
THE AMERICANS WITH DISABILITIES ACT AT 25 YEARS: LESSONS TO LEARN FROM THE CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES

Arlene S. Kanter*

ABSTRACT

In this Article, the Author argues that the Americans with Disabilities Act (ADA) and the subsequent ADA Amendments Act (ADAAA), have not realized the goal of ensuring equality for people with disabilities. The Author suggests that the Convention on the Rights of People with Disabilities (CRPD), adopted in 2006 by the United Nations, offers a new approach to realizing the right to equality for people with disabilities. The Author begins the Article with an analysis of the shortcomings of the ADA, including its medical approach to the definition of disability, its narrow application of the requirement of reasonable accommodation, as well as the broad defenses and the limited damages it offers to claimants, even after the 2008 ADAAA. The Author argues further that the ADA's limited success in achieving equality for people with disabilities is likely due to the fact that it was never intended to achieve equality; rather, it sought to move people from reliance on government benefits to employment by prohibiting discrimination. In contrast to the ADA's limited anti-discrimination approach to disability rights, the Author presents the advantages of the human rights approach of the CRPD, including its broad definition of equality, its use of the social model of disability, its recognition of the right to reasonable accommodation as a free standing human right, and its adherence to the interdependence of civil, political, economic, social, and cultural rights as well as negative and positive rights. The CRPD also differs from the ADA by valuing independence alongside the need for support by some people with disabilities. It is this "right to support," the Author argues, that offers an opportunity to ensure greater equality and participation in society for people with disabilities but which also poses a challenge to such American values as independence and self-reliance. Based on the limitations of the ADAAA and the advantages of the CRPD, the

* Bond, Schoeneck & King Distinguished Professor of Law, Laura J. and L. Douglas Meredith Professor of Teaching Excellence, Director, Disability Law and Policy Program, Co-Director, Center on Human Policy, Law, and Disability Studies, Syracuse University College of Law. All correspondence on this article may be addressed to Professor Kanter at kantera@law.syr.edu. The Author thanks her research assistants Brittany Murgallis and Daniel Van Sant for their assistance on this article.

Author concludes that the CRPD should play an important role in the implementation of the ADAAA as well as in the development of new laws and policies to advance the rights of people with disabilities in the U.S., even in the absence of Senate ratification of the CRPD.

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I. INTRODUCTION

The Americans with Disabilities Act (ADA) was adopted in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” through “clear, strong, consistent, enforceable standards.”¹ In enacting the ADA, Congress found

1. It is the purpose of the ADA

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

that discrimination against people with disabilities is “based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.”² Like the Rehabilitation Act before it, the ADA promotes and protects the legal rights of persons with disabilities by prohibiting discrimination based on disability.³ As a result of the ADA’s adoption, the United States has been hailed as being “in the global vanguard on disability issues.”⁴ Indeed, at its signing on the White House lawn in 1990, then President George Bush compared the ADA to the destruction of the Berlin Wall, stating:

Now I am signing legislation that takes a sledgehammer to another wall, one that has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp. And once again we rejoice as this barrier falls, proclaiming together we will not accept, we will not excuse, we will not tolerate discrimination in America. . . . Let the shameful wall of exclusion finally come tumbling down.⁵

address the major areas of discrimination faced day-to-day by people with disabilities.

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) (2012)). In 2008, Congress amended the ADA and stated the purposes of the amendments were

(1) to carry out the ADA’s objectives of providing ‘a clear and comprehensive national mandate for the elimination of discrimination’ and ‘clear, strong, consistent, enforceable standards addressing discrimination’ by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the [holdings of] the Supreme Court’s decisions in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); and its companion cases . . .

. . .

(6) to express Congress’ expectation that the Equal Employment Opportunity Commission (EEOC) will revise that portion of its current regulations [to conform to the 2008 amendments.]

ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554.

2. 42 U.S.C. § 12101(a)(7) (1988).

3. See RUTH COLKER, *THE DISABILITY PENDULUM* 6 (2005).

4. Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 46 (2007).

5. Remarks of President George Bush at the Signing of the Americans with

The ADA has resulted in greater access to buildings, programs, and services for people with disabilities. It also has raised the level of awareness about disability in the US, and it has provided a model to other countries⁶ and to the United Nations when it drafted the Convention on the Rights of People with Disabilities.⁷

But despite the ADA's many accomplishments, the wall remains. Even since the enactment of the ADA, the vast majority of people with disabilities find themselves in low-income jobs without many prospects for advancement.⁸ People with disabilities are still among the poorest Americans, and many are living in poverty, jails, prisons, and institutions, without access to adequate education, housing, employment or the support and accommodations they may need to participate fully in society.⁹

Some critics of the ADA argue that it has failed because it is poorly written and structurally flawed; others believe that it has been betrayed by judicial backlash; and, citing the high rate of unemployment, some critics argue that workplace accommodations have created disincentives to employers to hire disabled persons.¹⁰ This Article will not revisit these issues here.

This Article will argue, however, that the ADA has failed to live up to its goal of destroying the "wall of exclusion" for people with disabilities. From the outset, the ADA was never intended to ensure inclusion and full equality for people with disabilities. Instead, the ADA, as a narrowly drawn antidiscrimination law, sought only to move a segment of the disabled

Disabilities Act, EEOC.GOV (last visited June 20, 2015), http://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html.

6. See Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241, 248–52, 268 (2003) [hereinafter Kanter, *Globalization*].

7. See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, art. 1 (Dec. 13, 2006) [hereinafter CRPD]; *The Disability Treaty*, USICD (last visited May 27, 2015), <http://www.usicd.org/doc/CRPD%20One%20Pager%200731%202013.pdf>.

8. COLKER, *supra* note 3, at 19.

9. SHAWN FREMSTAD, HALF IN TEN: WHY TAKING DISABILITY INTO ACCOUNT IS ESSENTIAL TO REDUCING INCOME POVERTY AND EXPANDING ECONOMIC INCLUSION, CTR. FOR ECONOMIC & POL'Y RESEARCH 2, 14 (2009).

10. See Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1659 (2010) (reviewing SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009)).

population from reliance on government benefits to employment.¹¹ And it did so by relying on either the goodwill of employers and providers of services or the threat of litigation against them. With such limited means at its disposal, the ADA has had little chance of achieving equality for people with disabilities. Therefore, if society is determined to ensure greater equality, inclusion, and full participation for all people with disabilities, then society needs to identify new strategies to address the inequality which people with disabilities experience in the United States today. The UN Convention on the Rights of Persons with Disabilities offers new ideas that could lead to new strategies.¹²

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 with the most number of signatories of any UN treaty.¹³ It has been hailed as the “Declaration of Independence” for persons with disabilities throughout the world.¹⁴ Since its adoption, it has been signed by 159 countries and ratified by 156 countries.¹⁵ The U.S. is one of the three countries that has signed but not ratified the convention.¹⁶ A careful reading

11. See BAGENSTOS, *supra* note 10, at 1–3.

12. Others have offered suggestions on how to improve the ADAAA itself. See, e.g., Kevin Barry, Brian East, & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1 (2013) (suggesting methods for plaintiffs to successfully plead the definition of “disability” under the ADA as amended by the ADAAA); Ruth Colker, *Speculation About Judicial Outcomes Under 2008 ADA Amendments: Cause for Concern*, 2010 UTAH L. REV. 1029, 1032 (2010) (“If we ever expect the win-loss rate [under the ADA] to approach a more balanced level, we have to find a way to provide individuals with disabilities competent counsel to handle their cases.”). The recent report of the National Council on Disability discusses how the ADAAA will result in positive changes for plaintiffs in ADA lawsuits. See *A Promising Start: Preliminary Analysis of Court Decisions Under the ADA Amendments Act*, NAT’L COUNCIL ON DISABILITY 8 (July 23, 2013), <http://www.ncd.gov/publications/2013/07232013> (“The central message from the review of the case law is that, in the decisions rendered so far, the ADAAA has made a significant positive difference for plaintiffs in ADA lawsuits.”).

13. ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 1 (2015) [hereinafter KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS*].

14. Gerard Quinn, *Closing: Next Steps—Towards a United Nations Treaty on the Rights of Persons with Disabilities*, in *DISABILITY RIGHTS* 519, 541 (Peter Blanck ed., 2005).

15. *Rights and Dignity of Persons with Disabilities*, U.N. ENABLE, <http://www.un.org/disabilities/> (last visited July 1, 2015).

16. *Convention and Optional Protocol Signatures and Ratifications*, U.N. ENABLE, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited July 1, 2015).

of the history and language of this treaty reveals that it has much to teach us about realizing the goals of our own ADA. Like the ADA, the CRPD is intended to address discrimination against people with disabilities in most, if not all, aspects of their lives.¹⁷ The CRPD therefore includes more substantive rights than in any prior treaty. It also includes some new rights, such as the right to “reasonable accommodation,”¹⁸ “support,”¹⁹ and “accessibility.”²⁰ These rights are not included in existing human rights treaties, yet they go to the very core of how and for whom society is structured.

Whereas the ADA is a civil rights law that views equality for people with disabilities through a limited antidiscrimination lens, the CRPD is a human rights law that, based on a social model of disability, moves beyond traditional notions of equality towards a society that accepts people with disabilities as full and equal members. This Article will explore such differences between the ADA and the CRPD, and their consequences.

This Article proceeds in five parts. Part I consists of a cursory introduction to the ADA and the CRPD. Part II discusses the ADA and its limits as an antidiscrimination law. Part II begins with an overview of the history leading up to the ADA, followed by a discussion of certain aspects of the ADA and the extent to which the ADA Amendments Act of 2008 (ADAAA) successfully addressed the original law’s shortcoming. However, even after the ADAAA, the ADA is limited in its ability to achieve equality for all people with disabilities due to its medical approach to the definition of disability, its narrow definition of what constitutes a reasonable accommodation, its broad defenses, and the limited damages available to successful plaintiffs. Part III of this Article discusses the CRPD, focusing on ways in which it differs from the ADA, including ways in which those

17. The ADA does not cover housing discrimination against people with disabilities because it is covered in the Fair Housing Amendments Act of 1988. *See* Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in 42 U.S.C. §§ 3601–3631 (2012)); *see also* Arlene S. Kanter, *A Home of One’s Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925, 943 (1994) [hereinafter Kanter, *A Home of One’s Own*]. Nor does the ADA address the rights of children with disabilities in preschool through high school because they are covered in the Individuals with Disabilities Education Improvement Act. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended 20 U.S.C. §§ 1400–1482 (2012)).

18. CRPD, *supra* note 7, at art. 5.

19. *See, e.g., id.* at art. 12, 16, 19.

20. *Id.* at art. 9.

differences may help consideration of the implementation of the ADA as well as future legislation on behalf of people with disabilities, even in the absence of U.S. ratification of the CRPD. This Part also discusses the CRPD's overall human rights approach, the social model of disability, its view of reasonable accommodations, and the way in which it values independence while also acknowledging the some people's need for support and assistance. It is this "right to support" that presents an opportunity to ensure greater equality for people with disabilities but which also poses a challenge to American values, particularly an adherence to independence and self-reliance.²¹ Part IV provides a brief overview of the history of the U.S. Senate vote on ratification of the CRPD, including a rebuttal to the reasons given by the opponents regarding the lack of concordance between the CRPD and U.S. laws. This Article concludes by suggesting ways in which the U.S. may learn from the CRPD to inform the future development of disability laws and policies in the U.S.²²

II. THE LIMITATIONS OF THE AMERICANS WITH DISABILITIES ACT

A. A Brief History Leading up to the ADA

The ADA is one of many laws that Congress has passed addressing the needs and rights of people with disabilities in the past few decades. The first major disability-related law Congress enacted was the Social Security Act, which focused on identifying and providing medical and therapeutic services to "crippled" children and adults.²³ This law, together with other early Congressional initiatives, did not seek to ensure equality for people with disabilities.²⁴ Rather, these laws were driven by paternalistic notions of charity.²⁵ For the initiatives aimed at benefitting veterans, Congress saw it as the obligation of the U.S. government to take care of returning soldiers, just as these soldiers had taken care of their country.²⁶

21. See *infra* Part III.E.

22. See *infra* Part V.

23. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620; see also Arlene S. Kanter, *Toward Equality: The ADA's Accommodation of Difference*, in DISABILITY, DIVERS-ABILITY AND LEGAL CHANGE 228-29 (Melinda Jones & Lee Ann Bassar Marks eds., 1998) [hereinafter Kanter, *Toward Equality*].

24. See FRANK BLOCH, BLOCH ON SOCIAL SECURITY § 1:3 (2015); Kanter, *Toward Equality*, *supra* note 23, at 228-29.

25. See Kanter, *Toward Equality*, *supra* note 23, at 228-29.

26. *Id.*

During the 1960's, when Congress began to address issues of inequality in American society, people with disabilities were ignored. The first comprehensive antidiscrimination law, the Civil Rights Act, was passed in 1964 to prohibit discrimination based on race, color, religion, sex, and national origin; disability was not included.²⁷ In 1972, Senator Hubert Humphrey and Representative Charles Vanik proposed amending the Civil Rights Act to prohibit discrimination against people with "physical and mental handicap[s]." ²⁸ But this effort failed.²⁹

Responding to the lack of access to buildings for people with disabilities, Congress enacted the Architectural Barriers Act in 1968,³⁰ and the Developmental Disabilities Services and Facilities Construction Amendments in 1970,³¹ which provided funding, for the first time, for community-based living arrangements, employment, and other services for people with developmental disabilities. The Social Security Amendments, enacted shortly thereafter, also provided cash payments to people with disabilities whose incomes met a certain threshold requirement, to provide them with financial assistance to live outside of institutions.³² Then, in 1973,

27. See Civil Right Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in 42 U.S.C. §§ 2000e-2000e-17 (2012)); see also Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203, 228 (2010).

28. Barry, *supra* note 27, at 228; Kanter, *Toward Equality*, *supra* note 23, at 229.

29. See Barry, *supra* note 27; Kanter, *Toward Equality*, *supra* note 23, at 229; Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 429 (1991).

30. Architectural Barriers Act in 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended in 42 U.S.C. §§ 4151-4157 (2012)). This law requires access to facilities designed, built, altered, or leased with federal funds. *Id.* Its Access Board, established in 1973 under Section 502 of the Rehabilitation Act, develops and maintains accessibility guidelines under this law. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 502, 87 Stat. 355, 392-93 (codified as amended 29 U.S.C. § 792(j) (2012)).

31. See Developmental Disabilities Services and Facilities Construction Amendments of 1970, Pub. L. No. 91-517, 84 Stat. 1316.

32. See Kanter, *Toward Equality*, *supra* note 23, at 230. People with disabilities have had to fight the Social Security Administration's attempts to deny claims for federal benefits based on the view that most disabilities can now be accommodated in the workplace. Robert E. Rains, *The Americans with Disabilities Act & the Social Security Act: Complementary Remedies or Catch 22?*, 43-DEC. FED. LAW. 22, 22 (1996). Further, some commentators have attempted "to reconcile the ADA's terms and polices with the statutory frameworks of income support programs and to determine whether a per se exclusion of recipients of such income supports comports with [the ADA and its] underlying policies." Anne Beaumont, Note, *This Estoppel Has Got to Stop: Judicial*

Congress passed the Rehabilitation Act, which was the first law to prohibit discrimination against people with disabilities, but only by the federal government, federal contractors, and entities or programs that receive federal funds.³³

However, most of these laws that were enacted prior to the ADA—except the Rehabilitation Act and the FHAA—were designed to provide

Estoppel and the Americans with Disabilities Act, 71 N.Y.U. L. REV. 1529, 1534 (1996).

33. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended 29 U.S.C. § 794(a) (2012)). The law originally prohibited discrimination against a qualified person with a handicap, however, the language was eventually changed, replacing *handicap* with *disability*. Compare Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (using the term “handicap”), with 29 U.S.C. §§ 701–796l (2012) (reflecting the various amendments substituting “handicap” for “disability”). Congress enacted other laws related to people with disabilities, including the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, 775 (codified as amended 20 U.S.C. §§ 1400–1482 (2012)). This act was amended and renamed the Individuals with Disabilities Education Act in 1990 (IDEA). See Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 901(a)(1), 104 Stat. 1103, 1141–42 (codified as amended 20 U.S.C. §§ 1400–1482 (2012)). In 2004, the Act was again amended by the Individuals with Disabilities Education Improvement Act (IDEIA). See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended 20 U.S.C. §§ 1400–1482 (2012)). But the IDEIA is not an antidiscrimination law; it provides funds to states to provide children with disabilities a free, appropriate public education. See *id.* at § 601(d)(1)(A). The same year, Congress passed the Developmental Disabilities Assistance and Bill of Rights Act, which was the first broad-based civil rights law on behalf of people with developmental disabilities. See Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975), *repealed by* Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, 114 Stat. 1677. However, the Developmental Disabilities Assistance Act was repealed soon after its enactment. *Id.* In 1988, Congress passed the Fair Housing Amendments Act (FHAA), which prohibits discrimination against people with disabilities in housing. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3631 (2012)); Kanter, *Home of One's Own*, *supra* note 17. Finally, in 2002, Congress passed the Help America Vote Act to improve the administration of elections by ensuring access to polling places and voting ballots for people with disabilities. See Help America Vote Act of 2002, Pub. L. No. 107-252, § 101(b)(1)(G), 116 Stat. 1666, 1669 (codified at 42 U.S.C. § 15301(b)(1)(G) (2012)). In fiscal years 2002 through 2004, 15 million dollars in federal funding was spent to improve access to voting for people with disabilities. *The President's New Freedom Initiative for People with Disabilities: The 2004 Progress Report*, Executive Summary, THE WHITE HOUSE: GEORGE W. BUSH, <http://georgewbush-whitehouse.archives.gov/infocus/newfreedom/summary-2004.html> (last visited April 17, 2015).

services to people with disabilities but not to protect their right to equality.³⁴

Attempts to amend the Civil Rights Act to include people with disabilities occurred periodically prior to the ADA.³⁵ But such efforts were opposed, often by traditional civil rights groups, who feared that opening up the 1964 Act would endanger the previous hard-fought victories for other groups.³⁶ In addition, there were those who saw differences in legislative solutions to eradicate racial discrimination compared to discrimination against people with disabilities.³⁷ Such differences focused on the need of people with disabilities for individualized assessments of accommodations in the workplace, accessible transportation, and the removal of architectural and other barriers that are generally not applicable in cases alleging race, national origin, or gender bias.³⁸ As one judge later observed, the Civil Rights Act model was “not automatically adaptable to the problem of discrimination against the handicapped, but involved a very different analytical undertaking. Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole.”³⁹

In the meantime, in the years prior to the ADA, federal courts were also busy deciding a series of cases designed to protect certain rights for people with disabilities under the U.S. Constitution. Federal courts held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment entitled people with disabilities to receive treatment when placed in institutions,⁴⁰ protection from harm in government-operated

34. See *supra* notes 23, 27–33 and accompanying text.

35. See, e.g., 131 CONG. REC. 454 (daily ed. Jan. 3, 1985) (statement of Rep. John Joseph Moakley) (proposing to amend the Civil Rights Act of 1964); *supra* notes 28–29 and accompanying text.

36. Burgdorf, *supra* note 29.

37. See NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE: AN ASSESSMENT OF FEDERAL LAWS AND PROGRAMS AFFECTING PERSONS WITH DISABILITIES 8, 29, 33, 35–39 (1986).

38. *Id.*

39. *Garrity v. Gallen*, 522 F. Supp. 171, 206 (D.N.H. 1981). See U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 149–53, 163–64 (1983), for further discussion on the applicability of civil rights standards to discrimination based on disability. The Commission recommended that traditional civil rights laws should be applied to disability discrimination cases “only when, and to the degree that, they are equally relevant.” *Id.* at 163.

40. See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (“To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for

facilities,⁴¹ appropriate public education,⁴² and procedural and substantive due process rights in the course of civil commitment hearings or, phrased another way, freedom from involuntary institutionalization of nondangerous individuals with disabilities.⁴³

In *Alexander v. Choate*, the Supreme Court also recognized that discrimination against people with disabilities did exist and that such discrimination was the result of “thoughtlessness and indifference—of benign neglect.”⁴⁴ The Court observed that disability discrimination is one of America’s “shameful oversights” which causes people with disabilities to live among society “shunted aside, hidden, and ignored.”⁴⁵

The same year as *Alexander v. Choate* was decided, the Supreme Court decided *City of Cleburne, Texas v. Cleburne Living Center, Inc.*⁴⁶ The Supreme Court refused to apply a heightened level of review under the Equal Protection, as it had with other groups that were considered members of a “suspect” or “quasi-suspect” class.⁴⁷ Although the Court ultimately held that Cleburne had unlawfully applied its zoning scheme to a group home for 13 people with “mental retardation”⁴⁸ (the now outdated term used in the case), the Court refused to accord the plaintiffs special status under the Constitution and used only the lowest level of review, known as the “rational basis test.”⁴⁹ Applying this level of review, typically associated with economic legislation, the Supreme Court found that the city did not have a

humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.”); *but see* N.Y. State Ass’n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973) (“Due process may be an element in the right to protection from harm, but it does not establish a right to treatment.”).

41. See *Rockefeller*, 357 F. Supp. at 762.

42. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (“[D]enying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.”).

43. See *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

44. *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (footnote omitted) (upholding state’s reduction of days of inpatient hospitalization care covered by Medicaid despite claims of disparate impact discrimination against people with disabilities).

45. *Id.* at 295–96 (quoting 117 CONG. REC. H45974 (daily ed. Dec. 9, 1971) (statement of Rep. Vanik)).

46. *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

47. *Id.* at 442, 446.

48. *Id.* at 450.

49. See *id.* at 442.

rational basis for requiring a zoning permit for the group home.⁵⁰ Accordingly, the group home was allowed to open without a permit.⁵¹ But the Court refused to strike down the zoning ordinance on its face, and found the zoning requirement irrational only as applied to this case.⁵² A majority of the Justices agreed with the final decision, but a vocal minority would have held that people with disabilities are entitled to a heightened level of review under the Equal Protection Clause, in the same way as are other groups that have experienced a long and sordid history of discrimination.⁵³ Thus, although the Court in *Cleburne* found that the city had acted irrationally and that there was no legitimate basis for its denial of the permit,⁵⁴ the Court conceded that in most other cases involving people with disabilities, the state will prevail because rational basis requires only minimal justification.⁵⁵

In sum, prior to the ADA, there was no comprehensive federal statute prohibiting discrimination against people with disabilities by private and state employers or private providers of services,⁵⁶ and no Supreme Court decision upheld the right of people with disabilities to equal treatment under the U.S. Constitution. To do that, additional legislation was required. Congress responded to that challenge in 1990 with the passage of the ADA.⁵⁷

To some, the ADA is a great success. It opened up public and private spaces to people with disabilities, raised awareness about disability discrimination, and provided remedies for at least some acts of disability discrimination. Indeed, many people with disabilities in the United States who once may have lived in institutions now live fulfilling and productive lives. They graduate from high school, go on to college and find jobs, own homes, and have friends, lovers, and families of their own. But many do not.

50. *Id.* at 450.

51. *Id.*

52. *See id.*

53. *Id.* at 456, 459, 464–65 (Marshall, J., concurring in the judgement in part and dissenting in part). The Court held that people with disabilities do not qualify as a “suspect class” under the Equal Protection Clause. *Id.* at 442 (majority opinion).

54. *See id.* at 450.

55. *See id.* at 440–42.

56. *But see* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2012)) (prohibiting discrimination against handicapped individuals but only by “any program or activity receiving federal financial assistance”).

57. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12113 (2012)).

Today, 25 years since the ADA's enactment, the employment rate for people with disabilities is 40 percent lower than the rate for people without disabilities,⁵⁸ with only 18 percent of working age people with disabilities actually employed.⁵⁹ And, of those people with disabilities who are employed, they occupy lower-level positions, work fewer hours,⁶⁰ and earn an average of 33 percent less than workers without disabilities.⁶¹ Further, many people with disabilities who work report that their career paths are limited due to structural barriers and stigma.⁶² Yet if all the people with a disability who are not now working entered the workforce, the United States would have at least 8.2 million additional workers.⁶³ The next section of this Article will explain why the ADA has had limited success, particularly in the area of employment.

B. *The Language of the ADA*

Modeled after the Civil Rights Act and the Rehabilitation Act,⁶⁴ the

58. See Michelle Maroto & David Pettinicchio, *The Limitations of Disability Antidiscrimination Legislation: Policymaking and the Economic Well-being of People with Disabilities*, 36 LAW & POL'Y 370, 394 (2014). Indeed, as the authors of the study also found, "[P]eople with disabilities fare better in progressive states with a longer history of disability antidiscrimination legislation [O]ur findings allude to the importance of antidiscrimination legislation in improving the economic well-being of people with disabilities." *Id.* at 395.

59. *Id.* at 371 (citing *Persons with a Disability: Labor Force Characteristics—2012*, USDOL-13-1141, U.S. DEP'T OF LABOR (2013), <http://www.bls.gov/news.release/pdf/disabl.pdf>).

60. *Id.* (citations omitted).

61. *Id.* at 388 (noting after controlling for individual characteristics and government assistance, adult workers with disabilities earned about \$19,000 or 33 percent less than adult workers without disabilities). An independent study in 2008 by Cornell University estimated that the employment rate for disabled, working-age people was as low as 17.7 percent, while the employment rate for the general working-age population was 79.7 percent. MELISSA J. BJELLAND ET AL., CORNELL UNIV., 2008 PROGRESS REPORT ON THE ECONOMIC WELL-BEING OF WORKING-AGE PEOPLE WITH DISABILITIES 4, 5 tbl.2 (2008), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1255&context=edicollect>.

62. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23 (2004) (asserting that many disabled individuals face structural barriers such as the lack of personal-assistance services, assistive technology, accessible transportation, and health insurance).

63. S. REP. NO. 101-116, at 8 (1989).

64. Compare Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in 42 U.S.C. §§ 2000e–2000e-17 (2012)), and Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–61 (2012)), with Americans

ADA was intended to remove obstacles for people with disabilities in the areas of employment,⁶⁵ access to state and local programs and services,⁶⁶ public accommodations,⁶⁷ public transportation,⁶⁸ and telecommunications equipment.⁶⁹ The ADA refers to people with disabilities as a “discrete and insular minority” in order to draw a parallel between individuals who have experienced discrimination on the basis of disability with those who experience discrimination based on other characteristics that the Civil Rights Act was intended to address.⁷⁰ But unlike the Civil Rights Act, the ADA is not purely an antidiscrimination law. The ADA includes provisions that are typically not included in civil rights laws, such as requiring plaintiffs to establish they are “qualified,” and allowing for such defenses as undue hardship, undue burden, and fundamental-alteration.⁷¹ In both the original ADA and the ADAAA of 2008, plaintiffs alleging employment discrimination under Title I have had difficulty prevailing if they do not qualify under what is a medical definition of disability.⁷² The ADA defines disability as, “with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁷³ Plaintiffs must also show they are entitled to accommodations that do not pose an “undue hardship” on the employer.⁷⁴ Similarly, Title II and III plaintiffs seeking remedies against a state or private entity for discriminatory policies or programs must meet the same definition

with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12113 (2012)).

65. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101–108, 104 Stat. 327, 330–37 (codified as amended at 42 U.S.C. §§ 12111–12117 (2012)).

66. See *id.* at §§ 201–205 (codified as amended at 42 U.S.C. §§ 12131–12134 (2012)).

67. See *id.* at §§ 301–310 (codified as amended at 42 U.S.C. §§ 12181–12189 (2012)).

68. See *id.* at §§ 221–246 (codified as amended at 42 U.S.C. §§ 12141–12165 (2012)).

69. See *id.* at §§ 401–402 (codified as amended at 47 U.S.C. §§ 225, 611 (2012)).

70. See *id.* at § 2(a)(7).

71. See 42 U.S.C. § 12111(10) (defining undue hardship); § 12112(a) (prohibiting discrimination against “a qualified individual on the basis of disability”); § 12182(b)(2)(A) (allowing for fundamental alteration as a defense to compliance with the ADA).

72. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329–30 (codified as amended at 42 U.S.C. §§ 12102(2) (2012)); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555–56 (codified as amended at 42 U.S.C. §§ 12102(2) (2012)).

73. § 12102(1)(A)–(C).

74. *Id.* § 12112(b)(5)(A).

and will not prevail if the state or private provider can show that the requested relief would cause an “undue financial and administrative burden[]” or “fundamentally alter” the nature or the program or service.⁷⁵ Even with the ADAAA, the focus seems to be more on determining whether an individual meets the statutory requirements than on the individuals’ actual rights or needs.⁷⁶ Thus in the words of one commentator, Congress “made it acceptable to believe that the simple moral imperative of giving people access and individual accommodation was not something important enough, morally significant enough, to require.”⁷⁷ As a result, the provisions that limit a person with a disability from seeking redress under the ADAAA are not only not seen in other civil rights law, but by their very design, limit the potential for equality for people with disabilities.

Moreover, the ADA incorporates a profoundly different model of

75. See 28 C.F.R. § 35.150(a)(3) (2014); see also *Olmstead v. L.C.*, 527 U.S. 581, 587, 597 (1999) (upholding the right of plaintiffs to leave the state institution but only if the treating professional agreed and there would be no fundamental alteration to the State’s mental health system). Justice Ginsberg tried to ameliorate the effects of this defense in her plurality opinion where she wrote:

In evaluating a State’s fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State’s obligation to mete out those services equitably.

Olmstead, 527 U.S. at 597; see also COLKER, *supra* note 3, at 127 (noting the Supreme Court’s handling of the cost defense created a disturbing trend “mak[ing] it difficult, if not impossible, for individuals to obtain effective remedies against the state”).

76. See BAGENSTOS, *supra* note 10, at 34 (describing criticism of “definition-of-disability decisions as betraying the promises of the ADA” insofar as they focus more on determining whether the plaintiff is a qualified individual “rather than on whether the defendant engaged in improper discrimination”); cf. WAYNE THOMAS OAKES, *PERSPECTIVES ON DISABILITY, DISCRIMINATION, ACCOMMODATIONS, AND LAW: A COMPARISON OF THE CANADIAN AND AMERICAN EXPERIENCE* 62–64 (2005) (citing pre-ADAAA case law that made it “difficult to establish a claim”).

77. MARY JOHNSON, *MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE AND THE CASE AGAINST DISABILITY RIGHTS* 224 (2003). One researcher has found that “as civil rights enforcement has been drastically underfunded, Congress has been willing to allocate ten times as many funds to Social Security to conduct reviews to determine whether individuals no longer qualified for the meager social assistance programs provided.” Ravi Malhotra, *The Politics of the Disability Rights Movements*, 8 *NEW POLITICS* (2001), <http://nova.wpunj.edu/newpolitics/issue31/malhot31.htm> (citing MARTA RUSSELL, *BEYOND RAMPS: DISABILITY AT THE END OF THE SOCIAL CONTRACT* 109–121 (1998)).

equality than is associated with traditional non-discrimination statutes like the Civil Rights Act. The Civil Rights Act is aimed at achieving equal treatment of similarly situated individuals.⁷⁸ The ADA, by contrast, “require[s] not only that disabled individuals [are] treated no worse than non-disabled individuals with whom they were similarly situated, but also direct[s] that in certain contexts they be treated differently, arguably better, to achieve an equal effect.”⁷⁹ Some legal scholars have argued that “the equal treatment principle ha[s] not proven tremendously effective in addressing problems of equality and difference.”⁸⁰ According to this view, the ADA may be failing because it adopts the civil rights approach, which is the wrong lens through which to view the problems encountered by people with disabilities.⁸¹ These authors point out that unlike the African-American civil rights movement, when “[t]he nation heard, and eventually believed, that slavery was wrong. . . . that Jim Crow segregation was wrong; that treating people different simply because of their race was morally wrong,” the nation had “no public discussion of the moral issues that led people who themselves had disabilities to push for those laws.”⁸² As one writer has observed, “The reason people pay so little attention to the claims of disability rights is that for most of us it doesn’t answer any need. The nation feels it doesn’t need the disability rights solution; it has a time-honored solution already: ‘help the handicapped.’”⁸³

Yet, the ADA was never intended to be the solution to inequality for people with disabilities. The ADA was enacted primarily to equalize opportunities for people with disabilities, especially in the area of employment.⁸⁴ At the time the ADA was enacted, the median annual income for individuals with disabilities was less than half the income of people without disabilities.⁸⁵ Three out of ten people with a disability lived below

78. Linda Hamilton Krieger, Foreword, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 3 (2000).

79. *Id.* at 4.

