

## NOTES

### RECLAIMING AMERICA AS THE LAND OF OPPORTUNITY: HOW INTERNATIONAL LAW CAN HELP THE UNITED STATES INCREASE EMPLOYMENT FOR PERSONS WITH INTELLECTUAL DISABILITIES

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#### INTRODUCTION

In his book *The Epic of America*, James Truslow Adams defines the “American Dream” as “a dream of a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”<sup>1</sup> This “American Dream” is made possible by the foundational principles of freedom and equality that provide the opportunities that have undoubtedly caused the United States to achieve economic and societal heights. But unequal access to opportunity remains for persons with intellectual disabilities seeking employment.<sup>2</sup> Less than half of working-age Americans with intellectual disabilities are in the labor force, creating economic hardship at an individual level and suboptimal productivity on a national level.<sup>3</sup> These numbers lag behind a number of peer countries, raising

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1. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1st ed. 1931).

2. “[P]eople with intellectual impairments [are] three to four times less likely to be employed than people without disabilities – and more likely to have more frequent and longer periods of unemployment.” WORLD HEALTH ORG., *WORLD REP. ON DISABILITY*, 237-38 (2011) [hereinafter *WORLD REP. ON DISABILITY*] (citing M. M. L. Verdonchot, et al., *Community Participation of People with an Intellectual Disability: A Review of Empirical Findings*, 53(4) *J. INTELL. DISABILITY RES.*, 303-18 (2009)).

3. “The labor force” consists of people who are “currently employed or searching for work.” *National Snapshot of Adults with Intellectual Disabilities in the Labor Force*, SPECIAL OLYMPICS, <https://www.specialolympics.org/our-work/research/national-snapshot-of-adults-with-intellectual-disabilities-in-the-labor-force> [https://perma.cc/5JKP-UUX3]. The same study found that 28 percent

the question: what changes must be made to American disability law to enable the United States to truly be the “land of opportunity”?<sup>4</sup>

Although disability law is closely linked with scientific research, the law progresses slower than the science.<sup>5</sup> The U.S. utilizes anti-discriminations laws, which punish employers who engage in discriminatory behaviors, as the primary method to combat the challenges people with intellectual disabilities in the workplace face.<sup>6</sup> However, these laws have not kept pace with advances in education, treatments, and accommodations which have increased the employment potential for persons with intellectual disabilities.

Many employers lack a basic understanding as to the modern capabilities of persons with intellectual disabilities.<sup>7</sup> Due to this lack of understanding, other countries have begun creating programs to educate potential employers on hiring persons with intellectual disabilities.<sup>8</sup> In addition to employer education, many of these programs connect interested employers with people seeking employment and subsidize initial job training.<sup>9</sup>

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of working-age Americans with intellectual disabilities have never held a job. *Id.*

4. The World Health Organization conducted a deep study into the lives of persons with disabilities, including a survey of employment statistics from eighteen “developed” countries. WORLD REP. ON DISABILITY, *supra* note 2, at 237-38. The U.S. ranked thirteenth out of the eighteen selected countries for “employment ratio,” which compares a country’s employment rate of persons with disabilities against the employment rate of the overall population. *Id.*

5. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 [hereinafter ADA] (naming disability as a protected class beginning Jul. 26, 1990). See also, e.g. *What is Down Syndrome?*, NAT’L DOWN SYNDROME SOC’Y., <https://www.ndss.org/about-down-syndrome/down-syndrome/> [<https://perma.cc/KQY9-VTT9>] (crediting French physician Jérôme Lejeune with the identification of the chromosomal condition causing Down syndrome in 1959); Bonnie Evans, *How Autism Became Autism: The Radical Transformation of a Central Concept of Child Development in Britain*, 26 HIST. HUM. SCI., no. 3, 2013, at 31 (crediting Leo Kanner of Johns Hopkins University with labeling a number of symptoms associated with autism in 1943).

6. See ADA, 42 U.S.C. §§ 12112, 12117 (defining illegal acts of discrimination and incorporating the enforcement powers, remedies, and procedures found in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4, et seq.).

7. Two hundred and thirty companies responded to a survey regarding 14 common concerns employers have with the workplace capabilities of persons with intellectual disabilities. INST. FOR CORP. PRODUCTIVITY, EMPLOYING PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 14 (Lorrie Lykins et al. eds., 2014). When comparing responses about concerns held before and after a company had begun employing persons with intellectual disabilities, the number of affirmative responses for each of the 14 surveyed concerns dropped by an average of 42 percent. *Id.*

8. See, e.g., *How It Works*, READY WILLING & ABLE, <http://readywillingable.ca/how-it-works/> [<https://perma.cc/T6CC-LZRU>] [hereinafter RWA: *How It Works*]; *Opportunities Fund for Persons with Disabilities*, EMP. AND SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/programs/opportunity-fund-disability.html> [<https://perma.cc/L22K-L66P>] [hereinafter *Opportunities Fund for Persons with Disabilities*].

9. See, e.g., *How RWA Supports Businesses*, READY WILLING & ABLE,

The rise in the popularity of these programs began in the mid-2000s, corresponding with the consideration and adoption of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD).<sup>10</sup> The CRPD set forth principles, goals, and obligations for protecting and enabling persons with disabilities, serving as the starting point from which each ratifying Member State could update their own legal framework.<sup>11</sup> The CRPD was ratified by 87 percent of the U.N.'s Member States within the first ten years after entering into force, making it the fastest-ratified international treaty.<sup>12</sup> Despite this widespread success, at the time of this Note, the United States is not among the Member States to ratify the CRPD.<sup>13</sup> To match the low unemployment rates of persons with intellectual disabilities found in peer countries, the U.S. must ratify the CRPD and supplement outdated anti-discrimination laws with employment programs for persons with intellectual disabilities.

#### HISTORICAL OVERVIEW OF DISABILITY LAW IN THE U.S.

##### I. THE ADVENT OF U.S. ANTIDISCRIMINATION LAW

Despite the relative newness of U.S. federal antidiscrimination statutes protecting persons with disabilities—with the Americans with Disabilities Act (ADA) in effect only since 1990—many important developments in case law and legislation occurred during the preceding decades, setting the foundation for the ADA.<sup>14</sup> The ancestry of disability law in the U.S. can be traced back to perhaps the most important case to interpret the Fourteenth Amendment Equal Protection

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<http://readywillingable.ca/employers/rwa-employers/> [<https://perma.cc/C7Y5-HL8D>] [hereinafter *How RWA Supports Businesses*].

10. Convention on the Rights of Persons with Disabilities, U.N., *opened for signature* Mar. 30, 2007, 46 I.L.M. 443 (entered into force May 3, 2008) [hereinafter Convention on the Rights of Persons with Disabilities]. Ratifying Member States agreed to “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRPD].” *Id.* at art. 4.

11. *Id.* at art. 3-4 (providing the “general principles” and “general obligations” of the CRPD).

12. *10th Anniversary of the Adoption of Convention on the Rights of Persons with Disabilities (CRPD)*, U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-10th-anniversary-of-the-adoption-of-convention-on-the-rights-of-persons-with-disabilities-crpd-crp-10.html> [<https://perma.cc/7CWM-TVGX>] (naming 168 States and the European Union as ratifying entities as of Nov. 11, 2016).

13. *Status of Treaties: Convention on the Rights of Persons with Disabilities*, U.N., [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en) [<https://perma.cc/4NJG-BGKP>] [hereinafter *Status of Treaties: Convention on the Rights of Persons with Disabilities*]. The U.S. signed the CRPD on Jul. 30, 2009, but has yet to ratify it. *Id.*

14. ADA, 42 U.S.C. 12101, et seq.

Clause: *Brown v. Board of Education*.<sup>15</sup> In Chief Justice Warren's opinion for this 1954 case, the U.S. Supreme Court held that, because "separate educational facilities are inherently unequal... the segregation complained of deprived [the plaintiffs and similarly situated individuals] the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>16</sup> This holding occurred during the early stages of what would be many breakthroughs for racial equality in the 1950s and 1960s.

Strides toward racial equality were made over the course of the following decade, culminating in the passage of the Civil Rights Act of 1964 (CRA).<sup>17</sup> The CRA entitled all persons "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."<sup>18</sup> Title VII of the CRA prohibited employment discrimination against these protected classes by any employer who has fifteen or more employees.<sup>19</sup> The structure of and protections contained within this monumental legislation later served as a model for the Americans with Disabilities Act of 1990.<sup>20</sup>

The CRA established the Equal Employment Opportunity Commission (EEOC) to investigate and enforce Title VII claims.<sup>21</sup> Prior to filing an employment discrimination lawsuit, prospective plaintiffs must file a Charge of Discrimination with the EEOC.<sup>22</sup> Following an investigation, the EEOC may

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15. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (holding that "separate but equal" facilities in education are in violation of the Equal Protection Clause of the Fourteenth Amendment).

16. *Brown v. Board*, 347 U.S. at 495.

17. Civil Rights Act of 1964, 42 U.S.C. § 2000a, et seq.

18. Civil Rights Act of 1964, 42 U.S.C. § 2000a.

19. 42 U.S.C. §2000e(b) (defining "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."). This definition exempts: "(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers." 42 U.S.C. §2000e(b).

20. *Introduction to the ADA*, C.R. DIVISION, U.S. DEP'T OF JUST., [https://www.ada.gov/ada\\_intro.htm#:~:text=Modeled%20after%20the%20Civil%20Rights,law%20for%20people%20with%20disabilities](https://www.ada.gov/ada_intro.htm#:~:text=Modeled%20after%20the%20Civil%20Rights,law%20for%20people%20with%20disabilities) [<https://perma.cc/B68R-X4F2>] [hereinafter *Introduction to the ADA*].

