July 14, 2017), <https://undocs.org/A/72/133>.

<sup>182</sup> CRPD, *supra* note 1 at art. 23, 25.

<sup>183</sup> In fact, if the CRPD had explicitly supported abortion, the Editors of The National Catholic Review, a Catholic journal, would likely not have endorsed the ratification of the CRPD as strongly as it did. In response to the Senate's failure to ratify the CRPD, the Review stated that the ratification of the CRPD is "an ecumenical opportunity for the leadership of many faiths to call for justice with one voice. It deserves broad public support." *Missed Opportunity to Lead*, AM. MAG. (Jan 2, 2013), <https://www.americamagazine.org/issue/missed-opportunity-lead>; see also Bret Shaffer, *The Right to Life, the Convention on the Rights of Persons with Disabilities, and Abortion*, 28 PENN. ST. INT'L L. REV. 265 (2009); Lucia A. Silecchia, *The Convention on the Rights of Persons with Disabilities: Reflections on Four Flaws that Tarnish its Promise*, 30 J. CONTEMP. HEALTH L. & POL'Y 96 (2013).

<sup>184</sup> *Senator Harkin on Disabled Persons Treaty*, C-SPAN (Sept. 17, 2014), <http://www.c-span.org/video/?321544-7/senator-harkin-disabled-persons-treaty>.

Senate refused to take the vote. Senator Harkin responded by stating that it was “another sad, irresponsible day in the history of the United States Senate.”<sup>185</sup> Since 2014, the Senate has failed to bring the CRPD to the Senate floor for another vote.

## CONCLUSION

The United States has prided itself as a world leader in disability rights since at least the adoption of the ADA in 1990. Upon enacting the ADA, Congress recognized that people with disabilities “occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”<sup>186</sup> To address this concern, Congress passed, and Republican President George Bush signed, the ADA. Since then, the ADA has become a model for other countries’ domestic disability laws as well as for the CRPD, itself. In order to fully realize the goals of the ADA, the United States should ratify the CRPD.

The CRPD has been ratified by 177 countries, but not the United States. Although the ADA as well as the current ADAAA, is more limited in scope than the CRPD, as discussed above, there is nothing in the CRPD that contravenes existing federal law. “U.S. law is either consistent with the mandates of the Convention or capable of reaching those levels through more rigorous implementation and/or additional actions by Congress.”<sup>187</sup> Nonetheless, the United States Senate failed to ratify the CRPD on two separate occasions.

Because of the bipartisan support for the ADA and the ADAAA, the Senate’s failure to ratify the CRPD cannot be explained by the Senate Republican majority’s aversion to disability rights, generally. Moreover, even though the CRPD may extend greater protections than those included in the ADA and the ADAAA, the Senate Republican majority did not object to the CRPD on that basis. Instead, the Senate Republicans’ opposition to the CRPD reveals more about their view of international law than any particular view of equality for people with disabilities. This isolationist view, however, puts the United States at risk. As a former Obama Administration official observed, non-ratification of the CRPD makes it “difficult” to

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<sup>185</sup> *Id.*

<sup>186</sup> 42 U.S.C. § 12101(a)(6) (2018).

<sup>187</sup> Lord & Stein, *supra* note 127.

advance United States interests.<sup>188</sup> Why would other countries listen to the United States about the treatment of people with disabilities, for example, when the United States has not bothered to ratify a treaty that is modeled after its own domestic law?

In fact, the defeat of the ratification of the CRPD marks the beginning of what has become a new wave of United States isolationism and antipathy towards the international legal order. Within months of assuming office, the Trump administration has reduced funding to the United Nations, reneged on commitments to internationally negotiated trade and environmental agreements, imposed sanctions and trade barriers, forced closure of the government and vetoed legislation regarding a wall on our Southern border, failed in its negotiations with North Korea, and provoked actions towards other countries in the name of “America First.”

Nonetheless, despite the current situation, proponents of the CRPD have not given up hope that the Senate will eventually ratify the CRPD. As former Senator Harkin has declared, “We will succeed in ratifying this treaty. We will restore America’s stature as the world leader on disability rights, and we will continue to fight for justice and a fair shake for people with disabilities, not just here in America but around the world.”<sup>189</sup> Ratification of the CRPD by the United States would show the world that to be a global leader means supporting international efforts to advance the rights of people with disabilities worldwide as well as in its own borders. However, by failing to ratify the CRPD, the United States strengthens its position as an outlier in the international community, a position that in today’s world, the United States may no longer afford.

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<sup>188</sup> CRPD, *supra* note 1.

<sup>189</sup> *Senator Harkin on Disabled Persons Treaty*, *supra* note 184.