80. *See, e.g., id.* (citations omitted).

81. *See* JOHNSON, *supra* note 77, at 43.

82. *Id.*

83. *Id.*

84. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(9), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(a)(8) (2012)); *see generally* BAGENSTOS, *supra* note 10.

85. L.E. KRAUS & S. STODDARD, INFOUSE, CHARTBOOK ON WORK DISABILITY IN THE UNITED STATES 40 (1991).

the poverty line.⁸⁶ One out of seven people with disabilities were unemployed,⁸⁷ and of those, two out of three said that they would give up their government benefits in favor of a full time job.⁸⁸ Thus, Congress found that discrimination against people with disabilities cost the United States several billion dollars in “unnecessary expenses resulting from dependency and nonproductivity.”⁸⁹ As this quote illustrates, the intent of the ADA was not to ensure equality but rather to eliminate obstacles that prevent some people with disabilities from working.⁹⁰

This view of the ADA—as a law designed to increase the tax base—is also seen in statements by the architects of the original version of the ADA. They acknowledge that equality for people with disabilities was not on the minds of those who drafted the ADA. As one such architect of the law wrote,

As drafters of the ADA, we never discussed theories of equality. Using the rhetoric of traditional civil rights, which focuses on equal treatment, we incorporated nondiscrimination provisions from section 504 implementing regulations that assured that different treatment would be provided when necessary to achieve equal opportunity. We were insistent that reasonable accommodation *was not* affirmative action but simply part and parcel of meaningful non-discrimination. . . . [T]he disability movement has known from the outset that for people with disabilities, a civil rights statute based solely on equal treatment would fall far short of achieving the goals of inclusion and participation.⁹¹

When writing the original ADA, the drafters could have considered various approaches to disability rights. For example, they could have addressed not only the civil rights of persons with disabilities but also their demands for an adequate standard of living, access to job training, and an advanced education as well as universal design. Samuel Bagenstos has argued that the civil rights approach won out over a universalist or human rights approach because the drafters and advocates were faced with the

86. *Id.* at 41.

87. *Id.* at 32.

88. See LOUIS HARRIS & ASSOCIATES, INC., THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM 105–06 (1989).

89. See 42 U.S.C. § 12101(a)(8).

90. BAGENSTOS, *supra* note 10, at 55.

91. Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 536–37 (2001) (footnotes omitted).

political reality of a White House opposed to a more explicitly universalist ADA.⁹² Other writers argue that the ADA contains both the civil rights and universalist approaches.⁹³ One author suggests that the universalist strand in the ADA is contained in one of its definitions of disability—“being regarded as having such an impairment”⁹⁴—which relieves people of the need to show that they are different because of the way in which their impairments limit them.⁹⁵ “Now all they need show,” the author writes, “is that others limited them because of their impairments. That negative treatment, itself, brings them within the ADA’s coverage, just as negative treatment based on other characteristics brings plaintiffs within the coverage of other civil rights laws.”⁹⁶

While the “regarded as” prong is one of the most significant accomplishments of the ADA, it has not *yet* resulted in dramatic change within society. The “regarded as” prong is based on Congress’s finding that “the negative reactions of others are just as disabling as the actual impact of an impairment.”⁹⁷ Whereas the other prongs of the definition require some medical diagnosis to qualify for coverage, the “regarded as” prong does not require individuals to meet any medical or functional test; plaintiffs need show only that they were treated adversely because of an impairment, without having to establish the severity of the impairment.⁹⁸ But even the “regarded as” prong will not result in the societal changes that are necessary to ensure equality for people with disabilities, especially those people who actually have an impairment that “substantially limits a major life activity,”⁹⁹ and for whom accommodations are necessary. As the ADAAA makes clear,

92. See BAGENSTOS, *supra* note 10, at 28.

93. Barry, *supra* note 27, at 2.

94. 42 U.S.C. § 12102(1)(A)–(C).

95. Barry, *supra* note 27 at 226.

96. *Id.* at 208 (footnote omitted).

97. 29 C.F.R. pt. 1630, app. § 1630.2(1) (2011) (quoting 2008 Senate Statement of Managers at 9).

98. See *id.* (citing Joint Hoyer-Sensen-Brenner Statement at 3). The individual must also show causation between the person’s disability and the prohibited action. The regulations make clear that an individual is regarded as having such an impairment whenever the “covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.” 29 C.F.R. § 1630.2(l)(2) (2012); see also § 1630.2(g)(1)(iii).

99. See 42 U.S.C. § 12102(1)(C) (2012).

reasonable accommodations are not available to “regarded as” plaintiffs.¹⁰⁰

Moreover, although plaintiffs now can sue under the “regarded as” prong by showing only that the defendant believed that he or she has an impairment that is not minor or transitory, the “regarded as” prong may not result in widespread protections for most people with disabilities, as one would hope. First, as stated above, even after the ADAAA, the “regarded as” prong is still only available to those people who do not require any accommodations or modifications.¹⁰¹ Second, even today, few ADA plaintiffs rely on the “regarded as” prong when they file suit.¹⁰² The lack of reported “regarded as” cases may be because such cases are strong and will likely settle early; or, it may be because in those few cases that do not settle, courts simply do not rely on that prong in their decisions.¹⁰³ For example, although a “regarded as” plaintiff need not demonstrate a substantial limitation on a major life activity, as is required under the other prongs, courts still seem to feel compelled to find that a plaintiff is substantially limited and therefore “actually disabled” in addition to being “regarded as” disabled.¹⁰⁴

Congress recognized in the original ADA that persons with disabilities constitute a discrete and insular minority and “unlike individuals who have

100. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(h), 122 Stat. 3553, 3558 (codified as amended at 42 U.S.C. § 12201(h) (2012)).

101. *See id.*; *see also* Barry, East, & Karin, *supra* note 12, at 19.

102. In one recent study, it appears that plaintiffs relied on the “regarded as” prong in 38.46% of the ADA cases brought in the Second, Fifth, and Ninth Circuits. Barry, East, & Karin, *supra* note 12, at 73, app. B. In another article, the Author observes that since the ADAAA, there has been no increase in the number of cases brought under the “regarded as” prong. *See* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2063 (2013).

103. *See* Befort, *supra* note 102, at 2063–64 (“Although the reason for this decline is not clear from looking at the decided cases, two very different explanations are possible. One possibility is that employers simply are not contesting prong three standing claims because of the small likelihood of obtaining a favorable outcome. A second possibility is that post-amendment plaintiffs may be deterred from asserting a prong three claim due to the need for a reasonable accommodation in order to be able to perform the essential functions of the job. As noted above, the ADAAA provides that an employer need not provide a reasonable accommodation to a plaintiff who has standing as disabled only under prong three. More research and analysis will be necessary to determine if either or both of these possibilities bear some causal link with the prevalence of post-amendment prong three claims.”).

104. *See, e.g.,* Wells v. Cincinnati Children’s Hosp. Med. Ctr., 860 F. Supp. 2d 469, 483 (S.D. Ohio 2012).

experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination.”¹⁰⁵ However, Congress chose to limit those who would be covered by the ADA.¹⁰⁶ Certain types of impairments are specifically excluded.¹⁰⁷ These exclusions are more likely the result of a political compromise than a decision based on medical research or the absence of discrimination experienced by people with these impairments.¹⁰⁸ Nonetheless, by excluding some people from coverage, the law cannot be properly seen as promoting equality for *all* people with disabilities.¹⁰⁹

The ADAAA was enacted in 2008 to remedy some of the problems in the original version of the law, particularly with respect to the Supreme Court’s interpretation of the definition of disability in a series of cases in 1999.¹¹⁰ However, even with the changes, the current version of the law

105. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(4), 104 Stat. 327, 328 (codified as amended at 42 U.S.C. § 12101(a)(4) (2012)).

106. See 42 U.S.C. § 12102(1)–(2) (2012) (providing the definition of what qualifies as a disability and what constitutes a major life activity under the ADA).

107. 42 U.S.C. § 12211(a)–(b) (2012).

108. *Id.*

109. For example, Title I protects people who have 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). As such, the ADA’s definition of disability is one of the most comprehensive in the world. On the other hand, Congress excluded from the definition of disability

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behaviour disorders;

(2) compulsive gambling, kleptomania, pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

42 U.S.C. § 12211(b). These conditions may be as disabling as others that are covered, but a majority of Congress decided to exclude these categories of people groups.

110. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 (2012)) (see historical notes accompanying § 12101). Although the exclusions from the definition remain after the ADAAA, the overall definition of disability has undergone revisions since it was first introduced in the original version of the ADA in 1990. After Congress found that the Supreme Court had improperly limited the definition of disability in a series of ADA cases—including *Sutton*

retains the medical approach to disability, particularly in the first and second prongs of the definition.¹¹¹ Although the ADAAA now makes it clear that the definition of disability is to be construed broadly, it nonetheless fails to include within the protection of the law all people who self-identify as disabled or whom others perceive as disabled; it includes only those who are found by a court to qualify for coverage under the law. In the employment setting in particular, the ADAAA, like the ADA before it, protects only “qualified” employees.¹¹² Thus, an employer would not violate the ADA by refusing to hire a person with a disability if the employer, based on his or her subjective judgment, believes that the person is not qualified to do the job.¹¹³ As a result, the issue of who is and who is not covered by the law will

v. United Airlines, 527 U.S. 471 (1999), *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002)—Congress amended the ADA to become the ADA Amendments Act of 2008. *See id.* at § 2(a)(4)–(7). The stated purpose of the ADAAA is specifically to “reject the Supreme Court’s reasoning” in the 1999 cases and to “reinstat[e] a broad scope of protection to be available under the ADA.” *See id.* at § 2(b)(1)–(5). 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.” *See* 154 Cong. Rec. S9626-01 (2008) (statement of Sen. Harry Reid). 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. *See* 29 C.F.R. § 1630.2(j)(3)(iii) (2014). A person with any of the conditions on this list will be presumed to qualify for coverage under the ADA. *See id.* (“[I]t should easily be concluded that the [impairments provided in this section] will, at a minimum, substantially limit the major life activities [as defined 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 or AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic syndrome and schizophrenia. *See id.* The EEOC demonstrated intent to give effect to these changes in 2011. *See* Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978-01 (proposed Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630). 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 use of mitigating treatments or therapies as a relevant factor in assessing whether an individual is disabled. *See* 29 C.F.R. § 1630.2(i) (2014) (listing several major life activities and describing criteria for identifying others).

111. *See* 42 U.S.C. § 12102(2) (2012).

112. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(2), 122 Stat. 3553, 3557 (codified at 42 U.S.C. § 12111(8) (2012)).

113. *See id.*

continue to be the subject of litigation, even after the clarifying amendments of 2008.¹¹⁴

Moreover, even if a person is able to find a lawyer to bring a case to establish that he or she is a qualified person with a disability, additional legal barriers exist in the ADAAA to prevent a successful outcome for plaintiffs in Title I, II, and III actions. Such barriers include the rules of standing or mootness that may cause the case to be thrown out of court, without even a chance to present the merits.¹¹⁵ Or, if an individual succeeds in convincing a court that he or she should be covered by the law and actually prevails on the disability discrimination claim, a myriad of defenses are available to the defendant, which may preclude a successful outcome for the plaintiff.¹¹⁶

As these few examples illustrate, the scope and coverage of the ADA, together with the Supreme Court's unwillingness to accord people with disabilities heightened protections under the Constitution, limits the promise of equality for people with disabilities in the U.S. Perhaps no law can *actually* guarantee equality. After all, a law is only words, and ensuring equality requires changes of action and attitudes, which is no easy task. But nowhere in the ADA does it require the government or individuals to

114. See, e.g., *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 579 (1999) (Thomas, J., concurring) (finding 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); *Keith v. Cnty. of Oakland*, 703 F.3d 918, 927 (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"); *Jones v. Walgreen Co.*, 679 F.3d 9, 18 (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); *Bates v. UPS*, 465 F.3d 1069, 1094 (9th Cir. 2006) ("We hold that when plaintiffs challenge an employer's use of safety-based qualification standard, they need not, independently of that challenge, establish generally that they can perform the essential function of doing the job safely. They are, however, required to show that they are 'qualified' in the sense that they satisfy prerequisites for the position, including safety-related prerequisites, not connected to the challenged criterion.").

115. See, e.g., *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1141–45 (11th Cir. 2014) (discussing the issue of standing under the ADA); *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013) (holding the party had standing under the ADA); *Levine v. Nat'l R.R. Passenger Corp.*, No. 13-1696 (CKK), 2015 WL 674073, at *1 (D.D.C. Feb. 18, 2015) (holding the party lacked standing under the ADA to bring suit).

116. See, e.g., 42 U.S.C. §§ 12111(10), 12112(a), 12182(b)(2)(A).

consider ways in which society must change, not simply to accommodate individuals with disabilities one at a time, but to include, accept, and value all people with disabilities as equal citizens, who may have different needs, skills, and abilities, but who are equal citizens nonetheless. As one commentator has written, “Although U.S. disability legislation is considered to be human rights legislation, the human rights of people with disabilities seem to have gotten lost in the shuffle.”¹¹⁷

In response to the lingering inequality that people with disabilities face, Samuel Bagenstos has argued that “disability rights activists should accept the limits of the ADA’s approach and concentrate their activism on expanding the coverage of public health insurance, which he sees as ‘the most significant barrier to employment and community integration for people with disabilities.’”¹¹⁸ This Article offers an alternative proposal. Part III suggests that it is time to peek out from behind the ADA lens and look to the CRPD as a guide for advancing the equality agenda for people with disabilities.

III. THE POSSIBILITIES OF THE CRPD

On December 13, 2006, the United Nations General Assembly adopted the CRPD and its Optional Protocol.¹¹⁹ The CRPD is the first international human rights treaty drafted specifically to protect the rights of people with disabilities under international law.¹²⁰ On May 3, 2008, after receiving its 20th ratification, the CRPD entered into force,¹²¹ becoming the first human rights treaty of the twenty-first century.¹²² “The CRPD is not only the most rapidly negotiated human rights treaty in history, but it also garnered more signatories on its opening day than any other treaty in the history of the

117. Megan Flynn, *Olmstead Plans Revisited: Lessons Learned from the U.N. Convention on the Rights of Persons with Disabilities*, 28 *LAW & INEQ.* 407, 428 (2010) (footnotes omitted).

118. Elizabeth R. Schiltz, *Hauerwas and Disability Law: Exposing the Cracks in the Foundations of Disability Law*, 75 *LAW & CONTEMP. PROBS.* 23, 43 (2012) (quoting BAGENSTOS, *supra* note 10, at 13).

119. See CRPD, *supra* note 7.

120. *Frequently Asked Questions Regarding the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?navid=24&pid=151#iq4> (last visited Apr. 20, 2015).

121. *Entry into Force*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?id=210#text> (last visited Apr. 20, 2015).

122. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, <http://www.un.org/disabilities/default.asp?id=150> (last visited Apr. 20, 2015).

UN.”¹²³ Moreover, since its adoption and as of July 1, 2015, 159 countries have signed the CRPD and 156 countries have ratified it (with the notable exception of the United States).¹²⁴

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.”¹²⁵ The state’s obligation to respect one’s inherent dignity is included in most human rights treaties; but it is particularly important in a treaty on the rights of persons with disabilities since people with disabilities in most, if not all, countries around the world have been routinely denied their dignity by affirmative policies of exclusion and mistreatment as well as benign neglect.¹²⁶ The CRPD requires States Parties to ensure the equality of persons with disabilities by prohibiting all types of discrimination “on the basis of disability.”¹²⁷ But the CRPD does not only prohibit discrimination. This section discusses the ways in which the CRPD moves beyond a purely antidiscrimination law to a treaty that mandates equality, inclusion, and participation of all people with disabilities.