21. See 42 U.S.C. § 2000e-4.

22. *Filing a Charge of Discrimination with the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/S47H-W4GW>] [hereinafter *Filing a Charge of Discrimination with the EEOC*].

issue a Notice of Right to Sue.<sup>23</sup> Only after receiving this notice may an employee file a discrimination suit against their employer.<sup>24</sup> The EEOC may also file suit on behalf of the employee.<sup>25</sup> “When deciding whether to file a lawsuit, the EEOC considers factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC’s efforts to combat workplace discrimination.”<sup>26</sup>

In the 1970s, “equal opportunity” legislation and case law in the U.S. began to expand beyond the subjects of race and gender. *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, the “first notable case to deal with the constitutionality of segregating mentally disabled students in the educational system,” was heard in the Eastern District of Pennsylvania in 1972.<sup>27</sup> The plaintiffs included the families of thirteen children with intellectual disabilities.<sup>28</sup> These families challenged several Pennsylvania statutes related to the education of children with intellectual disabilities.<sup>29</sup> These statutes

relieve[d] the State Board of Education from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable<sup>30</sup> . . . [,] allow[ed] an indefinite postponement of admission

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23. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/A8FV-K795>] [hereinafter *Filing a Lawsuit*].

24. *Id.* The employee has 90 days from the issuance of the Notice of Right to Sue in which to file a discrimination lawsuit. *Id.*

25. *Id.*

26. *Id.*

27. Lauren Peña, Assistant Director of Student Recruitment, Ind. Univ. Robert H. McKinney School of Law, Address at the Ind. Univ. Robert H. McKinney School of Law Symposium: *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act* (Nov. 16, 2015) [hereinafter *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*] (transcript available in the Ind. Univ. Robert H. McKinney School of Law Library) (citing *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Penn., et al.*, 343 F. Supp. 279 (E.D. Pa. 1972) as the first notable case on the subject of segregating children with intellectual disabilities in education). The organization representing the plaintiffs changed its name in 1981 to the Association for Retarded Citizens (ARC). *Our History*, THE ARC, <https://thearc.org/about-us/history/> [<https://perma.cc/4KH4-JX9M>]. Due to increasing usage of the word “retarded” in derogatory contexts, the organization dropped the acronymic style in 1991 in favor of its current name, “The Arc.” *Id.*

28. *Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Penn., et al.*, 343 F. Supp. 279, 281-82 (E.D. Pa. 1972) [hereinafter *PARC v. Commonwealth of Penn.*]. The named defendants included the Commonwealth of Pennsylvania, Secretary of Welfare, State Board of Education, and the thirteen school districts in which the plaintiffs resided. *Id.* at 282. The plaintiffs also joined all school districts in Pennsylvania as a class to be represented by the thirteen named school districts. *Id.*

29. *See id.*

30. *Id.* (citing 24 Purd. Stat. Sec. 13-1375). “The burden of caring for such a child then

to public school of any child who has not attained a mental age of five years<sup>31</sup> . . . [,] excuse[d] any child from compulsory school attendance whom a psychologist finds unable to profit therefrom,<sup>32</sup> . . . [, and] define[d] compulsory school age as 8 to 17 years, [which the schools] used in practice to postpone admissions of retarded children until age 8 or to eliminate them from public schools at age 17.<sup>33</sup>

During the pre-trial stages, the parties agreed to a settlement in which the Attorney General of the Commonwealth would issue Opinions directing the Commonwealth to apply the challenged statutes as requested by the plaintiffs.<sup>34</sup> The settlement concluded with the promise that “[every] retarded person between the ages of six and twenty-one shall be provided access to a free public program of education and training appropriate to his capacities.”<sup>35</sup>

Some school districts in Pennsylvania initially argued that the Court should reject the settlement; however, only one defendant school district maintained its challenges through the date of the final hearing.<sup>36</sup> These challenges, based on procedural questions of jurisdiction and abstention, were rejected by the Court.<sup>37</sup> Although the lone school district argued the settlement should be rejected solely on procedural grounds, the Court’s opinion also addressed the “fairness” of the agreement.<sup>38</sup> At the conclusion of this discussion, the Court stated that

We have absolutely no hesitation about approving the [settlement] as fair and reasonable to the plaintiffs. . . . This is a noble and humanitarian end in which the Commonwealth of Pennsylvania has chosen to join. Today, with the following Order, this group of citizens will have new hope in their quest for a life of dignity and self-sufficiency.<sup>39</sup>

In *Peter Mills, et al. v. Board of Educ. of Dist. of Columbia, et al.*, another case from 1972, the U.S. District Court for the District of Columbia “established the principle that a lack of funding was not sufficient to deny educational services

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shift[ed] to the Department of Welfare which ha[d] no obligation to provide any educational services for the child.” *Id.* at 282. Plaintiffs argued this statute was unconstitutional on its face and as applied. *Id.* at 283.

31. *Id.* at 282 (citing 24 Purd. Stat. Sec. 13-1304). Plaintiffs argued this statute was unconstitutional on its face and as applied. *Id.* at 283.

32. *Id.* at 282 (citing 24 Purd. Stat. Sec. 13-1330). Plaintiffs argued this statute was unconstitutional only as applied. *Id.* at 283.

33. *Id.* at 282 (citing 24 Purd. Stat. Sec. 13-1326). Plaintiffs argued this statute was unconstitutional only as applied. *Id.* at 283.

34. *See id.* at 285-86.

35. *Id.* at 287. The agreement, submitted Oct. 7, 1971, set Sep. 1, 1972 as the deadline by which the Commonwealth must have achieved this goal. *Id.* at 285, 288.

36. *See id.* at 290.

37. *See id.* at 290-300.

38. *See id.* at 300.

39. *Id.* at 302.

to children with disabilities.”<sup>40</sup> The case consisted of the families of seven children with intellectual disabilities claiming that the District of Columbia Public Schools improperly excluded the plaintiffs and similarly-situated children from access to public education.<sup>41</sup> “[I]n a 1971 report to the Department of Health, Education and Welfare, the District of Columbia Public Schools admitted that an estimated 12,340 handicapped children were not to be served in the 1971-72 school year.”<sup>42</sup> The parties stipulated that D.C. law, as enacted by the U.S. Congress, required the Board of Education of the District of Columbia to provide “publicly supported education to all of the children of the District, including these ‘exceptional’ children.”<sup>43</sup> The parties also agreed that these children were owed “a constitutionally adequate prior hearing and periodic review” of their education plan.<sup>44</sup> The defendants admitted they had failed to comply with these statutory requirements and entered into an interim stipulation with the plaintiffs on December 20, 1971 in which they pledged to create and implement a plan to remedy the plaintiffs’ claims.<sup>45</sup>

The Board of Education for the District of Columbia failed to promptly provide or implement a remedial plan, and the Court heard arguments on March 24, 1972.<sup>46</sup> The defendants argued that the cost of plaintiffs’ relief was too high without a substantial increase in funding.<sup>47</sup> The Court was not persuaded, stating that the defendants’ “failure to . . . include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and [defendants’] failure to afford [plaintiffs] due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.”<sup>48</sup> The Court concluded that even insufficient funds “must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.”<sup>49</sup>

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40. Lauren Peña, *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, *supra* note 27 (citing Peter Mills, et al. v. Board of Educ. of Dist. of Columbia, et al., 348 F. Supp. 866 (D.D.C. 1972)).

41. *See* Mills, et al. v. Board of Educ. of Dist. of Columbia, et al., 348 F. Supp. 866, 868 (D.D.C. 1972).

42. *Id.* at 868-69.

43. *Id.* at 870-71 (citing District of Columbia Code, 31-103).

44. *Id.* at 871.

45. *See id.* at 871-72.

46. *See id.* at 873.

47. *Id.* at 875. The defendants argued that any sufficient remedial plan would require either [1] millions of dollars of additional congressional funding or [2] a diversion of millions of dollars of education funding meant for children outside the plaintiffs’ class. *Id.*

48. *Id.* at 875-76. The Court found that the duty to provide the plaintiffs with a publicly supported education, due process hearings, and periodical review stemmed from “the Constitution of the United States, the District of Columbia Code, and [the Board’s] own regulations.” *Id.* at 876.

49. *Id.* The Court went on to state that equity does not permit insufficient funding “to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.” *Id.*

## II. RECOGNIZING DISABILITY AS A PROTECTED CLASS

While courts around the U.S. were beginning to recognize the rights of children with intellectual disabilities in education, Congress passed the Rehabilitation Act of 1973.<sup>50</sup> Section 504 of the Rehabilitation Act (hereinafter, “Section 504”) was the “first major law prohibiting discrimination in employment on the basis of disability.”<sup>51</sup> The Rehabilitation Act of 1973 used the term “handicapped individuals” to identify the class of protected persons.<sup>52</sup> In part, the Rehabilitation Act sought to “promote and expand employment opportunities in the public and private sectors for handicapped individuals.”<sup>53</sup> Specifically, this law made it illegal for federal government agencies, federal contractors, and recipients of federal financial assistance to discriminate against handicapped individuals in employment on the basis of their disability.<sup>54</sup> The definition for “handicapped individuals,” as applied to employment discrimination, was expanded by the Rehabilitation Act Amendments of 1974 to include “any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”<sup>55</sup> Before too long, states began adopting their own statutes based on the Rehabilitation Act.<sup>56</sup>

The next breakthrough in U.S. federal disability law came in 1975 with the Education of All Handicapped Children Act (EHA), which Congress reauthorized and renamed the Individuals with Disabilities Education Act (IDEA) in 1990.<sup>57</sup> This act, authored in the U.S. House of Representatives by Congressman John Brademas of Indiana,<sup>58</sup> was created in response to the large number of federal

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50. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended 29 U.S.C. §§ 701-96).

51. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 272 (Robert C. Clark et al., eds., Concise 8th ed. 2015) [hereinafter *EMPLOYMENT LAW: CASES AND MATERIALS*].

52. Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 360 [current version at 29 U.S.C. § 705(6)].

53. Pub. L. No. 93-112, § 2(8), 87 Stat. 355, 357.

54. *EMPLOYMENT LAW: CASES AND MATERIALS*, *supra* note 51, at 272 (citing Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 501, 503-04, 87 Stat. 355, 390-94).

55. Rehabilitation Act Amendments of 1974, Pub. L. 93-516, § 111(A), 88 Stat. 1617, 1619 [current version at 29 U.S.C. § 705(20)] (defining “individual with a disability”). This is the modern definition for “handicapped individual” and is also the same language used to define the term “disability” in the Americans with Disabilities Act of 1990. 42 U.S.C. § 12102(1) (2008).

56. *EMPLOYMENT LAW: CASES AND MATERIALS*, *supra* note 51, at 272.

57. Education of All Handicapped Children Act, Pub. L. 94-142 (1975); Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1142 (1990).

58. Prof. Frank Sullivan, Jr., Professor of Law, Ind. Univ. Robert H. McKinney School of Law, *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, *supra* note 27 (crediting Congressman John Brademas for authoring IDEA). Congressman John Brademas served for eleven consecutive terms in the U.S. House of Representatives from 1959 through 1981.



lawsuits brought by the families of children with disabilities during the three years since the decisions in *Pennsylvania Association for Retarded Children and Mills*.<sup>59</sup> At that time, “[t]here were nearly eight million children with disabilities in the United States, less than half of whom were receiving an appropriate education.”<sup>60</sup> Under IDEA, federal funding for a state’s department of education became contingent on the state’s adherence to policies meant to remedy shortcomings in the education of children with disabilities.<sup>61</sup> In addition to the advancements in education for children with disabilities, IDEA required that “each recipient of assistance [under IDEA] make positive efforts to employ and advance in employment qualified individuals with disabilities in [IDEA-assisted] programs.”<sup>62</sup>

### III. INTERPRETING SECTION 504 OF THE REHABILITATION ACT THROUGH THE COURTS

As is often the case with groundbreaking legislation, the boundaries of the new disability antidiscrimination statutes were undefined at the time of enactment. In a 1979 decision, *Southeastern Community College v. Davis*, the U.S. Supreme Court outlined some limitations to Section 504.<sup>63</sup> Davis, a person with a “severe hearing disability,” sought admission into a registered nurse college program.<sup>64</sup> The program was offered by Southeastern Community College

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*Brademas John*, OFF. HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/9734> [<https://perma.cc/JV3X-CV5A>]. In addition to authoring IDEA, Congressman Brademas sponsored the Rehabilitation Act of 1973. H.R. REP. NO. 8070 (1973).

59. The movement to protect the education rights of children with disabilities “spurred advocates to bring more than 30 additional federal cases before the courts.” Lauren Peña, *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, *supra* note 27.

60. Prof. Frank Sullivan, Jr., *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, *supra* note 27 (quoting important findings of the House and Senate subcommittee hearings on the bill that led to IDEA, the Education for All Handicapped Children Act). Congressman Brademas remarked that these statistics represented “a waste of one of our most valuable resources, our young people, and the potential they possess to become contributing and self-sufficient members of society.” Prof. Frank Sullivan, Jr., *Celebrating the 40<sup>th</sup> Anniversary of the Individuals with Disabilities Education Act*, *supra* note 27 (quoting Congressman Brademas’s remarks made during the debate for the final passage of the bill).

61. Each fiscal year, a state must file a plan with the U.S. Secretary of Education that makes assurances that the state can meet a number of conditions, including: provide a free education to all children with disabilities with certain enumerated exceptions; create an individualized education program for all children who qualify; and place children with disabilities in the least restrictive environment necessary. 20 U.S.C. § 1412.

62. 20 U.S.C. § 1405.

63. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

64. *Id.* at 400.

(hereafter, "Southeastern"), "a state institution that receive[d] federal funding."<sup>65</sup> Davis "had difficulty understanding questions asked" during an admissions interview with a member of the nursing school faculty and was questioned about her hearing problems.<sup>66</sup> After Davis admitted to "a history of hearing problems and dependence on a hearing aid," the interviewer recommended that Davis "consult an audiologist."<sup>67</sup>

The audiologist diagnosed Davis with "bilateral, sensori-neural hearing loss."<sup>68</sup> The audiologist recommended a change in hearing aids, which would allow Davis "to detect sounds 'almost as well as a person would who has normal hearing.'"<sup>69</sup> However, even with the hearing aids, Davis would not be able to "discriminate among sounds sufficiently to understand normal spoken speech."<sup>70</sup> Instead, the hearing aids simply allowed others to get Davis's attention.<sup>71</sup> Davis would need to continue relying on eye contact and lipreading for effective communication with others.<sup>72</sup>

Southeastern requested the Executive Director of the North Carolina Board of Nursing to review the audiology report.<sup>73</sup> Based on the report, the Executive Director recommended that Southeastern deny Davis's application.<sup>74</sup> The recommendation was based on two theories. First, there was concern that Davis's communication difficulties "made it unsafe for her to practice as a nurse."<sup>75</sup> Second, the Executive Director believed that any accommodations for Davis's hearing disability would "be the same as denying her full learning to meet the objectives of [Southeastern's] nursing programs."<sup>76</sup> Based on this advice, Southeastern denied Davis's application.<sup>77</sup> Southeastern reconvened a panel to reconsider the decision at Davis's request, but ultimately decided to deny the application a second time.<sup>78</sup>

Davis filed suit in federal court, "alleging both a violation of Section 504 of the Rehabilitation Act of 1973 . . . and a denial of equal protection and due process."<sup>79</sup> The district court ruled in favor of Southeastern, citing a great deal of

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 401 (citing the audiologist's report).

69. *Id.* (citing the audiologist's report).

70. *Id.* (citing the audiologist's report).

71. *See id.* (citing the audiologist's report).

72. *See id.* (citing the audiologist's report). At that time, Mary McRee was the Executive Director of the North Carolina Board of Nursing. *Id.*

73. *See id.* at 401.

74. *Id.*

75. *Id.*

76. *Id.* at 402 (quoting the Mary McRee).

77. *Id.*

78. *Id.* Mary McRee reiterated the same concerns after she was consulted again by the second panel. *Id.*

79. *Id.* at 402-03. Davis cited the Fourteenth Amendment for her equal protection and due

concern for the “potential of danger to future patients in such situations.”<sup>80</sup> The Court of Appeals for the Fourth Circuit reversed this decision and concluded, based on its understanding of controlling federal regulations, “that the District Court had erred in taking respondent’s handicap into account in determining whether she was ‘otherwise qualified’ for the program, rather than confining its inquiry to her ‘academic and technical qualifications.’”<sup>81</sup>

The U.S. Supreme Court, granting certiorari “[b]ecause of the importance of this issue to the many institutions covered by [Section] 504,” reversed the Fourth Circuit’s decision.<sup>82</sup> In a unanimous decision authored by Justice Powell, the Court held that “Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.”<sup>83</sup> Therefore, the Court defined an “otherwise qualified person” under Section 504 as “one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>84</sup> The Court rejected the Fourth Circuit’s interpretation of the federal regulations relating to Section 504 by citing an explanatory note which states that “legitimate physical qualifications may be essential to participation in particular programs.”<sup>85</sup> By finding that only the federal government was required to take affirmative action “for the hiring, placement, and advancement of handicapped individuals,” and that the Rehabilitation Act of 1973 distinguished “between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps,” the Court concluded that there was no “intent to impose an affirmative-action obligation on all recipients of federal funds.”<sup>86</sup>

Disability rights activists were able to secure a better result in *Consolidated Rail Corp. v. Darrone*.<sup>87</sup> This 1984 case centered around a locomotive engineer whose left hand and forearm were amputated following injuries sustained in a workplace accident.<sup>88</sup> The company that owned the railroad received federal funds through the sale of securities to the U.S. government.<sup>89</sup> “[T]he proceeds

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process claims. *Id.* at 403.

80. *Id.* at 403.

81. *Id.* at 404 (citing the Fourth Circuit opinion, *Davis v. Southeastern Community College*, 574 F.2d 1158, 1161 (4th Cir. 1778), *rev’d*, 442 U.S. 397 (1979)).

82. *Davis*, 442 U.S. at 404.

83. *Id.* at 405. The Court found that Section 504 “requires only that an ‘otherwise qualified handicapped individual’ not be excluded from participation in a federally funded program ‘solely by reason of his handicap,’ indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.” *Id.* at 404.

84. *Id.* at 406.

85. *Id.* at 406-07.

86. *Id.* at 410-11.

87. *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

88. *See id.* at 628.