A. *The CRPD’s Vision of Equality*

The Preamble of the CRPD acknowledges that the treaty was motivated in large measure by the continuing exclusion of disabled persons, and the recognition of the many benefits that participation by disabled persons contributes to their respective societies.¹²⁸ The CRPD embraces a substantive equality model as opposed to the ADA’s equal opportunities model. Although the equal opportunities model has generally been considered the most appropriate model for disability rights protection,¹²⁹ the CRPD drafters believed it does not go far enough to ensure equality for

123. KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 1.

124. *Rights and Dignity*, *supra* note 15.

125. *See* CRPD, *supra* note 7, at art. 1.

126. *See* KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 7–11.

127. *See* CRPD, *supra* note 7, at art. 5.

128. *See id.* at pmbl.

129. *See* GERARD QUINN & THERESIA DEGENER, HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY, 16 (2002), available at <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf>.

people with disabilities.¹³⁰ Ensuring equality of opportunities, particularly on a case by case basis, may provide a person with a disability access to a building, accommodations on the job, and a sign language interpreter, but it fails to address the underlying causes of different treatment, particularly to the extent that such causes may relate to power or privilege within any given society.¹³¹ Further, the equal opportunities model does not resolve how to ensure equality for those who are denied accommodations, unable to ask for accommodations, or who may choose not to receive any accommodations or modifications at all but still wish to be treated with respect and dignity. In such cases, even the right to “equalization of opportunities,” will not change a society that allows for social marginalization and devaluation of people with disabilities.¹³²

The CRPD takes a broader view of equality than is contained in the ADA.¹³³ While Article 3 of the CRPD affirms the right of people with disabilities to “[f]ull and effective participation and inclusion in society,” and “[e]quality of opportunity,” the CRPD also goes beyond the model of equality of opportunity contained in the ADA to address substantive equality.¹³⁴ Substantive equality does not focus only on the need for accommodations on a case-by-case basis in order to ensure equal treatment; rather, it focuses on how to ensure the results of such equal treatment.¹³⁵

130. See, e.g., CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW 241 (Marcia H. Rioux, Lee Ann Bassier & Melinda Jones eds., 2011).

131. 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. L.J. 155, 159 (2011).

132. *Id.* at 156.

133. For a discussion of the various models of equality as applied to people with disabilities, see QUINN & DEGENER, *supra* note 129, at 16–19 and Arlene S. Kanter, THE RIGHT TO EQUALITY UNDER THE CRPD AND THE LAWS OF THE UNITED STATES AND CANADA, WINDSOR YEARBOOK ON HUMAN RIGHTS (forthcoming 2015).

134. See CRPD, *supra* note 7, at art. 3.

135. 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, who we call different or “not normal” depends on whom we call “normal.” Scholars in the field of Disability Studies have taken on this issue of who is normal and who is not, ultimately challenging the notion that normal is a fixed state. Instead, normalcy is considered a social construct, defined by those in power to reinforce adherence to the current power hierarchy. See QUINN & DEGENER, *supra* note 129, at 14–15; see also Kanter, *Globalization*, *supra* note 6, at 247.

Substantive equality, therefore, is not about treating everyone the same; it is about treating people in such a way that the outcome for each person is equal. According to this model, to achieve equal results, societal changes are necessary to ensure preferential or special treatment, affirmative action, quotas, and accommodations and modifications. In fact, the substantive model of equality 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 and acknowledges that inequitable treatment, discrimination, and inequality itself are not the individual's doing and cannot be remedied one individual at a time. Rather, this inequitable treatment and discrimination is the result of state action and long-held societal views that require systematic responses. Thus, substantive equality has found its home among those who seek to address systematic inequality by minimizing economic, social, and cultural oppression.

Under the substantive equality model, more than equal treatment is required. Substantive equality requires not merely facilitating an entrance to a building but rather making structural changes in society so that no inaccessible buildings are built in the first place. This reformulation of equal treatment is what Martha Minow has labelled the "dilemma of difference."¹³⁶ The dilemma of difference exists when we acknowledge that treating people differently is not always discrimination, and the same treatment does not always lead to more equality.¹³⁷ For people with disabilities, in particular, the dilemma of difference means that different treatment can be both protective of equality and violative of equality, depending upon the person. Thus, to achieve full equality, "a shift in the paradigm we use to conceive of difference, a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions"¹³⁸ is necessary. This paradigm requires society to rethink its structures, norms, and attitudes in order to achieve greater equality for all. The CRPD seeks to effectuate this paradigm shift for people with disabilities throughout the world.

For example, paragraph (m) of 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

136. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 20 (1991).

137. *Id.*

138. *Id.* at 15.

and economic development of society and the eradication of poverty.”¹³⁹ Such statements clearly go beyond the traditional model of equality contained in the ADA, which seeks to address specific barriers, one individual at a time. This statement also promotes disability inclusion as good for society generally. Thus, the CRPD counters the “free market civil rights” framework of the ADA,¹⁴⁰ as Marta Russell calls it, which does not adequately address the structural inequalities to which people with disabilities are subjected on a daily basis in the US and elsewhere. To do that, the CRPD seeks to ensure not only accommodations and modifications for individuals with disabilities, but also the removal and elimination of barriers that create such inequities in the first place, now and in the future.

B. The CRPD’s Human Rights Approach to Disability

A second way in which the CRPD differs from the ADA is in its approach to disability. The ADA is a civil rights law; it protects only those rights which the state confers upon its citizens, such as the right to be free from discrimination. By contrast, the CRPD adopts a human rights approach to disability. Human rights are universal; they are the rights people possess simply because they are human beings. In its Preamble, the Universal Declaration of Human Rights proclaims that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁴¹ The CRPD extends this view of human rights to people with disabilities and reconceptualizes disability as a human rights issue, which is an important paradigm shift, as recognized by Gerard Quinn and Theresia Degener:

[T]he human rights perspective on disability means viewing people with disabilities as subjects and not objects. It entails moving away from viewing people with disabilities as problems towards viewing them as holders of rights. Importantly, it means locating problems outside the disabled person and addressing the manner in which various economic and social processes accommodate the difference of disability¹⁴²

This encompasses a shift in substantive content, but also in the manner in which monitoring and implementation at all levels is addressed.

139. See CRPD, *supra* note 7, at pmb1.

140. RUSSELL, *supra* note 77, at 114.

141. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

142. QUINN & DEGENER, *supra* note 129, at 1.

A human rights approach to disability views people with disabilities as rights holders who are more often disabled by the physical and attitudinal barriers societies erect to exclude and stigmatize them than by their own physical or mental condition.¹⁴³ The CRPD, therefore, represents a paradigm shift that sees limitations placed on people with disabilities by their social and physical environments as violations of their human rights,¹⁴⁴ transforming the needs of people with disabilities into rights they can claim and for which they can advocate.

This shift to a human rights approach is most noticeable in Article I of the Convention which states that ‘the purpose of the present Convention 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. What is interesting, however, is that this Article also includes a statement that ‘[p]ersons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The reason this second statement is included in Article I is that there was no agreement regarding whether the Convention should include a definition of disability. Some [Disabled People’s Organizations] and delegates feared that without including a specific definition of disability in the Convention itself, Member States would feel free to exclude people with certain disabilities from their laws’ protections, thereby putting at risk the entire purpose of the convention.

In fact, the Seventh Ad Hoc meeting was devoted almost exclusively to a discussion of the proposed definitions of disability. However, those who argued against including a specific definition of disability[,] [including the Chair,] ultimately prevailed. They reasoned that the Convention should not include a definition of disability since a definition, no matter how it would be worded, necessarily includes some people and not others.¹⁴⁵

The CRPD was intended to protect the human rights of *all* people with

143. *See id.* at 14.

144. *See CRPD, supra* note 7, pmbl.

145. KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 49 (footnotes omitted).

disabilities, not some of them, some of the time.¹⁴⁶ Including a definition of disability in the CRPD would have conceded a medical model of disability and thereby undermined the Convention's commitment to the social model of disability.¹⁴⁷ The medical model of disability was described recently as "the most powerful influence on the conceptualisation of disability in modern history."¹⁴⁸ It defines a person with a disability as one who has a "particular condition or impairment."¹⁴⁹ Under the ADA, that condition must also "substantially limit" a "major life activity" or be the basis for a record of a disability, or the individual must be "regarded as having such an impairment."¹⁵⁰ As such, under the ADA and other laws based on the medical model, the person with a disability must prove that he or she has a medical condition or diagnosis in order to receive protection under the law.¹⁵¹ No other civil rights law in the U.S. requires the person to prove eligibility by meeting a certain test, nor do any other civil rights laws include categories of people who are specifically excluded.¹⁵²

The CRPD avoids these definitional disputes by relying on the social model of disability.¹⁵³ The social model of disability sees the problem of exclusion of people with disabilities not as a result of the person's medical condition or diagnosis, but rather the result of societal barriers that limit the person's full inclusion and participation in society.¹⁵⁴ The CRPD fully

146. See *id.*; CRPD, *supra* note 7, art. 1.

147. See CRPD, *supra* note 7, art. 1 (noting one of the primary purposes of the Convention was to ensure disabled individuals' "full and effective participation in society on an equal basis with others").

148. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of People with Disabilities*, 8 HUM. RTS. L. REV. 1, 5 (2008).

149. *Id.*

150. 42 U.S.C. § 12102(1) (2012).

151. See *Hale v. King*, 642 F.3d 492, 500 (5th Cir. 2011) (requiring a plaintiff be disabled within the meaning of the ADA); *Kemp v. Holder*, 610 F.3d 231, 235 (5th Cir. 2010) (same).

152. Title VII cases are never analyzed based on whether or not the plaintiff in a case was "really a woman," or "really 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.

153. See KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 8.

154. See *id.*; see also MICHAEL OLIVER & COLIN BARNES, THE POLITICS OF DISABLEMENT 20–24 (2012). Michael Oliver, who is credited with the founding of the social model of disability, also has cautioned that "if we are not careful we will spend all

embraces the social model of disability by describing disability not as a condition that warrants medical treatment or society's pity, but as a condition arising from "interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."¹⁵⁵ According to the social model, therefore, it is the obligation of society to address 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.¹⁵⁶

Under the CRPD, therefore, persons need not establish that they qualify for protection under the law. As human beings, they are protected under the CRPD. In fact, the State has an affirmative obligation to remove the barriers that "disable" certain people from participating in society.¹⁵⁷ As such, the CRPD moves beyond the ADA's non-discrimination approach as well as all prior international disability-related documents.¹⁵⁸ No international document adopted prior to the CRPD includes such strong language regarding the responsibility of States Parties to remove barriers and to take affirmative steps to enable people with disabilities to realize their right to equality under law.¹⁵⁹

C. The Interdependence of Civil and Political Rights and Economic, Social, and Cultural Rights in the CRPD

A third way in which the CPRD moves beyond the ADA is by ensuring

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* 2 (July 23, 1990), available at <http://disability-studies.leeds.ac.uk/files/library/Oliver-in-soc-dis.pdf>.

155. CRPD, *supra* note 7, at pmbl.

156. Arlene S. Kanter, *The Relationship Between Disability Studies and Law*, in *RIGHTING EDUCATIONAL WRONGS: DISABILITY STUDIES IN LAW AND EDUCATION* 1, 10 (Arlene S. Kanter & Beth A. Ferri eds., 2013); Arlene S. Kanter, *The Law: What's Disability Studies Got to Do with It or An Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 427 (2011) [hereinafter Kanter, *The Law*].

157. See Kanter, *The Law*, *supra* note 156, at 427.

158. See generally KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS*, *supra* note 13, at 21–63 (recounting history of international documents leading up to the CRPD). None of these documents are as comprehensive as the CRPD. *Id.*

159. See CRPD, *supra* note 7.

not only the “negative” right to be free from discrimination, but also by requiring State Parties to protect “positive rights” by taking affirmative steps to eliminate discrimination in the first place.¹⁶⁰ The CRPD addresses negative and positive rights, as well as civil and political rights and economic, social, and cultural rights, as well.¹⁶¹ The Preamble specifically affirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.”¹⁶²

Traditionally, human rights instruments addressed either civil and political rights (i.e. the International Convention on Civil and Political Rights) or economic, social, and cultural rights (i.e. the International Convention on Economic, Social, and Cultural Rights), but not both. Although prior to the CRPD, both the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of the Child referred to political and civil rights as well as certain economic, social, and cultural rights, neither of those treaties make explicit the important relationship between, and among, these various rights, particularly for people with disabilities.¹⁶³

The recognition of the interdependency and indivisibility of civil and political rights as they relate to economic, social, and cultural rights is one of the most significant aspects of the CRPD generally, and another way in which it distinguishes itself from the ADA.¹⁶⁴ The CRPD acknowledges that the right to be free from discrimination in the workplace means nothing if jobs are in short supply.¹⁶⁵ Similarly, the right to liberty for people with disabilities is dependent on their right to be free from illegal confinement on the basis of their disability.¹⁶⁶ The civil right to vote or access justice is dependent on accessible voting places and courthouses. When reviewing a claim for damages by a man who was denied access to a courthouse because he used a wheelchair and the courthouse was not accessible, Justice Antonin Scalia observed during oral argument that

160. *See id.* at pmbl.

161. *See id.*

162. *Id.*

163. *See* KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 24–26.

164. *See id.* at 26.

165. *See* CRPD, *supra* note 7, at art. 27.

166. *See id.* at art. 14.

“[i]naccessible voting place proves nothing at all. It just proves that the state did not go out of its way to make it easy for the handicapped to vote, as it should, but as it is not constitutionally required to do. To simply say many voting places are inaccessible proves nothing at all. . . . They’re not saying you can’t vote, they’re saying we don’t have facilities for you to get into the voting place.”¹⁶⁷

By contrast, according to the CRPD, civil, political, economic, social, and cultural rights are all complimentary and mutually reinforcing.¹⁶⁸ Accordingly, the CRPD stands for the principle that civil and political rights cannot be realized unless and until related social, economic, and cultural rights are also ensured.¹⁶⁹

Further, unlike the CRPD, the ADA focuses only on the government’s role in prohibiting discrimination, which confers a negative right, and then only in the settings enumerated within the ADA. For example, Title I of the ADA limits claims of employment discrimination to “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”¹⁷⁰ Article 27 of the CRPD, however, looks beyond

167. Transcript of Oral Argument at 40, *Tennessee v. Lane*, 541 U.S. 509 (2004) (No. 02-1667), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/02-1667.pdf, reprinted in Laura Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1097 (2004).

168. See CRPD, *supra* note 7, at pmbl.

169. See *id.* at art. 29.

170. 42 U.S.C. § 12112(a) (2012). Title I prohibits classifying, segregating, or limiting a job applicant or employee based on his or her disability; failing to make reasonable accommodations for an applicant or employee with a disability; and using selection criteria, qualification standards, or employment tests that screen out individuals with disabilities. *Id.* §§ 12112(b)(1), (b)(5)(A), (6). Title I of the ADA also specifically prohibits preemployment inquiries as to whether the applicant has a disability or as to the nature or severity of the disability. *Id.* § 12112(d)(2)(A). However, even with these protections, the employer is still free to identify the essential functions of the job at issue and to ask whether the applicant can perform these essential functions. *Id.* § 12112(d)(2)(B). Congress also provided several defenses to employers including relieving the employer of any responsibility to provide accommodations if such action would “require significant difficulty or expense,” or the employer’s decision not to hire the person is “job related and consistent with business necessity.” *Id.* §§ 12112(4)(A), 12113(a); see also 29 C.F.R. § 1630.15(b) (1995). The final defense available to employers is known as the direct threat defense, which allows the employer may refute an allegation of disability discrimination by showing that the individual poses a “direct threat to the health and safety of other individuals in the workplace.” 42 U.S.C. § 12113(b). A direct threat is defined in the ADA regulations as a “significant risk of substantial harm” to the

discrimination as the only barrier to bringing people with disabilities into the labor force and beyond the limited role of the government in only enforcing the negative right of prohibiting discrimination.¹⁷¹ Article 27 includes both negative and positive rights: it recognizes general rights to work; equal pay; safe and healthy working conditions; equal trade union rights; access to technical and vocational guidance programs, placement services, and continuing training programs; promotion of employment opportunities and career advancement; assistance in obtaining employment; promotion of opportunities for self-employment; promotion of employment in the public sector; promotion of employment in the private sector (including the possibility of affirmative action programs, incentives, and other measures); and rehabilitation, job retention, and return-to-work programs.¹⁷² These provisions go far beyond the nondiscrimination approach of the ADA. As such, the interdependency of the many substantive rights included in the CRPD, as well as the responsibility of States Parties to protect those rights, is one of the most important aspects of the CRPD and one which moves it towards ensuring greater substantive equality for people with disabilities.¹⁷³

D. The Right to Reasonable Accommodations in the CRPD

A fourth way in which the CRPD and the ADA differ is their respective perspectives on the right to reasonable accommodations. In Title I of the ADA, discrimination is defined as, among other things:

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.¹⁷⁴

disabled individual or to others that cannot be reduced or eliminated by reasonable accommodations. *Id.* at § 12111(3). But it is based solely on the subjective judgment of the employer, and can even override a plaintiff's willingness to risk any potential danger. This clearly undermines the decision-making rights of the individual.