89. *See id.* at 627.

from these sales [were] to be devoted to maintenance of rail properties, capital needs, refinancing of indebtedness, or working capital.”<sup>90</sup> “[A]lthough it had no justification for finding him unfit to work,” the railroad refused to hire the engineer back after his recovery.<sup>91</sup>

The U.S. Supreme Court, in another unanimous decision authored by Justice Powell, held that a person may file suit under Section 504 for disability discrimination in employment as long as the employer receives federal funds, even if “promoting employment” was not the “primary purpose” of the funds.<sup>92</sup> This decision solved a circuit split by affirming the Third Circuit’s ruling, which had declined to extend the “primary objective” restriction found in Section 604 of the Rehabilitation Act onto Section 504.<sup>93</sup> The Supreme Court observed that amendments to the Rehabilitation Act “[make] ‘available’ the remedies, procedures and rights of Title VI for suits under [Section] 504 against ‘any recipient of federal assistance.’”<sup>94</sup> The Supreme Court concluded that the “application of [Section] 504 to all programs receiving federal financial assistance fits the remedial purpose of the Rehabilitation Act ‘to promote and expand employment opportunities’ for the handicapped.”<sup>95</sup>

#### CURRENT U.S. DISABILITY LAW

##### I. THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act (ADA) “is one of America’s most comprehensive pieces of civil rights legislation” and has served as the framework for disability law in the U.S. since it was signed into law on July 26, 1990.<sup>96</sup> The ADA was the Congressional response to a number of judicial opinions and executive regulations that had chipped away at the protections for persons with disabilities offered by Section 504 of the Rehabilitation Act.<sup>97</sup> The original draft bill was “prepared by the National Council on Disability, an independent federal agency whose members were appointed by President [Ronald] Reagan.”<sup>98</sup> A truly bipartisan effort, the bill was first introduced to Congress in April 1988 by

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90. *Id.*

91. *Id.* at 628.

92. *See id.* at 632-33.

93. *Id.* at 629.

94. *Id.* at 635.

95. *Id.* at 634.

96. *Introduction to the ADA, supra* note 20. Title I of the ADA contained the employment provisions and became effective on July 26, 1992, two years after it was signed into law by President George H. W. Bush. Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. AND DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/#:~:text=Before%20the%20ADA%2C%20no%20federal,a%20federal%20grant%20or%20contract> [https://perma.cc/SK5W-MR66] [hereinafter *Mayerson*].

97. *See* Mayerson, *supra* note 96.

98. *Id.*

Republican Senator Lowell Weicker, Jr. and Democrat Representative Tony Coelho.<sup>99</sup> Speaking in front of Congress in May 1989, Representative Coelho, a person with epilepsy, stated that the ADA, “a clear, comprehensive national mandate for the elimination of discrimination against individuals with disabilities, . . . [was] urgently needed by our Nation’s 43 million disabled citizens.”<sup>100</sup>

The ADA Bill passed by an overwhelming margin in the U.S. Senate, garnering 45 votes from Democrats and 31 votes from Republicans.<sup>101</sup> Republican President George H. W. Bush signed the ADA into law on July 26, 1990.<sup>102</sup> This initiated a gradual rollout of ADA protections, beginning on January 26, 1992, when the provisions dealing with state and local governments<sup>103</sup> and public accommodations became effective.<sup>104</sup> Six months later, the employment provisions of the ADA became effective.<sup>105</sup>

The ADA is modeled after two of the most important anti-discrimination laws in the United States: The Civil Rights Act of 1964 and Section 504 of the

99. Lowell Weicker, Jr. was a Republican Senator for the State of Connecticut from 1971 through 1989. *Weicker, Lowell Palmer, Jr.*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=w000253> [<https://perma.cc/G8C3-6M5H>]. A moderate Republican, Weicker was known as one of the most liberal members of his party. See *Lowell Weicker: Governor of Connecticut, 1991-1995*, MUSEUM OF CONN. HIST., <https://museumofhistory.org/2015/08/lowell-weicker/> [<https://perma.cc/GR5M-T5BR>]. Eventually, Weicker would leave the GOP and successfully run for Governor of Connecticut as a third-party candidate. *Id.* Senator Weicker has cited the ADA as one of his proudest accomplishments during his time in Washington, D.C. Neil Vigdor, *A Connecticut Political Maverick Turns 80: Lowell Weicker Jr.*, STAMFORD ADVOC. (May 15, 2011), <https://www.stamfordadvocate.com/news/article/A-Connecticut-political-maverick-turns-80-Lowell-1380692.php> [<https://perma.cc/K99C-5ZTA>]. Representative Anthony “Tony” Coelho was a Democrat Congressman for the State of California from 1979 through 1989. *COELHO, Tony*, OFF. OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/11178> [<https://perma.cc/VD9K-LRAA>]. Representative Coelho “became the first Hispanic American to attain a top-tier leadership position [in Congress],” serving as House Majority Whip from 1987 through 1989. *Id.*

100. COELHO, Tony, *supra* note 99.

101. Roll Call Vote 101st Congress – 1st Session, S. 933, U.S. Senate (Sept. 7, 1989, 8:35 PM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=101&session=1&vote=00173](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=101&session=1&vote=00173) [<https://perma.cc/9D72-VGRZ>]. The ADA Bill passed: 76 voting YEA, 8 voting NAY, and 16 Not Voting. *Id.*

102. *Introduction to the ADA*, *supra* note 20.

103. Title II of the ADA dealt with state and local governments. *Introduction to the ADA*, *supra* note 20.

104. Title III of the ADA dealt with public accommodations for persons with disabilities. *Introduction to the ADA*, *supra* note 20.

105. Title I of the ADA, effective July 26, 1992, dealt with the employment of persons with disabilities. *Introduction to the ADA*, *supra* note 20.

Rehabilitation Act of 1973.<sup>106</sup> The definition of “disability” utilized in the ADA is essentially identical to what was originally drafted for Section 504.<sup>107</sup> A “disability” covered under the ADA, “with respect to an individual, . . . [means:] (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.”<sup>108</sup> The provisions following this definition provide a non-exhaustive list of what qualifies as a “major life activity”<sup>109</sup> and define the phrase “being regarded as having such an impairment.”<sup>110</sup>

Most importantly, the parameters for who qualifies for protection under the ADA intentionally encapsulate a wide array of situations that may commonly be referred to as a disability. The ADA’s definition of disability “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”<sup>111</sup> The ADA further broadens its reach by liberally applying the term “impairment.”<sup>112</sup> First, “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.”<sup>113</sup> Additionally, “[a]n impairment that is

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106. See *Introduction to the ADA*, *supra* note 20. More recently, the definitions provision of the Rehabilitation Act has been amended to simply say “[t]he term ‘disability’ . . . [has] the meaning given it in section 12102 of Title 42,” ensuring complete uniformity between Section 504 and the ADA. Rehabilitation Act, 29 U.S.C. § 705(9)(B).

107. *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RTS. EDUC. AND DEF. FUND, <https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504/> [<https://perma.cc/K6TV-PBWZ>] [hereinafter *A Comparison of ADA, IDEA, and Section 504*].

108. 42 U.S.C. § 12102(1).

109. 42 U.S.C. § 12102(2). Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working all qualify as general major life activities. ADA, 42 U.S.C. § 12102(2)(A). Additionally, the ADA names the following as “major bodily functions,” which, if limited, constitutes a limited major life activity: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. ADA, 42 U.S.C. § 12102(2)(B). Neither of these lists are exhaustive, meaning that a person may successfully claim to have a disability on other grounds. See ADA, 42 U.S.C. §§ 12102(2)(A), (B).

110. See 42 U.S.C. §§ 12102(3)(A), (B). The phrase “being regarded as having such an impairment,” for the purposes of 42 U.S.C. § 12102(1)(C), means: “(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. §§ 12102(3)(A), (B).

111. 42 U.S.C. § 12102(4)(A).

112. See 42 U.S.C. §§ 12102(4)(C), (D).

113. 42 U.S.C. § 12102(4)(C).

episodic or in remission is a disability if it would substantially limit a major life activity when active.”<sup>114</sup>

Most remedies that a person with a disability may use to mitigate their symptoms are excluded when determining “whether an impairment substantially limits a major life activity.”<sup>115</sup> This is yet another major factor which expands the inclusive definitions found in the ADA. “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.”<sup>116</sup> This provision lists a number of “mitigating measures,” such as: medication and medical devices;<sup>117</sup> assistive technology;<sup>118</sup> reasonable accommodations;<sup>119</sup> and “learned behavioral or adaptive neurological modifications.”<sup>120</sup> However, “ordinary eyeglasses or contact lenses” are exempt from this provision and “shall be considered in determining whether an impairment substantially limits a major life activity.”<sup>121</sup>

Like the Civil Rights Act of 1964, the ADA protects against employment discrimination in both public and private settings.<sup>122</sup> By including all private employers with fifteen or more employees,<sup>123</sup> the ADA expands employee protections for persons with disabilities beyond what was previously available under Section 504, which reaches private employers only if they receive federal financial assistance.<sup>124</sup> The ADA and Title VII of the 1964 CRA work together to protect persons with disabilities as a class from employment discrimination.

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114. 42 U.S.C. § 12102(4)(D).

115. 42 U.S.C. § 12102(4)(E)(i).

116. *Id.*

117. 42 U.S.C. § 12102(4)(E)(i)(I) (including “medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies.”).

118. 42 U.S.C. § 12102(4)(E)(i)(II).

119. 42 U.S.C. § 12102(4)(E)(i)(III). In addition to reasonable accommodations, this provision includes “auxiliary aids or services.” *Id.*

120. 42 U.S.C. § 12102(4)(E)(i)(IV).

121. 42 U.S.C. §§ 12102(4)(E)(ii), (iii).

122. *See Introduction to the ADA, supra* note 20.

123. 42 U.S.C. § 12111(5)(A) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.”). *Id.* “(i) [T]he United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26” are not included in the ADA’s definition of “employer.” 42 U.S.C. § 12111(5)(B).

124. *A Comparison of ADA, IDEA, and Section 504, supra* note 107.

This includes the use of the EEOC to investigate claims of employment discrimination based on disability.<sup>125</sup> If successful in their EEOC claim, a person seeking protection under the ADA and Title VII has a host of remedies available, including non-discriminatory job placement, back pay, front pay, compensatory and punitive damages, attorneys' fees and costs, and certain types of equitable relief.<sup>126</sup>

## II. EVOLUTION OF DISABILITY LAW IN THE U.S. AFTER THE ADA

As was the case with Section 504, the U.S. Supreme Court played a major role in interpreting the ADA. In 1999, the Court held in *Sutton v. United Air Lines, Inc.* “that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses.”<sup>127</sup> The petitioners in *Sutton* applied for employment as commercial airline pilots despite being extremely limited in their daily lives due to “severe myopia.”<sup>128</sup> The petitioners claimed that corrective lenses made their eyesight “20/20 or better”; however, the respondent rejected the applications due to the applicants' uncorrected eyesight.<sup>129</sup> The petitioners filed suit for employment discrimination, which the district court dismissed for failure to state a claim upon which relief could be granted.<sup>130</sup> The Tenth Circuit and the U.S. Supreme Court affirmed this decision. With this holding, the Supreme Court limited the class of people who could claim disability by only protecting persons who would qualify as having a “disability” even after efforts were made to mitigate the effects.

The Court further limited the reach of ADA protections in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.<sup>131</sup> The plaintiff in this case claimed disability based on carpal tunnel syndrome and sought accommodations from her

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125. *Filing a Charge of Discrimination with the EEOC*, *supra* note 22.

126. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, Management Directive 110 (2015). “There are limits on the amount of compensatory and punitive damages a person can recover.” *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/remedies-employment-discrimination> [<https://perma.cc/GP68-EFLT>]. The limits, based on the size of the employer, are as follows: “For employers with 15-100 employees, the limit is \$50,000. For employers with 101-200 employees, the limit is \$100,000. For employers with 201-500 employees, the limit is \$200,000. For employers with more than 500 employees, the limit is \$300,000.” *Id.*

127. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

128. *Id.*

129. *Id.* at 475-76 (“[W]ithout corrective lenses, each ‘effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores,’ . . . but with corrective measures, such as glasses or contact lenses, both ‘function identically to individuals without a similar impairment . . . .’” (internal citation omitted)).

130. *Id.* at 476.

131. *See Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002).



employer under the ADA.<sup>132</sup> After a number of failed attempts at accommodation, the plaintiff experienced greater pain, was unable to work, and was terminated.<sup>133</sup> The employer claimed the termination was a result of the plaintiff's poor attendance record.<sup>134</sup> The plaintiff believed that her employer's attempts did not meet the minimum requirement for an accommodation and filed a charge with the EEOC.<sup>135</sup> At the conclusion of the EEOC investigation, the plaintiff received a right to sue letter from the EEOC and filed in federal district court.<sup>136</sup>

The U.S. District Court for the Eastern District of Kentucky granted the employer's motion for summary judgment, holding that the plaintiff was not disabled; therefore, she was not entitled to accommodations as required under the ADA.<sup>137</sup> More specifically, the district court found that the plaintiff's "impairment did not qualify as a disability because it had not 'substantially limit[ed]' any 'major life activit[y].'"<sup>138</sup> The district court also found that termination was not improper under the ADA for the same reason.<sup>139</sup>

The Sixth Circuit reversed the district court's decision with regards to the accommodations claim but affirmed the decision as it pertained to termination.<sup>140</sup> The Court of Appeals found that the plaintiff's "manual disability involve[d] a 'class' of manual activities affecting the ability to perform tasks at work."<sup>141</sup> The Sixth Circuit was persuaded by this standard and did not feel compelled to consider the plaintiff's ability in carrying out daily life activities at home.<sup>142</sup>

The Supreme Court reversed the Sixth Circuit and remanded the case.<sup>143</sup> The Court reached this decision by claiming that the dictionary definitions of "substantially" and "major," along with the language in the ADA itself, created "a demanding standard for qualifying as disabled."<sup>144</sup> The standard was intentionally high because "Congress [did not intend] everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled . . . ."<sup>145</sup> Therefore, the Supreme Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the

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132. *Id.* at 187.

133. *Id.* at 189-90.

134. *Id.* at 190.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 191.

139. *Id.*

140. *Id.* at 191-92.

141. *Id.* at 192.

142. *Id.* The plaintiff was able to "ten[d] to her personal hygiene [and] carr[y] out personal or household chores." *Id.*

143. *Id.* at 202.

144. *Id.* at 197.

145. *Id.*

individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."<sup>146</sup> Such an impairment would not rise to the level of protected disability based on medical evaluations alone, but instead would require "evidence that the extent of the limitation [caused by their impairment] in terms of their own experience ... is substantial."<sup>147</sup>

In light of the limitations on the ADA imposed by *Sutton* and *Toyota*, Congress passed the ADA Amendments Act of 2008 (hereafter, ADAAA).<sup>148</sup> These amendments retained the basic definition of "disability" as stated in the ADA but added clarification for the purpose of expanding the subset of people covered by the definition.<sup>149</sup> The ADAAA expressly overturned *Sutton* by "stat[ing] that mitigating measures other than 'ordinary eyeglasses or contact lenses' shall not be considered in assessing whether an individual has a disability."<sup>150</sup> This meant that more people would meet the definition of having a "disability." The ADAAA also changed the law to reject the *Toyota* holding by creating two non-exhaustive lists of "major life activities" and stating that a claimant need only prove that the disability substantially limits one such activity.<sup>151</sup>

### III. INCENTIVIZING EMPLOYERS TO HIRE PERSONS WITH DISABILITIES

Although the U.S. has created a substantial antidiscrimination framework through the ADA and subsequent legislation and case law, there is an insufficient number of incentives directed at private employers who hire persons with disabilities. The U.S. offers a few tax benefits, such as the Disabled Access Credit<sup>152</sup> and the Barrier Removal Tax Deduction,<sup>153</sup> to businesses employing

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146. *Id.* at 198.

147. *Id.*

148. *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008> [<https://perma.cc/KP66-PFV7>] [hereinafter *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Tax Benefits for Businesses Who Have Employees with Disabilities*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> [<https://perma.cc/SXP4-NY25>] [hereinafter *Tax Benefits for Businesses Who Have Employees with Disabilities*]. The Disabled Access Credit allows small businesses with under 30 employees and \$1 million in yearly revenue a tax credit for every year they incur access expenditures. *Id.*

153. *Id.* The Barrier Removal Tax Deduction allows businesses of any size to deduct up to \$15,000 per year in expenses associated with removing barriers to the mobility of persons with disabilities and the elderly. *Id.*

persons with disabilities.<sup>154</sup> However, most of these tax incentives focus on modifications to the workplace for persons with physical disabilities and not on accommodations for employees with intellectual disabilities.

The U.S. also has job programs to help persons with disabilities find work; however, the programs often have strict qualifications for applicants and do not provide much help to private-sector employers. For example, “the Workforce Recruitment Program (WRP) is a recruitment and referral program that connects federal and private-sector employers nationwide with highly motivated college students and recent graduates with disabilities.”<sup>155</sup> By restricting applicants to only those in college, the program leaves out many of the country’s persons with intellectual disabilities. Although private-sector employers may participate in the WRP, “the Office of Disability Employment Policy [will] search the WRP database for a private sector employer” only on a “limited basis.”<sup>156</sup> This means that, instead of creating an environment where all parties can mutually seek the best employer-employee matches, the responsibility is usually on the college student with disabilities to find open positions.

#### INTERNATIONAL APPROACHES TO DISABILITY LAW

##### I. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

###### *A. Drafting Procedure for International Treaties*

There have been over 560 multilateral treaties<sup>157</sup> deposited with the Secretary-General of the United Nations since the post-World War II establishment of the international governing body.<sup>158</sup> These treaties, which are sometimes referred to as “conventions,” are organized into 29 chapters and cover a wide range of topics.<sup>159</sup> A treaty may be proposed by a U.N. Member State, an

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154. *See id.*

155. *Workforce Recruitment Program: About Us*, OFF. OF DISABILITY EMP. POL’Y, U.S. DEP’T OF LABOR, [https://www.wrp.gov/wrp?id=wrp\\_about\\_us](https://www.wrp.gov/wrp?id=wrp_about_us) [<https://perma.cc/7GXT-ETQQ>].

156. *Workforce Recruitment Program (WRP)*, EMPLOYER ASSISTANCE AND RESOURCE NETWORK ON DISABILITY INCLUSION, CORNELL UNIV., <https://aslearn.org/topics/recruitment-hiring/workforce-recruitment-program-wrp/> [<https://perma.cc/7EG6-3NB2>] [hereinafter *Workforce Recruitment Program (WRP)*].

157. A treaty “between a large number of states, usually (though not always) denoting participation by a majority of the world’s states” is considered “multilateral.” *Multilateral Treaties*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/multilateral\\_treaties](https://www.law.cornell.edu/wex/multilateral_treaties) [<https://perma.cc/ZD5X-TNAC>].