171. *See* CRPD, *supra* note 7, at art. 27.

172. *Id.*

173. *See id.*

174. 42 U.S.C. § 12112(b)(5)(A)–(B). Title I defines reasonable accommodation as:

Thus an accommodation is not reasonable and need not be provided, if the employer can show that it would result in an “undue hardship,” defined in the ADA regulations as an action that would require significant difficulty or expense¹⁷⁵ or one that would pose a direct threat to the health or safety of others in the workplace.¹⁷⁶ Further, the ADA does not require the employer to accept an employee’s proposed accommodation; the employer retains the right to provide an alternative accommodation, even one which the employee neither requests nor prefers.¹⁷⁷ Thus, under the ADA, a reasonable accommodation is not an unqualified right; it is something that an employee or prospective employee may request and which the employer may choose to grant or deny.

In the context of access to services and places of public accommodation

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) 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).

175. *Id.* § 12112(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. § 12112(10)(B).

176. *See id.* § 12111(3); *see also* *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76, 87 (2002) (extending “direct threat” defense to harm to self).

177. *See* 29 C.F.R. § 1630.9 app. (2011).

Titles II and III of the ADA refer to reasonable modifications rather than accommodations.¹⁷⁸ Here too, the provider of services is not required to provide requested modifications, if to do so would constitute a “fundamental-alteration” of the entity’s program.¹⁷⁹ Moreover, even if the employer or provider is required to provide a reasonable modification under Title II or III, these modifications are available only to those persons who make the request.¹⁸⁰ As in Title I, the employer or provider under Title II or III, even a state or local government, is not required to ensure that the accommodations or modifications are available for the next person who may need them, even the next person who may need the identical accommodation or modification.¹⁸¹ That next person would have to prove the appropriateness of such accommodation and modification in his or her case, as would the next person after that, and so on.¹⁸²

As such, the requirement of reasonable accommodation in the ADA may perpetuate the very stereotype that the ADA seeks to eradicate. It supports the observation by disability studies scholar Lennard Davis, that when individuals exercise their right to accommodations, they are seen as “overly self-concerned, overly demanding . . . [,] regarded as narcissists . . . [,] and] as demanding exceptions for themselves that overstep what employers can or should provide.”¹⁸³ As long as such negative views of people with disabilities remain unchallenged, people with disabilities will remain stigmatized and excluded from mainstream society. Thus, the goal of reasonable accommodation and modifications in Titles I, II, and III, is to help individuals do their jobs or enter buildings, but not to eliminate the barriers which people with disabilities continually face.¹⁸⁴ The requirement of reasonable accommodations and modifications under the ADA may open up the door for some people with disabilities to get jobs and access to public life, but it does not require that those doors remain open.

178. See, e.g., 42 U.S.C. §§ 12131(2), 12182(b)(2)(A) (2012). Private clubs and religious entities are exempt from coverage under Title III. See *id.* § 12187.

179. 28 C.F.R. § 35.130(b)(7) (2008).

180. 29 C.F.R. § 1630.9 app. (2014).

181. See *id.* (discussing the fact that employers are only obligated to provide reasonable accommodations for known disabilities).

182. See *id.*

183. Lennard J. Davis, *Bending over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 197 (2000).

184. See 42 U.S.C. § 12111(9) (providing the definition of reasonable accommodation under the ADA).

The CRPD, by contrast, affirms the right to reasonable accommodation as a human right, for the first time in international law.¹⁸⁵ It recognizes not only that discrimination can include the refusal to provide a reasonable accommodation, as in the ADA, but it goes one step further, by designating the right to a reasonable accommodation as a free standing right under international human rights law.¹⁸⁶ Although the requirement of reasonable accommodation in the CRPD is limited to those accommodations that do “not impos[e] a disproportionate or undue burden, where needed in a particular case,” the CRPD goes on to state in Article 5, entitled Equality and Non-Discrimination, that “to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”¹⁸⁷ The ADA includes no such affirmative obligation by the state.¹⁸⁸ As a result, the federal government in the United States has no role in monitoring or enforcing compliance with the ADA’s reasonable accommodation or reasonable modification requirements.¹⁸⁹ The only method of enforcement is for the person with a disability to find a lawyer and sue or to convince the United States Justice Department to take action, which it will do in only the rarest of cases.¹⁹⁰

Further, Article 4 of the CRPD requires States Parties to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise” recognizing that such measures may be achieved “to the maximum of its available resources.”¹⁹¹

185. CRPD, *supra* note 7, at art. 2.

186. *See id.* at art. 5.

187. *Id.* at art. 2, art. 5. “Reasonable accommodation” is defined in Article 2 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.* at art. 2. Like the ADA, there are limits on what may be considered reasonable, but the responsibility for ensuring that accommodations are provided ultimately rests on the State not the judgment of individual employers.

188. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination in the hiring, advancement, or discharge of disabled employees, but not placing any obligations on the state to ensure compliance).

189. *But see id.* § 12101(b)(3) (stating a purpose of the ADA is “to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities”).

190. *See id.* § 12117(a).

191. CRPD, *supra* note 7, at art. 4.

This language in the CRPD may serve as a guide to our own ADA's application of the reasonable accommodation standard in Title I and the reasonable modification requirement in Titles II and III.¹⁹² Although the regulations promulgated under the ADA provide examples of how reasonable accommodations and reasonable modifications may be calculated, there is little guidance on how to interpret these provisions. The CRPD may fill this gap by clarifying that at least with respect to the State's compliance with the reasonable accommodation standards, "what is 'reasonable' for one country may not be for another."¹⁹³ One commentator wrote that the State's obligation to "take measures to the maximum of its available resources" to protect the rights recognized by the CRPD may conflict with "historic United States policy towards 'entitlement spending.'"¹⁹⁴ However, that author went on to observe that if the United States, "as one of the world's wealthiest countries," were to use the "maximum of its available resources" to eradicate discrimination against people with disabilities and to ensure their inclusion in society, it "could involve allocating significantly more resources than the nation currently does to achieve the level of deinstitutionalization the Convention advocates."¹⁹⁵

In short, under the ADA, no public or private entity is required to change its practices or policies to ensure equality for people with disabilities, at least not until a complaint is raised.¹⁹⁶ Moreover, even if an individual with a disability is fortunate enough to find and pay for an attorney, bring suit, and win, the damages under the ADA are limited.¹⁹⁷ Even after the ADAAA, the law does not provide for economic damages against Title III private entities that discriminate against their customers, unless specifically requested by the Attorney General.¹⁹⁸ Nor does the law provide damages for

192. See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (discussing whether riding in a golf cart fundamentally alters the PGA tournament); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1056 (5th Cir. 1997) (discussing whether permitting service animals on tours of a brewery constitutes a fundamental alteration of the nature of the goods, services, facilities, privileges, or accommodations offered or provided).

193. Flynn, *supra* note 117, at 435 (quoting CRPD, *supra* note 7, at art. 4).

194. *Id.* at 434–35 (quoting CRPD, *supra* note 7, at art. 4).

195. *Id.* at 435 (quoting CRPD, *supra* note 7, at art. 4 (describing the lengths to which States Parties should incorporate the Convention's protections into their legislation)).

196. See *Overview*, EEOC, <http://www.eeoc.gov/eeoc/index.cfm> (last visited June 8, 2015).

197. See 42 U.S.C. § 1981a(b)(3) (2012).

198. *Id.* § 12188(b)(2)(B).

violations of Title II, unless the plaintiff can prove discriminatory intent.¹⁹⁹ Therefore, individuals with disabilities who qualify for coverage under the ADAAA, and who prove that they experienced discrimination, will still not receive any compensation for their injuries absent a showing of discriminatory intent.²⁰⁰ Without the possibility of compensation, contingency arrangements will not be possible; nor will most individuals with disabilities decide to go through the difficulties, delay, and expense of pursuing litigation. And without such litigation, many workplaces, public and private buildings, services, and programs will remain inaccessible.

The CRPD, on the other hand, does not rely on litigation as a way to enforce its mandates. Rather, it requires States Parties, not the individual person with a disability, to take the necessary steps to ensure compliance with the CRPD.²⁰¹ This model is consistent with the social model of disability that sees disability as a result of barriers in society rather than a person's particular impairment, as discussed above.²⁰² For example, Article 5 of the CRPD requires States Parties to "take all appropriate steps to ensure that reasonable accommodation is provided," and to take "[s]pecific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities."²⁰³ Thus, in the employment context, the CRPD promotes affirmative action, quotas, and set asides.²⁰⁴ Yet such approaches have been referred to by our National Council on Disability as "beyond the concept of equality as currently understood in U.S. law and politics."²⁰⁵

Similarly, Article 9 of the CRPD recognizes a right to accessibility to enable persons with disabilities to live independently and participate fully in all aspects of life as follows:

States Parties shall take appropriate measures to ensure to persons with

199. See *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998).

200. See *id.*

201. See CRPD, *supra* note 7, at art. 4.

202. See *supra* Part III.B.

203. CRPD, *supra* note 7, at art. 5.

204. See *id.*; NATIONAL COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES 10 (May 12, 2008), <http://www.ncd.gov/publications/2008/May122008> [hereinafter NATIONAL COUNCIL].

205. NATIONAL COUNCIL, *supra* note 204, at 10. The National Council on Disability (NCD) goes on to state, "These types of schemes, however, are within Congress's spending power to authorize if it so chooses." *Id.*

disabilities access, on an equal basis with others, to the physical environment, to 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, which shall include the identification and elimination of obstacles and barriers to accessibility. . . .²⁰⁶

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 such access. 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.²⁰⁷ States Parties also must ensure that “[i]nformation, communications and other services, including electronic services and emergency services,” are accessible.²⁰⁸ However, all articles of the CRPD are aspirational. To realize the goal of Article 9, as well as other articles, individual countries that ratify the CRPD must develop their own domestic laws and policies to enforce the mandates of the CRPD. On this issue, the United States is way ahead of most countries since the United States already has comprehensive accessibility standards,²⁰⁹ which can provide a model to other countries that wish to comply with the accessibility requirements of the CRPD.²¹⁰

Moreover, the CRPD also recognizes that there are ways to ensure equal access and inclusion of people with disabilities other than responding to individual requests for accommodations and modifications. The CRPD promotes the use of universal design. Universal design emerged from the field of architecture as a way to design buildings, places and products so that they are usable by the widest range of people without adaptation.²¹¹ Universal

206. CRPD, *supra* note 7, at art. 9.

207. *Id.*

208. *Id.*

209. See, e.g., 36 C.F.R. 1191, app. B–D (2010) (setting forth “Accessibility Guidelines”); *but see Rights and Dignity*, *supra* note 15 (noting the United States as one of the signatories to the CRPD, but has yet to ratify it).

210. See Tracy R. Justesen & Troy R. Justesen, *An Analysis of the Development and Adoption of the United Nations Convention on the Rights of Individuals with Disabilities: Why the United States Refuses to Sign this UN Convention*, 14 HUM. RTS. BRIEF 36, 46 (2007).

211. Bettye Rose Connell, et al., *The Principles of Universal Design*, N.C. STATE UNIV. CTR. FOR UNIVERSAL DESIGN (Apr. 1, 1997), <http://www.ncsu.edu/ncsu/design/>

design therefore conceptualizes access as a way to maximize participation for the greatest number of people with and without disabilities.

The CRPD promotes universal design in Article 2.²¹² Moreover, the CRPD requires State 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 disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines.”²¹³ Thus, the CRPD makes clear that by relying on universal design, the need for individual accommodations will be reduced, and many people with disabilities will not have to be singled out to ask for “special” accommodations or modifications which may result in the very stigmatization and exclusion that the CRPD (as well as the ADA) is hoping to eradicate.

E. *The Right to Independence and Supports*

A fifth example of how the CRPD goes beyond the ADA is that it embraces not only the “civil rights” of people with disabilities but also their needs—in an unapologetic and affirmative way. The goal of the ADA is to ensure for people with disabilities “equality of opportunity, full participation, independent living, and economic self-sufficiency.”²¹⁴ Although the ADA does not define these terms, they are clearly consistent with the American values of rugged individualism and self-reliance. In the United States, the key to the “American Dream” is independence, autonomy, and the ability to pull one’s self up by one’s own bootstraps.²¹⁵

The ADA clearly reflects this view of the individual as independent and self-reliant. Samuel Bagenstos has observed, for example, that the

[cud/about_ud/udprinciplestext.htm](#).

212. See CRPD, *supra* note 7, at art. 2 (defining 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”). 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.*

213. *Id.* at art. 4.

214. 42 U.S.C. § 12101(a)(7) (2012).

215. 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).

disability activists who worked for passage of the ADA clung to independence as an overarching value.²¹⁶ He argues that the decision of disability activists to focus on the ADA's role in achieving independence for people with disability was a deliberate strategy to win the support of politicians and the broader public.²¹⁷ According to Bagenstos, "the presentation of disability rights law as a means of achieving independence resonated strongly with the ascendant conservative ethic of individualism, self-reliance, and fiscal restraint."²¹⁸ Although the ADA's commitment to facilitating the independence of people with disabilities is obvious throughout the law, what the law does not acknowledge is that no one—with or without a disability—is truly independent. In fact, everyone needs people, and some need more people more of the time.

In recent years, feminist scholars have challenged the values of individualism, autonomy, and self-reliance, which are so deeply embedded in our laws and attitudes. As Joan Tronto has written, "Throughout our lives, all of us go through varying degrees of dependence and independence, of autonomy and vulnerability. A political order that presumes only independence and autonomy as the nature of human life thereby misses a great deal of human experience"²¹⁹

The drafters of the CRPD embraced the importance of an individual's right to be independent, but recognized also that people need others and the support they offer to exercise this right to independence and autonomy. The CRPD rejects independence and self-reliance as goals unto themselves and instead recognizes that in order to realize the goal of independence of thought and action, support may be needed.²²⁰ The CRPD recognizes that some people with disabilities can realize their full potential and independence only if they receive support. As Virginia Held has observed, "That we can think and act as if we were independent depends on a network of social relations making it possible for us to do so."²²¹ To achieve

216. BAGENSTOS, *supra* note 10, at 27.

217. *Id.*

218. *Id.* at 29.

219. JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* 135 (1993).

220. *See* CRPD, *supra* note 7, at pmbl.

221. VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 14 (2006). Held goes on to say, "This is not to say that we cannot become autonomous; feminists have done much interesting work developing an alternative conception of autonomy in place of the liberal individualist one. . . . But it means that from the

substantive equality (or equality of outcome) for people with disabilities under the CRPD, therefore, society must reconsider how it views independence itself.