158. *See United Nations: Treaty Collection*, U.N., <https://treaties.un.org/> [<https://perma.cc/23L6-SDDQ>]. “The United Nations was established by the Charter of the United Nations, [which] entered into force on 24 October 1945.” *Founding Member States*, U.N. <https://research.un.org/en/unmembers/founders> [<https://perma.cc/2UAW-QQVA>].

159. *Multilateral Treaties Deposited with the Secretary-General*, U.N. <https://treaties.un.org/>

intergovernmental organization (IGO), or a nongovernmental organization (NGO).<sup>160</sup> Before the first draft is authored, survey and research committees consider a number of factors, including the level of need, likelihood of success, and estimated costs.<sup>161</sup>

Assuming these first-stage committees determine that the treaty is a worthwhile endeavor, the treaty enters the drafting stage. This stage “consists of a number of steps, which, however, do not necessarily follow each other in a neat sequence but may overlap, iterate, in part be omitted, and in any event be structured in many different ways.”<sup>162</sup> Several rounds of research and drafting, by either the initiating party or a U.N. subcommittee, result in a first draft, which is usually skeletal by design in anticipation of negotiations within the General Assembly.<sup>163</sup> Multiple rounds of negotiations and edited drafts seek to strike a balance between the different treaty interests held by the Member States.<sup>164</sup>

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Pages/ParticipationStatus.aspx?clang=\_en [https://perma.cc/W92K-44KG]. The Convention on the Rights of Persons with Disabilities is organized under “Chapter IV: Human Rights.” *Id.*

160. *International Norm-Making: B. Steps in the Treaty-Making Process*, U.N. Univ., <https://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> [https://perma.cc/Y555-7TTY] [hereinafter *B. Steps in the Treaty-Making Process*].

161. *See id.* The U.N. University provides a list of nine factors to be considered:

- (a) The need that the new instrument is to meet
- (b) The existing legal regime, including the extent of its applicability to the perceived problem
- (c) Any relevant legislative efforts in other fore
- (d) The likelihood of success in developing an instrument, i.e. is it foreseeable that the required measure of agreement can be reached on the solution aimed for?
- (e) The optimal form for the proposed instrument: treaty, solemn declaration, model law or rule, etc.
- (f) The likelihood that the proposed instrument will be accepted by a sufficient number of significant states
- (g) An anticipated time-schedule for the project
- (h) The expected costs of formulating and adopting the proposed instrument, both to the IGO concerned and to the states participating in the process
- (i) Particularly in formulating instruments in relation to technical or scientific problems (such as outer space or the environment) it may be necessary to carry out extensive scientific studies or research to determine the parameters of the problem and the lines of potential solutions

*Id.*

162. *Id.*

163. *Id.*

164. *Id.* The negotiation is the “part of the process that is most clearly political, in that it involves the mediation of the various interests concerned: those that favor a strong and those that favor a weak instrument; those that desire a wide and those that prefer a narrow one: those that prefer different approaches based on differing scientific perceptions or legal habits; and especially those that may wish to obtain resources from the proposed new regime and those that might have to contribute resources in order to make such a regime feasible and acceptable.” *Id.*

Once the drafting committee has determined that the treaty has reached its final form, the instrument is considered for adoption.<sup>165</sup> First, the U.N. must adopt the final draft of the treaty, usually by a two-thirds majority vote of its Member States.<sup>166</sup> However, adoption of the treaty's final text does not automatically create a binding treaty on the Member States. Rather, Member States wishing to become a party to the treaty must sign, then ratify, the instrument.<sup>167</sup> Although a Member State "does not undertake positive legal obligations under the treaty upon signature," the signature does indicate

the State's intention to take steps to express its consent to be bound by the treaty at a later date. Signature also creates an obligation, in the period between signature and ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty . . . .<sup>168</sup>

Most U.N. multilateral treaties require Member States to finalize their signed intention to be bound through a separate ratification process.<sup>169</sup> This ratification is distinct from a Member State's own governmental procedures, which may require a domestic "ratification" before the Member State may bind itself under a treaty.<sup>170</sup> "Ratification at the national level is inadequate to establish a State's intention to be legally bound at the international level. The required action at the international level . . . must also be undertaken."<sup>171</sup> The language of a multilateral treaty will include the requirements necessary to complete international-level ratification.<sup>172</sup>

Some multilateral treaties allow parties to bind themselves through either confirmation or accession, both of which are functionally equivalent to ratification. The term "confirmation" is used "when an international organization,

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165. *Id.*

166. *Id.* Although a two-thirds majority is usually all that is required to adopt a final draft, the U.N. often continues negotiations until a much higher percentage of Member States agree to the provisions to ensure successful enforcement. *Id.*

167. *Id.*

168. TREATY SEC. OF THE OFF. OF LEGAL AFF., U.N., TREATY HANDBOOK 5 (2012) [hereinafter TREATY HANDBOOK].

169. See *B. Steps in the Treaty-Making Process*, *supra* note 160.

170. See TREATY HANDBOOK, *supra* note 168, at 9. In addition to international ratification, the United States has internal requirements which must be satisfied before becoming a party to a treaty. See, e.g., The Treaty Clause of the U.S. Constitution, which authorizes the President to sign a treaty on behalf of the United States. U.S. CONST. art. II § 2, cl. 2. The U.S. Senate must approve the signed treaty by a two-thirds majority vote in order to ratify. U.S. CONST. art. II § 2, cl. 2.

171. TREATY HANDBOOK, *supra* note 168, at 9.

172. *Id.* See, e.g., Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 43 (stating that signatory Member States must also ratify the treaty in order to be bound by the CRPD).

[rather than a Member State,] expresses its consent to be bound to a treaty.”<sup>173</sup> Accession occurs when a “[Member State] accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other [Member States].”<sup>174</sup>

U.N. conventions create their strength by binding the greatest number of Member States possible. Because these multilateral treaties may include more than 100 ratifying parties, it is nearly impossible to draft terms which perfectly reflect the interests of each Member State. Therefore, some multilateral treaties allow Member States to clarify, or even curtail, binding treaty provisions.<sup>175</sup> A Member State may clarify “its understanding of a matter contained in or the interpretation of a particular provision in a treaty” through a declaration.<sup>176</sup> Declarations may be used to “harmonize” the Member State’s domestic laws with the language of the treaty; however, declarations may not “exclude or modify the legal effect of the provisions of the convention in their application to that [Member State].”<sup>177</sup>

More dramatically, reservations allow a Member State to change the legal effect of individual treaty provisions.<sup>178</sup> A reservation “modifies for the reserving State[,] in its relations with [another Member State,] the provisions of the treaty to which the reservation relates to the extent of the reservation.”<sup>179</sup> A Member State’s reservation is permitted unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.<sup>180</sup>

“A reservation may enable a State to participate in a multilateral treaty in which the State would otherwise be unwilling or unable to participate.”<sup>181</sup> Member

173. *Glossary of Terms Relating to Treaty Actions*, U.N., [https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1\\_en.xml#accession](https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession) [<https://perma.cc/BZ8N-55XN>] [hereinafter *Glossary of Terms Relating to Treaty Actions*].

174. *Id.*

175. *See B. Steps in the Treaty-Making Process*, *supra* note 160. Most multilateral treaties will expressly state whether alterations, known as “reservations,” are permitted. *See, e.g.*, Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 46 (granting Member States the authority to draft reservations which are “[compatible] with the object and purpose of the present Convention.”).

176. TREATY HANDBOOK, *supra* note 168, at 16.

177. *Id.*

178. *Id.* at 16-20.

179. Vienna Convention on the Law of Treaties art. 21(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties].

180. *Id.* at art. 19.

181. TREATY HANDBOOK, *supra* note 168, at 12.

States submit any reservations with the U.N. Secretary-General, who subsequently circulates the reservation to all concerned Member States.<sup>182</sup>

The Secretary-General will accept the reservation in deposit as long as no other Member State has requested that he not do so within a twelve-month period from the date of circulation.<sup>183</sup> Although the default rule holds that an objection does not preclude the enforcement of the treaty between the two Member States, the objecting Member State may specify whether their objection to a reservation “precludes the entry into force of the treaty between itself and the reserving [Member State].”<sup>184</sup> When the objecting party does not oppose the enforcement of the treaty between itself and the reserving Member State, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”<sup>185</sup>

### *B. Legislative History of the CRPD*

While U.S. disability law was in its infancy during the early 1970s, the United Nations began taking the first steps towards international protections for persons with disabilities. The Declaration on the Rights of Mentally Retarded Persons, proclaimed by resolution of the U.N. General Assembly in 1971, was the U.N.’s first major statement on disability rights.<sup>186</sup> However, unlike treaties and conventions, U.N. declarations and proclamations are not legally binding on adopting Member States.<sup>187</sup> Rather, these instruments are meant to model desirable legal standards to U.N. Member States.<sup>188</sup> The Declaration on the Rights

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182. TREATY HANDBOOK, *supra* note 168, at 12-13.

183. *Id.* at 13. The twelve-month period, which was not part of the Vienna Convention, was established in 2000 at the suggestion of U.N. Legal Counsel. *Id.*

184. *Id.* at 14. An objection to a reservation may expressly preclude the enforcement of entire treaty between the two Member States. *Id.* at 14. When the objecting Member State allows the treaty to remain in full force, the provisions to which the reservation relates are not enforced between the two Member States. *Id.* at 18-19.

185. Vienna Convention on the Law of Treaties, *supra* note 179, at art. 21(3).

186. *Developmental and Psychiatric Disabilities*, U.N., <https://www.un.org/esa/socdev/enable/disdevelopmental.htm> [<https://perma.cc/N5F5-6BFC>] [hereinafter *Developmental and Psychiatric Disabilities*]. “Unlike a convention, a declaration is a statement of principle rather than an agreement by which countries bind themselves under international law. Declarations also differ from conventions in that declarations are not subject to ratification by countries, and do not require countries to submit reports on their compliance.” *Glossary of Terms – Human Rights*, GOV’T OF CAN., <https://www.canada.ca/en/canadian-heritage/services/human-rights-glossary.html> (Oct. 24, 2017) [<https://perma.cc/L6XM-9FK8>].

187. *Appendix 3: A Human Rights Glossary*, HUM. RTS. RES. CTR., UNIV. MINN., [http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-5/6\\_glossary.htm](http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-5/6_glossary.htm) [<https://perma.cc/BG3R-BZBC>].

188. *Id.*

of Mentally Retarded Persons proclaimed rights relating to treatment,<sup>189</sup> caretakers,<sup>190</sup> education,<sup>191</sup> and economic security.<sup>192</sup> The next U.N. proclamation on disability rights came in 1975 with the Declaration on the Rights of Disabled Persons.<sup>193</sup> This Declaration sought to “assist disabled persons [in] develop[ing] their abilities in the most varied fields of activities and [to promote] their integration as far as possible in normal life.”<sup>194</sup> The U.N. continued to periodically release non-binding proclamations and programs on disability rights for the next twenty years.<sup>195</sup>

In the late 1990s, Member States of the U.N. began to consider ways to further advance previously-stated disability rights.<sup>196</sup> The U.N. General Assembly received a motion from the Government of Mexico in December 2001 “to establish an Ad Hoc Committee . . . to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities.”<sup>197</sup> The U.N. established a “working group” of twenty-seven representative nations in 2002 to prepare a draft text.<sup>198</sup> This group considered input from many U.N. Member States and presented the first draft in January 2004.<sup>199</sup> Following three additional years of debate and revision, the U.N. General Assembly adopted the Convention on the Rights of Persons with Disabilities on December 13, 2006, making it “the first comprehensive human rights treaty of the 21st century.”<sup>200</sup> Negotiations surrounding the CRPD lasted

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189. G.A. Res. 2856 (XXVI), at 2 (Dec. 20, 1971).

190. *Id.* at 4-5.

191. *Id.* at 2.

192. *Id.* at 3.

193. *Developmental and Psychiatric Disabilities*, *supra* note 186.

194. G.A. Res. 3447 (XXX), at Preamble (Dec. 9, 1975).

195. *Developmental and Psychiatric Disabilities*, *supra* note 186 (listing the World Programme of Action concerning Disabled Persons (1982), Principles for the protection of persons with mental illness and the improvement of mental health care (1991), and United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) as noteworthy examples of non-binding policy guidelines).

196. See THE UNITED NATIONS AND DISABILITY: 70 YEARS OF THE WORK TOWARDS A MORE INCLUSIVE WORLD, DIV. FOR SOC. POL'Y AND DEV., DEP'T OF ECON. AND SOC. AFF., U.N., 11-13 (Jan. 2018).

197. *Convention on the Rights of Persons with Disabilities (CRPD): Timeline of Events*, DEP'T OF ECON. AND SOC. AFF., U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/timeline-of-events.html> [<https://perma.cc/9X8V-NJE5>] [hereinafter *Convention on the Rights of Persons with Disabilities (CRPD): Timeline of Events*].

198. *Id.* In addition to the twenty-seven national governments represented, the working group comprised of twelve non-government organizations (NGOs) and one National Human Rights Institution. *Id.*

199. *Id.* Many of the Member States presented their own drafts, which were taken into account by the working group. *Id.*

200. *Home: Convention on the Rights of Persons with Disabilities (CRPD)*, DEP'T OF ECON. AND SOC. AFF., U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights->



just under five years, making the CRPD the fastest negotiated treaty in U.N. history.<sup>201</sup> The CRPD opened for signatures on March 30, 2007.<sup>202</sup> The CRPD garnered more opening day signatures from Member States than any U.N. convention in history.<sup>203</sup>

### *C. Goals of the CRPD*

The overarching aim of the CRPD was to change society's view of "persons with disabilities [from] 'objects' of charity, medical treatment, and social protection" to "'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society."<sup>204</sup> The U.N. took more than one approach to realizing this goal under the CRPD, the most prominent being numerous acknowledgements of basic rights. By ratifying the CRPD, Member States must ensure that persons with disabilities have certain rights, including but not limited to: equality with all others under the law;<sup>205</sup> access to inclusive education;<sup>206</sup> and protection from discrimination in health services<sup>207</sup> and employment.<sup>208</sup>

In addition to blanket acknowledgements of rights, the CRPD provided Member States with a general framework of the types of laws and programs necessary to ensure these rights. For example, the right to full inclusion in education was supported by requiring reasonable accommodations and support in general educational settings, as well as "individualized support measures ... that maximize academic and social development."<sup>209</sup> The CRPD provided greater detail in its plans to support the employment of persons with disabilities, suggesting job placement services and technical and vocational training.<sup>210</sup> More significantly, ratifying Member States agreed to employ persons with disabilities in the public sector and "promote [their] employment in the private sector."<sup>211</sup> The CRPD suggested "appropriate policies and measures ... [such as] affirmative action programs [and] incentives" to promote private-sector employment, but also

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of-persons-with-disabilities.html [https://perma.cc/PV7K-5NEV ] [hereinafter *CRPD Homepage*].

201. *Id.*

202. *Convention on the Rights of Persons with Disabilities (CRPD): Timeline of Events*, *supra* note 197.

203. *CRPD Homepage*, *supra* note 200.

204. *Id.*

205. *Convention on the Rights of Persons with Disabilities*, *supra* note 10, at art. 5(1).

206. *Id.* at art. 24.

207. *Id.* at art. 25.

208. *Id.* at art. 27.

209. *Id.* at art. 24.

210. *Id.* at art. 27.

211. *Id.* at art. 27(1)(h).

left the door open to other creative solutions.<sup>212</sup>

The CRPD was largely inspired by U.S. disability law, particularly the George H. W. Bush-era ADA.<sup>213</sup> Despite the major influence of U.S. law on the CRPD, the U.S. itself was not a part of the drafting “working group.”<sup>214</sup> Prior to the formation of the working group, Ralph F. Boyd, the U.S. Assistant Attorney General for Civil Rights under President George W. Bush, submitted a statement to the U.N. declaring that, due to the complexity of the issues, the “most constructive way . . . to ensur[e] that real change and real improvement is brought to [a Member State’s] citizens with disabilities” is for each individual nation to establish its own regulations.<sup>215</sup> Assistant Attorney General Boyd went on to say that, although the U.S. “hope[s] to participate in order to share . . . experiences and to offer technical assistance if desired on key principles and elements,” there was no “expectation that [the U.S. would] become party to any resulting legal instrument.”<sup>216</sup> In fact, the U.S. did eventually sign the CRPD on July 30, 2009.<sup>217</sup> However, as of the drafting of this Note, the U.S. remains one out of only nine signatory Member States that have not adopted the CRPD through formal confirmation, accession, or ratification.<sup>218</sup> This Note will further address the United States’ failure to adopt the CRPD in the Analysis and Recommendations section.

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212. *Id.* at art. 27(1)(h).

213. *CRPD One-Pager*, U.S. INT’L COUNS. ON DISABILITIES (USICD), [http://www.aucd.org/docs/policy/civil\\_rights/CRPD\\_One\\_Pager.pdf](http://www.aucd.org/docs/policy/civil_rights/CRPD_One_Pager.pdf) [<https://perma.cc/SY2R-STD7>] [hereinafter *CRPD One-Pager*].

214. *Working Group on a Convention: Membership*, U.N., <https://www.un.org/esa/socdev/enable/rights/ahcwg.htm#membership> [<https://perma.cc/S7PC-DAUX>].

215. Ralph F. Boyd, U.S. Assistant Att’y Gen. for C.R., Statement to the U.N. at the 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 (Jun. 16-27, 2003), <https://www.un.org/esa/socdev/enable/rights/contrib-us.htm> [<https://perma.cc/Q959-SDLT>].

216. *Id.*

217. *Status of Treaties: Convention on the Rights of Persons with Disabilities*, *supra* note 13.

218. *Id.* The other eight Member States who have signed but not adopted the CRPD are Bhutan, Cameroon, Lebanon, Liechtenstein, Solomon Islands, Tajikistan, Tonga, and Uzbekistan. *Id.* After President Barack Obama signed the CRPD in July 2009, the treaty was sent to the U.S. Senate for approval in May 2012. *Convention on the Rights of Persons with Disabilities*, AM. BAR ASS’N (ABA), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/conventionontherightsofpersonswithdisabilities/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/conventionontherightsofpersonswithdisabilities/) [<https://perma.cc/L7VB-NXDP>] [hereinafter *American Bar Association: CRPD*]. The CRPD made it out of committee in July 2012, but the full Senate voted against ratification 61 to 38, falling just short of the two-thirds majority requirement. *Id.* In July 2014, the Senate Committee on Foreign Relations again approved the CRPD for ratification; however, the treaty was not brought to the Senate floor for a vote. *Id.*

## II. DISABILITY LAW IN CANADA POST-CRPD

Canada was among the record-setting number of Member States to sign the CRPD on the first day the treaty was made available.<sup>219</sup> The Government of Canada ratified the CRPD on March 11, 2010, nearly three years to the date of its signing.<sup>220</sup> This ratification included a couple declarations and reservations regarding Articles 12 and 33 of the CRPD.<sup>221</sup> Since ratifying the CRPD, Canada has systematically implemented legislation to promote the rights and goals expressed in the CRPD. In July 2019, Canada's first national accessibility law, the Accessible Canada Act, came into effect.<sup>222</sup> Through this law, the Government of Canada "commit[ted] to hiring at least 5,000 people with disabilities over the next five years."<sup>223</sup> In conjunction with the Accessible Canada Act, the

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219. *Status of Treaties: Convention on the Rights of Persons with Disabilities*, *supra* note 13 (listing Canada as one of the 82 Member States to sign the CRPD on opening day).