Feminist scholars, such as Robin L. West and Joan Williams, have offered dependency-based theories of justice focusing on the particular dependency of children on their parents that may result in dependency for the care-giving parent.²²² Other feminist scholars have criticized the traditional conception of autonomy for being highly masculinized, individualistic, rationalistic, and serving to set up the independent, rational, and self-determining male as the archetype for sound decision making.²²³ These scholars argue that the traditional preoccupation with autonomy and self-sufficiency obscures the embeddedness of individuals in their social contexts, essentially ignoring how one's social position and close relationships affect decision-making.²²⁴ The legal philosophers Alasdair MacIntyre, Hans Reinders, Eva Feder Kittay, and Martha Albertson Fineman, also have written about the inherent dependency of people with disabilities or who are elderly, as they have developed alternative moral or political philosophies based on humanity's mutual vulnerability and dependency.²²⁵

Within the legal academy, Martha Albertson Fineman has been most thoughtful in her challenge to the value subscribed to independence and autonomy within rights-based discourse. Rights-based discourse perpetuates the "myth of autonomy,"²²⁶ according to Fineman, because no one is truly

perspective of an ethics of care, to construct morality *as if* we were . . . us[ing] Hobbes's image, mushrooms sprung from nowhere, is misleading." *Id.*

222. See generally, e.g., ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS AND THE RULE OF LAW (2003); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991); Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

223. See, e.g., RELATIONAL AUTONOMY FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 38–39 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

224. See *id.* at 42–43; LORRAINE CODE, WHAT CAN SHE KNOW? 87–88 (1991).

225. See generally, e.g., MARTHA FINEMAN, THE AUTONOMY MYTH (2004); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999); ALASDAIR C. MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999); HANS L. REINDERS, RECEIVING THE GIFT OF FRIENDSHIP (2008); HANS L. REINDERS, THE FUTURE OF THE DISABLED IN LIBERAL SOCIETY (2000).

226. See generally, Fineman, *supra* note 225.

independent, nor should they be.²²⁷ To Fineman, everyone needs other people to survive and to realize the potential of their autonomous selves.²²⁸ Accordingly, rights based laws—such as the ADA—that promote independence and autonomy above all else will necessarily devalue those people who, because of their physical, mental or sensory impairment, cannot literally or figuratively act with autonomy and independence.²²⁹ “In a society where active citizenship for those other than the very rich is associated with individualistic notions of ‘earning your keep,’ the perceived inability to do so poses a problem in terms of one’s overall social membership.”²³⁰ A world that values independence and autonomy above all else will necessarily value those who are considered well, with strong mind and body, and exclude those who, because of a physical or mental impairment do not fit that norm and are then “treated as inherently inferior, and removed from mainstream society.”²³¹ In such a world, people who need accommodations, modifications, or other people’s support in order to exercise their autonomy and independence will never be considered equal because of their need for

227. *Id.* at 8–17.

228. *See id.* at 28–30.

229. *See id.* at 29 (quoting STEPHAN COVEY, *THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE* (2004) (“[T]he current social paradigm enthrones independence.”)). Some people with disabilities have taken the idea of pulling themselves up by their own bootstraps quite literally. We hear many stories of people who lose a leg and are hailed as heroes for standing on their own two (albeit prosthetic) feet. Even a calf, who lost his legs to frostbite and received prosthetic legs was hailed as and named “Hero.” *See* Michelle Starr, *Hero Calf Walks Again on New Prosthetic Legs*, CNET (May 25, 2014), <http://www.cnet.com/news/hero-the-calf-walks-again-on-new-prosthetic-legs/>. Soldiers, victims of bombings, and accident victims are also praised when they can resume their “independent” lives. This praise means that one who can walk again will be hailed a hero, as opposed to one who may continue to need assistance and must depend on others. *See, e.g.*, Stephen Ceasar, *A College Athlete Beaten Back by Meningitis Reclaims His Life*, L.A. TIMES (Dec. 26, 2014), <http://www.latimes.com/local/great-reads/la-me-cl-aaron-loy-20141226-story.html#page=1>; Tim Craig, *Soldier Who Lost Leg in Afghanistan Vowed ‘I will Return.’ This is What it Took to Get Back*, WASH. POST (May 11, 2014), http://www.washingtonpost.com/world/soldier-who-lost-leg-in-afghanistan-vowed-i-will-return-this-is-what-it-took-to-get-back/2014/05/01/36af6e3c-b3ae-11e3-8cb6-284052554d74_story.html.

230. Maroto & Pettinicchio, *supra* note 58, at 397 (quoting Richard Jenkins, *Disability and Social Stratification*, 42 BRIT. J. SOC. 557, 557 (1991), available at <http://www.researchgate.net/publication/264347313>).

231. *See* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. Rev. 1341, 1344 (1993).

support or accommodations.²³² Their state of dependency justifies society's view of them as less equal, less worthy and less valuable. This is one of the unfortunate unintended consequences of the ADA.²³³

The CRPD, on the other hand, directly challenges the ideal of independency. Although the CRPD recognizes autonomy and independence as core values,²³⁴ the CRPD also recognizes that people with disabilities (like people without disabilities) are not entirely independent,²³⁵ 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, the right to receive the supports one may need becomes a way to promote social relationships among people with and without disabilities.

This new "right to support" is particularly evident in Article 19 of the CRPD, which affirms the "right of all persons with disabilities to live in the community, with choices equal to others."²³⁶ Article 19 provides that "[p]ersons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement."²³⁷ Moreover, Article 19 goes on to ensure that "[p]ersons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community."²³⁸

232. Law professor Luke Clements of Cardiff University argues that not only are people with disabilities entitled to human rights protections but so are their "carers," the people who care for them. See Luke Clements, *Does Your Carer Take Sugar? Carers and Human Rights: The Parallel Struggles of Disabled People and Carers for Equal Treatment*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 397 (2013).

233. 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 people with disabilities, without their input, state interventions deny them the 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, *THE DEVELOPMENT OF DISABILITY RIGHTS*, *supra* note 13, at 125–221.

234. CRPD, *supra* note 7, at art. 3.

235. See *id.* at art. 20.

236. *Id.* at art. 19.

237. *Id.*

238. *Id.*

The ADA takes a very different approach to the right of people with disabilities to live in the community.²³⁹ The ADA does not include any right to live in the community per se.²⁴⁰ The regulations promulgated pursuant to Title II of the ADA do require public entities to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”²⁴¹ The Preamble discussion of this “integration mandate” explains that “the most integrated setting” is one that “enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible”²⁴² This regulation came after a lower court decision limiting the traditional power of the federal courts to protect the rights of residents in institutions.²⁴³

However, the integration mandate has not resulted in the right of people with disabilities to live in the community as is provided in Article 19 of the CRPD. The Supreme Court had the opportunity to declare an unequivocal right for people with disabilities to live in the community, but it did not.²⁴⁴ In 1999, the Supreme Court decided the case of *Olmstead v. L.C. and E.C.*²⁴⁵ The Court held that the two named plaintiffs could leave the institution to live in the community, but only after their treating professionals agreed, and only after the evidence established that releasing them into the community would not “fundamentally alter” the state’s mental health system.²⁴⁶ In *Olmstead*, the Court could have addressed the underlying stigma, prejudice, and structural discrimination against people with disabilities in society that resulted in the institutionalization of many people in the U.S., including the plaintiffs. The Court could have required

239. Compare *id.*, with Arlene S. Kanter, *There’s No Place Like Home: The Right to Live in the Community for People with Disabilities, Under International Law and the Domestic Laws of the United States and Israel*, 45 ISRAEL L. REV. 181, 200 (2012) [hereinafter Kanter, *There’s No Place Like Home*] (explaining the ADA’s approach to community living).

240. See Kanter, *There’s No Place Like Home*, *supra* note 239.

241. 28 C.F.R. § 35.130(d) (2008) (the “integration mandate”).

242. 28 C.F.R. Pt. 35, app. A, subpart b, 572 (2010) (addressing § 35.130).

243. See *Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 125–26 (1984) (holding that federal courts may no longer enjoin the enforcement of state laws).

244. See Kanter, *There’s No Place Like Home*, *supra* note 239, at 202; see also Arlene S. Kanter & Eric Rosenthal, *The Right to Community Integration: Protections under United States and International Law*, in *DISABILITY RIGHTS LAW AND POLICY: INTERNATIONAL AND NATIONAL PERSPECTIVES* 3–4 (Mary Lou Breslin, Sylvia Yee & Arlene Meyerson eds., 2002).

245. See generally, *Olmstead v. L.C.*, 527 U.S. 581 (1999).

246. *Id.* at 605–07.

changes in the state's mental health system to effectuate the right to live in the community. But rather than doing that, the Court limited its interpretation of the "integration mandate" in Title II to ensure access to the community based on the individual characteristics of the resident, just as other cases brought under Title I and III of the ADA, focus only on providing a limited remedy for an individual act of discrimination.²⁴⁷ The CRPD, on the other hand, recognizes that the right to choose where to live is a human right.²⁴⁸ Thus, even without ratifying the CRPD, the U.S. Department of Health and Human Services could revise its regulations to reflect the message of Article 19 by clarifying that "the most integrated setting appropriate" for individuals with disabilities means that each individual has the right to decide where to live and with whom, and what help and support to receive, if any.²⁴⁹

IV. WHY THE UNITED STATES HAS NOT RATIFIED THE CRPD AND WHY IT SHOULD

The previous Part identified several areas in which the CRPD goes beyond the goal and language of the ADA. One may assume that based on these differences, the Senate was wise not to ratify the CRPD. However, that is not the case. This Part argues that the arguments made in opposition to ratification of the CRPD are unmeritorious and that the United States should ratify the CRPD without further delay.

No country, including the United States, is required to ratify or even sign a treaty, but most countries do, and for different reasons.²⁵⁰ Some

247. *See id.* at 587.

248. *See* CRPD, *supra* note 7, at art. 19.

249. *See* 28 C.F.R. § 35.130(d) (2008); KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at 64 (arguing that the right to live in the community means the right to live in a home, with whom and where they choose, in the same way that people without disabilities are able to choose where and with whom to live); *see also* Flynn, *supra* note 117, at 433 (arguing that the goal of access to home and residential services, funded by Medicaid, should be clearly stated within the ADA to "prevent isolation or segregation from the community"). Thus, "[i]n order to 'administer services, programs, and activities in the most integrated setting appropriate' for persons with disabilities," as is now required under the regulations implementing Title II of the ADA, "the United States must expand its range of services" by "offering home and community-based services to those individuals who would not qualify for Medicaid waiver services because of the cost-of-care maximums imposed by 42 U.S.C. § 1396n(c)(2)(D)." *Id.* The size of the waiver program could also be expanded, even without further legislation. *See id.*

250. *See* KANTER, THE DEVELOPMENT OF DISABILITY RIGHTS, *supra* note 13, at

countries ratify treaties with the intention of conforming their actions to the terms of the treaty, while others know they have no intention of doing so.²⁵¹ These countries may ratify a treaty in order to *avoid the ostracism* or punishment by the international community that may accompany a decision not to ratify a given treaty.²⁵²

Of the nine core human rights treaties that have been adopted by the U.N.,²⁵³ the U.S. has signed only three.²⁵⁴ This record gives the distinction of being the country with the “poorest record of ratification of human rights treaties among all industrialized nations.”²⁵⁵ In fact, the U.S. is the only

292–98. Of the UN’s 193 Member States that are eligible to ratify treaties, all member states—except the United States, Somalia, and Sudan—have ratified the Convention on the Rights of the Child (CRC):

180 countries have ratified the Convention on the Elimination of All Forms Discrimination Against Women (CEDAW); 175 countries have ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); 167 countries have ratified the International Covenant on Civil and Political Rights (ICCPR); 161 countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR); and 153 countries have ratified the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).

Id. at 292. For a complete list of members see *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited June 21, 2015).

251. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 4–5 (2009).

252. *Id.* at 57–102.

253. *The Core International Human Rights Treaties*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS (2006), available at <http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf>.

254. See Janet E. Lord & Michael Ashley Stein, *Ratify the UN Disability Treaty*, FOREIGN POLICY IN FOCUS (July 9, 2009), http://fpif.org/ratify_the_un_disability_treaty/.

255. *Id.* The Senate has a very bad track record when it comes to human rights treaties, having only ratified three treaties and two optional protocols since the 1960’s. See *id.*; *United States Ratification of International Human Rights Treaties*, HUMAN RIGHTS WATCH 6 (July 2009), <http://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties>. The three treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Id.* The United States has ratified two Optional Protocols for the Convention on the Rights of the Child. *Id.* One concerning children in armed conflict, and the other concerning “the sale of children, child prostitution and child pornography.” *Id.* The following are some of the treaties that the U.S. has not ratified: The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child

country in the world except Somalia that has not ratified the Convention on the Rights of the Child.²⁵⁶ Based on this record, some commentators have gone so far as to suggest that the U.S.'s failure to ratify human rights treaties reflects poorly on the United States and impacts its ability to conduct foreign policy.²⁵⁷

During the CRPD's negotiation and drafting process, U.S. Justice Department attorneys provided technical assistance to the drafting committee. The Bush Administration stated that because the ADA "is among the most comprehensive civil rights laws protecting the rights of people with disabilities in the world," [the] signing of and ratifying of the CRPD was unnecessary."²⁵⁸

(CRC), the Convention for the Protection of all Persons from Enforced Disappearance, the Mine Ban Treaty, the Convention on Cluster Munitions, and the Optional Protocol to the Convention against Torture. *Id.* With respect to the CEDAW, there are only seven countries, including the U.S., that have not ratified it. *Id.* The United States is also the only country besides Somalia that has not signed the CRC, and Somalia has no recognized government with which to sign the treaty. *Id.*

256. The U.S. has ratified two optional protocols of the CRC, but only signed the CRC. *Id.* According to Philip Alston, a leading international human rights legal expert, the U.S. reluctantly signed the CRC. Philip Alston, *Putting Economic Social and Cultural Rights Back on the Agenda of the United States* (NYU Ctr for Hum. Rts and Global Justice, Working Paper No. 09-35, 2009). "[T]he 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 been significantly watered down at the insistence of the Reagan Administration during the process of drafting the CRC in the 1980s." *Id.*

257. See David Kaye, *Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate*, FOREIGN AFFAIRS (Sept./Oct. 2013), <https://www.foreignaffairs.com/articles/united-states/2013-08-12/stealth-multilateralism>.

258. HUMAN RIGHTS WATCH, *supra* note 255 (quoting Letter from Kim R. Holmes, Assistant Secretary of State for International Organization Affairs, United States Department of State, to Lex Frieden, Chairperson, National Council on Disability (June 3, 2004)). The U.S. testified during the Ad Hoc Committee Meeting in June 2003 that it would not sign or ratify the CRPD, declaring no need for an international instrument because of national laws prohibiting discrimination on the basis of disability. See Ralph F. Boyd, *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*, U.N. ENABLE (June 18, 2003), <http://www.un.org/esa/socdev/enable/rights/attrib-us.htm>. The U.S. representative also referenced the long history of the U.S.'s commitment to equal rights for people with disabilities, and suggested that such a convention may be viewed as an unwelcome intrusion into national sovereignty. *Id.*

Most would agree, as does the Obama Administration,²⁵⁹ that implementation of national legislation is the most effective way of protecting the rights of Americans with disabilities. Nonetheless, President Obama, unlike President Bush—who had signed and praised the ADA—agreed to sign and work for ratification of the CRPD.²⁶⁰ On behalf of President Obama, U.N. Ambassador Susan Rice signed the CRPD on July 30, 2009.²⁶¹ The previous week, President Obama had announced its signing, referring to the “extraordinary treaty . . . [that] urges equal protection and equal benefits before the law for all citizens, reaffirms the inherent dignity and worth and independence of all persons with disabilities worldwide.”²⁶² Signing this treaty evidences the country’s commitment to the CRPD. Three years following the signing, in May 2012, the Administration transmitted the CRPD to the Senate for advice and consent to ratification.²⁶³

Since then, members of the Senate have taken several actions related to CRPD. On July 2012, the Senate Foreign Relations Committee (SFRC) held a hearing on the Convention.²⁶⁴ Later that month, the SFRC reported the treaty favorably to the full Senate by a vote of 13 in favor and 6 opposed, subject to certain conditions.²⁶⁵ “On December 4, 2012, the Senate voted against providing advice and consent to ratification of CRPD by a vote of 61 to 38,” only five short of the two-thirds majority needed for Senate ratification.²⁶⁶ The treaty was then automatically returned to the SFRC.²⁶⁷ In July 2014, the SFRC again “reported the treaty favorably by a vote of 12 in favor and 6 against,” subject to certain conditions.²⁶⁸ But “[t]he full Senate did not consider providing its advice and consent to ratification, [and the CRPD] was automatically returned to the SFRC at the end of the 113th

259. See *The Signing of the United Nations Convention on the Rights of Persons with Disabilities*, ABILITY MAGAZINE, <http://abilitymagazine.com/un-ada.html> (last visited June 7, 2015).

260. See *id.*

261. *Id.*

262. *Id.*

263. LUISA BLANCHFIELD & CYNTHIA BROWN, CONG. RESEARCH SERV., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ISSUES IN THE U.S. RATIFICATION DEBATE 5 (Jan. 21, 2015).

264. *Id.* at 7.

265. *Id.*

266. *Id.* at 8.

267. *Id.*

268. *Id.* at 9.

Congress.”²⁶⁹

Leading the support for CRPD ratification was Senator Harkin—a long time defender of disability rights and the primary architect and sponsor of the ADA and the ADAAA in 2008—and Senator John Kerry.²⁷⁰ Senator Mike Lee and Tea Party Republican and former presidential candidate Rick Santorum led the opposition to the CRPD.²⁷¹ They claimed that ratification would threaten American sovereignty and intrude on the parental rights of Americans to educate their own children.²⁷² Other Republicans in the Senate—and the Home School Legal Defense Association (HSLDA), which mounted a campaign against ratification—supported Senators Lee and Santorum.²⁷³ Michael Farris, founder and director of the HSLDA, urged “all freedom-loving Americans to contact their U.S. senators and urge them to oppose this dangerous U.N. treaty.”²⁷⁴ The CRPD ratification vote did not receive the same bipartisan support afforded the ADA, which is surprising in light of the advocacy to ratify the CRPD by two prominent Republicans, Bob Dole and Senator John McCain, both of whom are former presidential nominees and wounded veterans.²⁷⁵

The opposition to the CRPD may have more to do with some Senate Republicans’ opposition to human rights treaties in general, rather than opposition to equality for people with disabilities, in particular.²⁷⁶ Opposition to ratification of treaties—even objection to citations to international law in U.S. decisions—has become so strong among

269. *Id.*

270. See 158 CONG. REC. 7365, S7370 (daily ed. Dec. 4, 2012) (statement by Sen. Coons); June Zeitlin, *Disability Rights Convention Rejected by U.S. Senate*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/monitor/march-2013/disability-rights-convention.html> (last visited June 7, 2015).

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

272. *Id.*

273. See *id.*

274. Michael P. Farris, *The UN Convention on the Rights of Persons with Disabilities: A Danger to Homeschool Families*, HSLDA (May 29, 2012), <http://www.hslda.org/docs/news/2012/201205250.asp>.

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

276. See *id.* (reporting “opposition by Republicans, a majority of whom have argued that international treaties unduly constrain Washington’s freedom of action in the world or threaten U.S. sovereignty”).

Republicans that they have introduced bills to “prohibit federal courts from referring to foreign laws or rulings in interpreting the U.S. Constitution.”²⁷⁷ In addition, two Supreme Court justices, Justice Ruth Bader Ginsburg and now-retired Justice Sandra Day O’Connor, have even reported receiving anonymous death threats for citing international law in their opinions.²⁷⁸

During the Senate debates on CRPD ratification, those Senators who opposed ratification expressed concern regarding the Convention’s possible intrusion into U.S. state sovereignty, and its impact on existing U.S. laws and policies—particularly the role and authority of CRPD’s monitoring body, the Committee on the Rights of Persons with Disabilities.²⁷⁹ The CRPD Committee consists of members who are elected by States Parties, and now consists of 18 independent experts—mostly people with disabilities—who serve in their individual capacities.²⁸⁰ The CRPD Committee is charged with preparing reviews of country reports and providing “concluding observations” to those countries in response to their reports.²⁸¹ However, all of the CRPD Committee’s findings and responses to country reports are non-binding recommendations, with no authority under domestic law, even if the U.S. were to ratify the CRPD.²⁸²

Opponents to ratification also argued that the CRPD, and all such international treaties, threaten U.S. sovereignty and that somehow ratification would enable the CRPD to supersede U.S. law.²⁸³ However, this opposition faded as most Senators from both parties admitted that the

277. Tony Mauro, *Justice Ginsburg Says Death Threat Fueled by Dispute Over International Law*, CAL. SUP. CT. MONITOR (ONLINE) (Mar. 16, 2006), <http://www.nationallawjournal.com/id=900005449284/Justice-Ginsburg-Says-Death-Threat-Fueled-by-Dispute-Over-International-Law?slreturn=20150507213528>.

278. *Id.* After citing foreign law in their decisions, Justices Ginsberg and O’Connor became targets of online death threats, including one that is quoted as saying: “Okay commandoes, here is your first patriotic assignment. . . . This is a huge threat to our Republic and constitutional freedom. . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.” *Id.*

279. *See CRPD Debate on the Senate Floor 9/20/12*, CSPAN (Sept. 21, 2012), <http://www.c-span.org/video/?c3955480/crpd-debate-senate-floor-92012>.

280. CRPD, *supra* note 7, at art. 34(2)–(3).

281. *Id.* at art. 36(5).

282. *See* 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, 592 (2013); Virginia Knowlton Marcus, *U.S. Can Lead on Rights for Those with Disabilities*, DAILY RECORD, (Aug. 20, 2013), <http://www.legalnews.com/detroit/1379870>.

283. *See* BLANCHFIELD & BROWN, *supra* note 263, at 16.

CRPD is not a threat to U.S. sovereignty, nor does it undermine existing U.S. disability laws.²⁸⁴ In fact, the reservations, understandings, and declarations (RUDs) contained in the CRPD specifically address implementation of the CRPD in relation to U.S. law.²⁸⁵ The Federalism Reservation, proposed by the Obama Administration, specifically states that the CRPD is not a self-executing document and cannot impact state laws or be enforced in court without prior legislative implementation.²⁸⁶

284. *Id.*

285. *Id.*

286. *Id.* at 6; Marcus, *supra* note 282. 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 additional reservations, five understandings, and one declaration, including the following:

a private conduct reservation, which states that the United States does not accept CRPD provisions that address private conduct, except as mandated by U.S. law;

a torture or cruel, 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 U.N. 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 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 United States understands that CRPD prevents disability discrimination with respect 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 United States understands that U.S. law protects disabled persons against unequal pay, and that CRPD does not require the adoption of a comparable framework for persons with disabilities;

a uniformed military employee hiring understanding, which states that the United States 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 United States

Following the transmission of the CRPD to the Senate, the subsequent hearings and debates leading up to the vote on the CRPD focused primarily on the impact of ratification on current U.S. laws.²⁸⁷ Even with additional RUDs, the Senate did not ratify the CRPD nor has the Senate agreed to vote on the CRPD since the failed vote in 2012.²⁸⁸

Another issue of concern, expressed most vehemently by Senator Santorum, was the potential impact of U.S. ratification on parental rights—particularly decisions related to the education of disabled children and

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 CRPD.

BLANCHFIELD & BROWN, *supra* note 263, at 5–6 (footnotes omitted). The version of the treaty with these RUDs was reported favorably to the full Senate by the Foreign Relations Committee (SFRC). *Id.* at 7. The SFRC addressed these concerns by proposing additional RUDs. *Id.*

287. *Id.* at 1–2.

288. *Id.* at 7–8. These RUDs included the following:

a role of the Disabilities Committee understanding, which states that the committee has no authority to compel actions by State Parties, and that the U.S. does not consider the conclusions, recommendations, or general comments issued by the committee as constituting customary international law to be legally binding in the U.S. in any manner;

an abortion-related understanding, which states that nothing in the agreement requires State Parties to provide any health program or procedure; rather, the Convention requires parties to provide health programs and procedures to individuals with disabilities on a non-discriminatory basis;

a best interests of the child understanding, which states that the use of “best interest of the child” in the CRPD Article 7(2) will be applied and interpreted as it is under U.S. law, and that nothing in Article 7 requires a change to existing U.S. law;

a definitions understanding that modifies President Obama’s proposed understanding on the definition of disability—it clarifies that the terms “disability,” “persons with disabilities,” “undue burden” (terms not defined by the CRPD), “discrimination on the basis of disability,” and “reasonable accommodation,” are defined in U.S. law; and

a U.S. obligations declaration, which states that current U.S. law fulfills or exceeds the obligations of the Convention.

Id. at 8 (footnotes omitted). The Senate voted in favor of going into executive session to consider ratification of the Convention. *Id.*

homeschooling.²⁸⁹ Senator Santorum and others argued that the “best interest of the child standard” in the CRPD would “threaten . . . parental rights.”²⁹⁰ Article 7 of the CRPD, titled “Children with Disabilities,” states that, “In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”²⁹¹ Those in opposition argued that this article would change U.S. law by requiring the “best interest of a child” standard to trump parental interests.²⁹² However, it is well known that courts have used the “best interest of the child” standard since at least the 1970’s, and there is no evidence to support the claim that this standard has threatened or harmed parental rights.²⁹³

In addition to alleging a threat to parental rights in Article 7, the opponents of ratification cited Article 24 as undermining the right of parents to decide how and where to educate their children.²⁹⁴ Article 24 ensures the right to education for all children with disabilities.²⁹⁵ The argument that somehow the ratification of the CRPD would undermine parents’ choice and

289. Senator Santorum told supporters: “CRPD threatens U.S. sovereignty and parental rights” Shadee Ashtari, *Rick Santorum Renews Call to Defeat UN Disabilities Treaty*, HUFF POST (Nov. 5, 2013) http://www.huffingtonpost.com/2013/11/05/rick-santorum-disabilities-treaty_n_4220751.html.

290. *See id.*

291. CRPD, *supra* note 7, at art. 7.

292. *See* BLANCHFIELD & BROWN, *supra* note 263, at 18.

293. *See* Jennifer Benning, Note, *A Guide for Lower Courts in Factoring Religion into Child Custody Disputes*, 45 DRAKE L. REV. 733, 736 (1997).

294. *See* Farris, *supra* note 274.

295. CRPD, *supra* note 7, at art. 24. Article 24, in recognizing the right to education, provides:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

c. Enabling persons with disabilities to participate effectively in a free society.

Id.

control over their child's education is especially specious since education is an issue for state and local action, not federal law.²⁹⁶ Since the federal government does not have authority over the role of parents in educating their children, ratification of the CRPD would not affect the rights of students and their parents under state education laws, particularly the right to homeschooling.²⁹⁷ In fact, the Education for All Handicap Children's Act and its subsequent amendments, including the most recent version of the Individuals with Disabilities Education Improvement Act (IDEIA), do not even mention homeschooling. These federal laws give the states the sole authority to decide whether or not to cover homeschooled children with disabilities under the state education laws.²⁹⁸ Even today, there is no clear answer as to whether children with disabilities who are homeschooled are entitled to services under the IDEIA; it depends on each state's law.²⁹⁹ What is clear, however, is that the federal government has no say regarding the decisions of parents to homeschool their children.³⁰⁰ Accordingly, the CRPD would not in any way affect the rights of parents to homeschool their children.³⁰¹

The major force behind the homeschooling opposition to ratification of the CRPD was the HSLDA, which also opposed the U.N. Convention on the Rights of the Child (CRC) and the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³⁰² During a 2013 hearing on the CRPD, Senator Robert Menendez responded to HSLDA's arguments stating that he was "dumfounded" at how the HSLDA spokesperson could take noncontroversial language and "twist it into something that is rather sinister."³⁰³ In response to the specific assertion that

296. See BLANCHFIELD & BROWN, *supra* note 263, at 19.

297. *Id.* at 18.

298. See 20 U.S.C. §§ 1400–1482 (2012).

299. See, e.g., *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1037 (9th Cir. 2000) (holding "pursuant to the IDEA, States have discretion in determining whether home education constitutes an IDEA-qualifying 'private school'"); see generally 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).

300. See BLANCHFIELD & BROWN, *supra* note 263, at 10–11.

301. *Id.*

302. Farris, *supra* note 274.

303. S. EXEC. REP. NO. 113-12, at 109 (July 28, 2014), available at <http://www.gpo.gov/fdsys/pkg/CRPT-113erpt12/html/CRPT-113erpt12.htm> (statement of Senator Menendez).

the CRPD language threatens parental rights and the ability of parents to homeschool their children, he stated emphatically, “The text says nothing about the state stepping into the shoes of the parents. In fact, Article 23 describes in detail protecting parental rights and the rights of the extended family to care for and to make decisions for children with disability.”³⁰⁴ Former Attorney General of the United States, Richard Thornburgh, also addressed the homeschooling issue during the hearing, stating, “Nothing in this treaty prevents parents from homeschooling or making other decisions about their children’s education.”³⁰⁵ The former Attorney General went on to say, “the convention embraces the principles of the Individuals with Disabilities Education Act . . . which emphasizes the importance of the role of parents of children with disabilities in making decisions on behalf of their children.”³⁰⁶

Other lawmakers also raised questions about the CRPD’s possible impact on access to healthcare and the extent to which, if any, the Convention would affect existing laws and policies related to family planning, reproduction, and abortion.³⁰⁷ However, the drafters of the CRPD noted that the CRPD does not take a “position” on these issues.³⁰⁸ In fact,

304. *Id.*

305. *Id.* at 67 (statement of Richard Thornburgh).

306. *Id.*

307. 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 7, 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.*, art. 25. During the negotiation on the CRPD, one of the attorneys from the U.S. Department of Justice stated, it was the understanding of the U.S. that

the phrase “reproductive health” in Article 25(a) of the draft Convention does not include abortion, and its use in that Article does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion. We stated this understanding at the time of adoption of the Convention in the Ad Hoc Committee, and note that no other delegation suggested a different understanding of this term.

Jeanne E. Head, *UN General Assembly Approves Disability Convention*, NATIONAL RIGHT TO LIFE (Dec. 13, 2006), <http://www.nrlc.org/archive/UN/DisabilityConventionApproved.html>.

308. See generally Bret Shaffer, Comment, *The Right to Life, the Convention on the Rights of Persons with Disabilities, and Abortion*, 28 PENN. ST. INT’L L. REV. 265 (2009)

the Editors of America Magazine, The National Catholic Review, wrote in response to the United States' failure to ratify the CRPD 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."³⁰⁹

Protection of the right to reproductive health is an important issue for people with disabilities, particularly women with disabilities—who often face many insurmountable barriers to accessing healthcare in the United States and elsewhere.³¹⁰ Women with disabilities are particularly vulnerable not only to lack of access to prenatal care and other health care, but also to forced sterilization and abortion.³¹¹ Forced sterilization is still performed on women with disabilities around the world under the guise of legitimate medical care.³¹² Researchers have found that "no group has ever been as severely restricted, or negatively treated, in respect of their reproductive rights, as women with disabilities."³¹³ For these reasons, addressing the issue of reproductive health for persons with disabilities was seen as imperative by the drafters of the CRPD and one that seems to concur fully with U.S. laws.³¹⁴

On September 17, 2014, Senator Harkin asked for a unanimous

(reviewing the legislative history of Article 10 of the CRPD and finding "[u]ltimately, the 'right to life' article does not express any opinion on abortion"); 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, 120–25 (2013).

309. *Missed Opportunity to Lead*, AMERICA MAGAZINE: THE NATIONAL CATHOLIC REVIEW (January 7–14, 2013), <http://americamagazine.org/issue/missed-opportunity-lead>.

310. *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, NATIONAL COUNCIL ON DISABILITY, 80 (2012), http://www.ncd.gov/policy/health_care.

311. *See Human Rights Groups Unite Against Forced Sterilisation of Five Women with Disabilities in France*, CENTER FOR REPRODUCTIVE RIGHTS (Aug. 25, 2011), <http://www.reproductiverights.org/press-room/human-rights-groups-unite-against-forced-sterilisation-of-five-women-with-disabilities-in>; Carolyn Frohmader & Stephanie Ortoleva, *The Sexual and Reproductive Rights of Women and Girls with Disabilities*, ICPD BEYOND 2014—INTERNATIONAL CONFERENCE ON HUMAN RIGHTS 2 (July 1, 2013), *available at* http://womenenabled.org/pdfs/issues_paper_srr_women_and_girls_with_disabilities_final.pdf.

312. *See* Frohmader & Ortoleva, *supra* note 311, at 4.

313. *Id.* (citations omitted).

314. *See* KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS*, *supra* note 13, at 202–03, 211–12.

consent vote on the CRPD, which was denied.³¹⁵ He responded by acknowledging the “false claims of those who object to this treaty.”³¹⁶ He went on to say that they “will be overcome [and] 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. It’s a sad day, another sad and irresponsible day in the history of the United States Senate.”³¹⁷

As Senator Harkin observed, not only will ratifying the CRPD not result in the parade of horrors presented by its opponents, but it would also enhance the United States’ credibility abroad. For example, Obama Administration officials have observed that ratification will put the U.S. in the best possible position to influence the international community on disability rights, and that non-ratification would make it “difficult” to advance such interests.³¹⁸ Supporters also noted that CRPD ratification would help protect the rights of US citizens with disabilities travelling abroad.³¹⁹ In particular, ratification of the CRPD will 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 being developed on accessibility and technology access.³²⁰ In this way, ratification of the CRPD will help to ensure that Americans with disabilities will have equal opportunities to live, work, and travel abroad.³²¹ Ratification would also show its commitment to veterans and disability organizations that have worked long and hard for the CRPD’s ratification and to promote awareness about disability issues generally.³²²

315. 160 CONG. REC. S5,663-66 (daily ed. Sept. 17, 2014).

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

317. 160 CONG. REC. S5,663-66; *Senator Harkin*, *supra* note 316.

318. *Convention on the Rights of Persons with Disabilities Before the S. Comm. on Foreign Relations*, Treaty Doc. 112-7 (2012) (statement of Honorable Judith Heumann, Special Adviser for International Disability Rights, U.S. Dep’t of State).

319. *See* BLANCHFIELD & BROWN, *supra* note 263, at 5.

320. *See id.* at 17.

321. *See* Marcus, *supra* note 282.

322. *See id.*; *see also* Pierce Nahigyan, *Why the U.S. Refuses to Ratify the U.N. Disabilities Treaty*, NATION OF CHANGE (March 18, 2014), available at <http://www.nationofchange.org/why-us-refuses-ratify-un-disabilities-treaty-1395147907>.

Moreover, supporters of ratification argued that not ratifying the CRPD would hurt the U.S. by maintaining the status quo of current U.S. disability laws, rather than incorporating the more comprehensive and far reaching ideals envisioned in the CRPD.³²³ Thus, according to this view, ratifying the CRPD would bolster our existing laws, support the millions of individuals with disabilities in the United States who are seeking employment, and increase opportunities for people with disabilities.³²⁴ Moreover, other countries in Europe, as well as Australia, Canada and, Israel, which have strong disability laws modeled after the ADA, have ratified the CRPD.³²⁵ And as the U.S. National Council of Disability has written, most of the CRPD's articles are covered in U.S. law at the same level or are "capable of reaching those levels either through more rigorous implementation and/or additional actions by Congress," and "[n]o legal impediment to U.S. signature and ratification" of CPRD exists.³²⁶ Yet at present, ratification is hardly assured.

V. CONCLUSION

This Article has compared the approach to disability rights contained in the ADA and the CRPD. The U.S. Congress voted to enact the ADA because prior Congresses had refused to amend the existing civil rights laws to include discrimination based on disability, despite repeated attempts to do so. But unlike the Civil Rights Act, the ADA was not the result of a national campaign for equal rights. Although disability rights activists worked for the law's adoption, the ADA was the product of a coalition between disability activists and conservative Republicans. These unlikely allies enacted the ADA primarily to help people with disabilities get off of government benefit programs and into jobs. The way it sought to achieve this result was not with new and potentially costly programs, but rather by giving people with disabilities the right to sue to enforce their rights under the law.

The passage of both the ADA and the subsequent ADAAA marked a turning point in the history of treatment of people with disabilities in the

323. Palmer, *supra* note 282, at 586–87.

324. *See id.*

325. *Convention and Optional Protocol*, *supra* note 16.

326. John R. Vaughn, *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*, NATIONAL COUNCIL ON DISABILITY 3, 6 (May 12, 2008), <http://www.ncd.gov/publications/2008/May122008>.

United States. However, these laws have not resulted in full equality, participation, and acceptance of people with disabilities in American life. As Justin Dart, one of the moving forces behind the Americans with Disabilities Act, commented shortly after the law was enacted, "Our society is still infected by an insidious, now almost subconscious, assumption that people with disabilities are less than fully human and therefore are not entitled to the respect, the opportunities, and the services and support systems that are available to other people as a matter of right."³²⁷

Moreover, according to a recent investigation by the U.S. Senate Committee on Health, Education, Labor and Pensions, major social and economic barriers remain.³²⁸ Nearly one in three people with disabilities live in poverty, which is twice as many as people without disabilities, and fewer than 30 percent of working-age people with disabilities are participating in the workforce, which is far less than the 78 participation rate for workers without disabilities.³²⁹

But it is not just the high rates of unemployment that present challenges to people with disabilities in the United States today. Many people with

327. Justin Dart, *Introduction: The ADA: A Promise to Be Kept*, in LAWRENCE O. GOSTIN & HENRY A. BYER, *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT* (1993).

328. See UNITED STATES SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, *FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES REPORT 8* (2014), available at <http://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf> (finding nearly one in three people with disabilities live in poverty). The Committee found that the disabled population is struggling to find work, maintain needed supports, and access basic infrastructure like transportation. *Id.* at 28–31. The report indicated that prejudice and low expectations compound the situation. *Id.* Those who testified before the Committee presented a litany of the obstacles, including years-long waiting lists for housing, discrimination, and low pay in the workplace. *Id.* at 14, 19, 25. Some said they were afraid to seek out work because they would lose needed services if they earned too much money. *Id.* at 17–18.

329. *Id.* at 3, 7. May 2015 figures from the U.S. Department of Labor's monthly employment report indicate that more Americans with disabilities were employed in May than the month prior, though the unemployment rate for this population remained largely unchanged at 10.1 percent as opposed to the general unemployment rate of 5.5 percent. See Shaun Heasley, *Disability Employment on the Rise*, DISABILITYSCOOP (June 5, 2015), <http://www.disabilitycoop.com/2015/06/05/jobs-may-15/20358/>.

disabilities experience greater costs of daily living as well.³³⁰

Significant portions of their income are put toward the higher costs of finding or creating accessible housing, the added financial and time costs of arranging adequate transportation, arrangements for personal care attendants, and higher out-of-pocket medical expenses. As a result, people with disabilities have less discretionary income and are able to save less for the future or for significant expenditures such as a car, house, or higher education.³³¹

People with disabilities also experience prejudice and low expectations about their potential, which further exacerbates their plight.³³² As one disability studies scholar and activist has written, “Of course, the ADA has helped many people with disabilities, but, when these gains are measured against the daily reality experienced by those with disabilities, the law merely calls attention to the gross lack of equality.”³³³ Perhaps even more than its limitations on who is and is not covered, the ADA does not in any way hold society responsible for the substantial limitations a person with a disability may face. Even the most recent version of the law reinforces the narrative of the person as abnormal and not able. Thus, based on this stigma, as well as the continuing discrimination and exclusion of people with disabilities even after the ADAAA, it appears obvious that the U.S. needs to think of new ways to realize the goal of equality for all people with disabilities that moves beyond the non-discrimination approach of the ADA.

The Convention on the Rights of Persons with Disabilities presents a new approach to disability rights. As demonstrated in this Article, the CRPD recognizes that changes in laws, policies, and even long held beliefs and practices will need to occur to help people with a disabilities realize their right to equality. Rather than asking how the person with a disability will manage on his or her own, or what accommodations an employer may provide to a particular employee, as is required by the ADA, the CRPD asks how society can change to ensure that needed accommodations, support, and assistance are provided to a person with a disability. In this way, the CRPD may be an “important source for evaluating and defining human relations in

330. *Id.* at 7.

331. *Id.* (citing SOCIAL POLICY RESEARCH CENTRE, *THE COSTS OF DISABILITY AND THE INCIDENCE OF POVERTY* (2006)).

332. *See id.* at 26–29.

333. William J. Peace, *Parenting and Disability: The Final Frontier*, 5 *HLRe* 101, 103 (2015).

terms of care, reciprocity and interdependence.”³³⁴ Rather than distinguishing between people who are perceived as independent and valued in society from those who are dependent and devalued,³³⁵ the CRPD offers interdependence—of rights as well as of human beings—as a way to promote social relations as a desired social goal. However, embracing this new view of the value of social relations may impose “significant burdens on states to ensure collective health and well-being, commit to expansive social welfare and community economic development programs, and cease all practices which engender disabling violence.”³³⁶ Thus, even if a country is committed to change (which, given the current global economic situation, is unlikely in most countries) such change will take time.

The goal in arguing that the U.S. should look to the CRPD as a model for a new approach to disability rights is not to argue for an end to rights-based discourse or for the repeal of the ADAAA. The ADAAA and all of the other U.S.’s disability-related laws will and should continue to play an important role internationally as models for other countries’ domestic laws, and in our country, on the lives of our fellow citizens with disabilities. But now is the time to use the principles and language of the CRPD, as discussed in this Article, to improve the implementation of the ADAAA. By re-interpreting the ADAAA in light of the CRPD, we can expand the notion of what the right to equality means for persons with disabilities, regardless of whether or not the Senate votes to ratify the CRPD.³³⁷

334. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS*, *supra* note 13, at 301 (quoting Susan Wendell, *Toward a Feminist Theory of Disability*, 4 *HYPATIA: FEMINIST ETHICS & MED.* 104 (1989)). *See generally* BARBARA HILLYER, *FEMINISM AND DISABILITY* (1993); SUSAN WENDELL, *THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY* (1996).

335. As Eva Kittay has written, this view of equality obscures the very real facts of dependency for everyone when they are young, for most people at various periods of their lives when they are ill or old and infirm, for most people who are disabled, and for all those engaged in unpaid dependency work. In that way, it obscures the innumerable ways persons and groups are interdependent in the modern world. KITTAY, *supra* note 225, at 83–113; *see generally* EVA FEDER KITTAY & ELLEN K. FEDER, *THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY* (2002).

336. *See* Ribet, *supra* note 131, at 200 (footnotes omitted). Indeed, Ribet acknowledges that she is “not unsympathetic to the imperative to provide at least an initial antidiscrimination framework as opposed to nothing.” *Id.*

337. Having considered the substantial achievements of the CRPD, it is also important to recognize its flaws. This Author’s book, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* (2015), discusses various challenges within the CRPD and posed by it. For other critiques

Indeed, the adoption of a CRPD-based approach to U.S. disability laws will require the inclusion of positive rights to overcome the existing unequal position of people with disabilities resulting from past discrimination. It also will require additional expenditures and enforcement of new laws to protect the right of people with disabilities to health care, housing, education, transportation, personal care, and supports. The CRPD also challenges us to consider system-wide approaches to disability rights and perhaps to re-interpret the ADA's definition of disability and reasonable accommodation as well as its defenses such as undue hardship and fundamental-alteration.³³⁸ To remain a credible leader in the area of disability rights internationally, the U.S. should consider how to supplement existing legal protections with additional legislation to advance the principles of the CRPD, including its recognition of the indivisibility of civil and political rights and economic, social, and cultural rights. To effect the changes needed to ensure full inclusion and participation of people with disabilities in American society, the U.S. should adopt the CRPD's human rights approach and amend specific provisions of current laws as well as consider new legislation to provide protection for the full panoply of rights included in the CRPD.

The CRPD's human rights approach to equality looks beyond merely protection of negative rights, such as the right to be free from discrimination, as in the ADA, to the enforcement of such positive rights as the right to be valued as a person entitled to human rights, respect, dignity, and supports,

of the CRPD, see Ribet, *supra* note 131. Ribet argues that the CRPD's failure to include any specific mechanisms to dismantle "racism, patriarchy, and economic exploitation that are inherent in disability subordination," *id.* at 201, reinforces the idea that disability subordination is reducible to individual experiences of prejudicial or disparate treatment, and that questions of disablement, or basic collective and individual rights to health and quality of life are not essential to ensuring material and meaningful disability equality. *Id.* at 194. For additional critical discussion of the CRPD, see generally Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71 (2003). In this article, the author criticizes the CRPD for addressing disability as an issue distinct from race and gender and states, "[t]he current theoretical foundations, organizational structure, and practice of the United Nations and many nongovernmental organizations (NGOs) does not permit a nuanced human rights analysis that would account for multiple forms of human rights abuses occurring simultaneously." *Id.* at 74. Finally, for a discussion of the CRPD and religious freedoms, see Silecchia, *supra* note 308, at 125–30 (arguing the CRPD infringes on religious rights).

338. Compare CRPD, *supra* note 7, at art. 2 (defining disability-based discrimination and reasonable accommodations), with 42 U.S.C. §§ 12102(1), 12111(a) (2012) (defining disability and reasonable accommodations).

as needed.³³⁹ The CRPD also offers the opportunity to rethink the long held adherence to individualism, self-reliance, and independence in favor of a model of equality that promotes the need for support to realize one's ability to exercise independent thought and action. Under the CRPD, a society may no longer exclude a group of people based on their label of disability or their dependency on others.³⁴⁰ The CRPD values, as a social good, the idea that people need help from time to time, and that such help in no way diminishes their entitlement to equality.³⁴¹ Indeed, this is one of the overriding messages of the CRPD. The CRPD recognizes the rights *and* needs of persons with disabilities.³⁴² By contrast, the ADA views independence and self-sufficiency as the goal.³⁴³

For far too long, within the classic rights-based theory of justice, the right to "independence" has been misinterpreted to mean the right to be left alone to fend for oneself. However, the right to independence, as envisioned in the CRPD, does not require people with disabilities to choose between their right to independence, and their right to equality; rather, it enables them to receive the support they need to be able to participate as equal members of society.³⁴⁴ This new right to support moves international human rights towards substantive equality—an equality that puts an end to societal structures that deprive people with disabilities of their agency and their right to make decisions about their own lives.³⁴⁵

339. See CRPD, *supra* note 7, at art. 1; see also 42 U.S.C. § 12101(a).

340. See CRPD, *supra* note 7, at art. 1.

341. See *id.* at art. 2.

342. See *id.* at art. 1.

343. See 42 U.S.C. § 12101(a).

344. See CRPD, *supra* note 7, at art. 28–30.

345. This new right is also grounded in feminist critique of the "ethics of justice" which views society as a group of "independent autonomous units who co-operate only when the terms of co-operation are such as make it further the ends of each of the parties." BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* 166 (1973). Critics of this ethics of justice argue that the rule of law, which is seen as neutral, abstract and elevated, promotes an individualistic "self-versus others" approach; as such, this approach is said to "limit legal thinking and inhibit necessary social change." Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 318 (Katharine T. Bartlett & Rosanne Kennedy eds., 1989). For example, Catherine McKinnon has argued that the rule of law, institutionalizes the power in its male form and of men over women. Catherine McKinnon, *Difference and Dominance*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 276–77 (D. Kelly Weisberg ed., 1993). Others, such as Martha Nussbaum, have argued that the legalistic conception of equality itself operates on the illusion that society is

Moreover, the CRPD offers the opportunity to expand the rights of people with disabilities beyond civil and political rights to economic, social, and cultural rights. In a recent paper, Philip Alston, a leading international human rights scholar, argued that the U.S. has a long history of addressing not only the civil and political right but also the economic, social, and cultural rights and that it should return to the tradition.³⁴⁶

Of course, the success of the CRPD, like any law, ultimately depends on the willingness of the government to enforce its mandates.³⁴⁷ One of the ways in which the CRPD hopes to translate its terms into enforceable domestic law, however, is by ensuring that people with disabilities themselves play a major role in the implementation of disability laws on the national and international levels.³⁴⁸ Although people with disabilities, alone, cannot force governments to comply with the terms of the CRPD, ensuring a prominent role for people with disabilities in the development of policies and laws that affect their lives necessarily increases awareness about the need for greater vigilance for the protection of the equal rights of people with disabilities. In this way, the CRPD may have the potential to accomplish what has not yet been achieved in the U.S.

composed of free, equal, and independent individuals who can decide whether to associate with one another. *See generally* MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).

346. *See generally* Alston, *supra* note 256.

347. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS*, *supra* note 13, at 11.

348. *Id.*