220. EMP. AND SOC. DEV. CAN., *Statement - Minister Qualtrough Marks the 10th Anniversary of Canada's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, CISON (Mar. 11, 2020), <https://www.newswire.ca/news-releases/statement-minister-qualtrough-marks-the-10th-anniversary-of-canada-s-ratification-of-the-united-nations-convention-on-the-rights-of-persons-with-disabilities-819459708.html> [https://perma.cc/A8VE-X24L] [hereinafter *Statement - Minister Qualtrough Marks the 10th Anniversary of Canada's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*].

221. Article 12(4) promotes the right to exercise their legal capacity by minimizing the degree and duration of influence that others may have in making decisions for persons with disabilities. *Convention on the Rights of Persons with Disabilities*, *supra* note 10, at art. 12(4). Article 12(4) also provides for regular review of legal capacity decisions by independent authority. *Id.* Regarding Article 12, "Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12(4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal." *Status of Treaties: Convention on the Rights of Persons with Disabilities*, *supra* note 13. Article 33 says that implementing governments should put together plans to enable implementation of the CRPD at all levels of government and allow for independent monitoring of the same by organizations representing persons with disabilities. *Convention on the Rights of Persons with Disabilities*, *supra* note 10, at art. 33. "Canada interprets Article 33(2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones." *Status of Treaties: Convention on the Rights of Persons with Disabilities*, *supra* note 13.

222. *Statement - Minister Qualtrough marks the 10th Anniversary of Canada's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, *supra* note 220.

223. *Background: Accessible Government*, EMP. AND SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/news/2018/06/background-accessible-government.html>

Government of Canada pledged to “foster a diverse and inclusive workforce by introducing a federal internship program for Canadians with disabilities, and establishing a Centralized Workplace Accommodation Fund to better manage workplace accessibility for federal public service employees with disabilities.”<sup>224</sup>

Similar in structure to the U.S. Civil Rights Act of 1964, the Canadian Human Rights Act (hereafter, “CHRA”) protects against discrimination on the basis of “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.”<sup>225</sup> Passed in 1977, the CHRA provides in part that

[it is] discriminatory practice for an employer, employee organization or employer organization (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.<sup>226</sup>

The CHRA is enforced by the Canadian Human Rights Commission, which operates similarly to the EEOC in the United States. The Canadian Human Rights Commission receives complaints of discrimination which fall under the CHRA, investigates the claim, facilitates mediation, and chooses whether to issue a decision on the claim or refer the claim to the Canadian Human Rights Tribunal.<sup>227</sup> In addition to these responsibilities, the Commission is “designated as a body responsible for monitoring the Government of Canada’s implementation of [the Convention on the Rights of Persons with Disabilities].”<sup>228</sup>

The Employment Equity Act takes Canadian disability law a step further by requiring employers to:

prepare an employment equity plan that, [among other requirements], specifies the positive policies and practices that are to be instituted by the employer in the short term for the hiring, training, promotion and retention of persons [with disabilities] and for the making of reasonable accommodations for those persons, to correct the underrepresentation of [persons with disabilities].<sup>229</sup>

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[<https://perma.cc/HA8L-F66E>] [hereinafter *Backgrounder: Accessible Government*].

224. *Id.*

225. Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 3(1) (Can.).

226. *Id.* at s. 10.

227. *About the Process*, CAN. HUM. RTS. COMMISSION, <https://www.chrc-ccdp.gc.ca/eng/content/about-process> [<https://perma.cc/7FXH-LAWX>].

228. Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 28.1 (Can.).

229. Employment Equity Act, S.C. 1995, c. 44, s. 10(1)(a) (Can.). In addition to persons with disabilities, the Employment Equity Act covers women, aboriginal people, and visible minorities

The equity plan must set out short-term<sup>230</sup> and long-term<sup>231</sup> “measures to be taken by the employer . . . for the elimination of any employment barriers.” To track progress, private employers shall file yearly reports providing employment statistics for persons within protected classes.<sup>232</sup>

The Canadian government is also proactive in funding programs that focus on the hiring of persons with intellectual disabilities. One such program is found within the Job Bank, which helps any Canadian connect with private employers.<sup>233</sup> The Job Bank has a section dedicated to persons with disabilities that can be used by both employers and job seekers.<sup>234</sup> Another organization receiving Canadian federal funding is Ready, Willing, & Able (hereafter, “RWA”), which was allocated \$12 million over three years by the 2019 Canadian Federal Budget.<sup>235</sup> This money goes toward RWA’s annual budget of \$40 million.<sup>236</sup> “Since 2014, RWA has [c]onnected with over 10,000 Canadian businesses [and] [s]upported Canadian businesses in hiring candidates with an intellectual disability or [Autism Spectrum Disorder] for over 2,400 jobs.<sup>237</sup> RWA operates through a four-step process: Knowledge, Access, Hiring Support, and Ongoing Support.<sup>238</sup> First, RWA seeks to educate employers on the many benefits of hiring persons with intellectual disabilities.<sup>239</sup> According to RWA, some benefits to these employees are high ratings on punctuality, attendance, and

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[defined as non-white]. Employment Equity Act (S.C. 1995, c. 44, s. 9(1)(a)).

230. Employment Equity Act, S.C. 1995, c. 44, s. 10(1)(b) (Can.).

231. *Id.* at s. 10(1)(e).

232. *Id.* at s. 18(1). Required statistics include: “(b) the occupational groups in which its employees are employed and the degree of representation of persons who are members of designated groups in each occupational group; (c) the salary ranges of its employees and the degree of representation of persons who are members of designated groups in each range and in each prescribed subdivision of the range; and (d) the number of its employees hired, promoted and terminated and the degree of representation in those numbers of persons who are members of designated groups.” Employment Equity Act, S.C. 1995, c. 44, s. 18(1)(b-d) (Can.).

233. See Emp. and Soc. Dev. Can., *What is Job Bank?*, YOUTUBE (Sep. 13, 2018) <https://www.youtube.com/watch?v=4HiWefN4XyM> [<https://perma.cc/W9KM-8WKZ>] (explaining the basics of Job Bank as it applies to all potential employees).

234. *Recruit Persons with Disabilities*, JOB BANK, [https://www.jobbank.gc.ca/report\\_note.do?cid=12205](https://www.jobbank.gc.ca/report_note.do?cid=12205) [<https://perma.cc/63BM-AM5N>].

235. *Government of Canada Supports Employment Opportunities for Persons with Disabilities*, EMP. AND SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/news/2019/05/government-of-canada-supports-employment-opportunities-for-persons-with-disabilities.html> [<https://perma.cc/AMH8-S4TT>] [hereinafter *Government of Canada Supports Employment Opportunities for Persons with Disabilities*].

236. *Id.*

237. *How RWA Supports Business*, *supra* note 9.

238. RWA: *How It Works*, *supra* note 8.

239. *Id.*

turnover rate when compared to employees without intellectual disabilities.<sup>240</sup> Next, RWA helps employers and persons with intellectual disabilities access each other through recruitment aid.<sup>241</sup> Finally, RWA continues to assist potential employers through the hiring process and beyond by “provid[ing] necessary on-the-job supports during onboarding and beyond [and] maintain[ing] regular contact and support with [the] business.”<sup>242</sup>

Canadian tax law allows employers to further offset the costs of hiring persons with disabilities through deductions. For example, a business can “deduct expenses ... incur[red] for eligible disability-related modifications made to a building.”<sup>243</sup> These deductions are not limited to physical changes. A company may also deduct “disability specific computer software and hardware attachments,” which would likely cover many aids that help persons with intellectual disabilities.<sup>244</sup>

Canada has also created a host of incentives for private employers who hire persons with disabilities. These incentives are meant to lower or eliminate the financial burdens that may be associated with hiring a person with disabilities. One type of incentive is the government grant. The Opportunities Fund for Persons with Disabilities “supports a wide range of programs and services, including job search supports, pre-employability services, wage subsidies, work placements and employer awareness initiatives to encourage employers to hire persons with disabilities.”<sup>245</sup> Another grant, the Enabling Accessibility Fund “provides funding for projects that make Canadian communities and workplaces more accessible for persons with disabilities.”<sup>246</sup> This funding—which can include projects up to \$3 million CAD—aims to “create more opportunities for persons with disabilities . . . to access employment.”<sup>247</sup>

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240. *Benefits of Ready, Willing, and Able*, READY WILLING & ABLE, <http://readywillingable.ca/benefits-of-ready-willing-able/> [<https://perma.cc/K8FE-MTJU>]. RWA reports that over 90 percent of employees with intellectual disabilities hired through the organization rate better than average on punctuality, attendance, and turnover. *Id.*

241. RWA: *How It Works*, *supra* note 8.

242. *Id.*

243. *Disability-Related Modifications*, GOV'T OF CAN., <https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/sole-proprietorships-partnerships/report-business-income-expenses/completing-form-t2125/other-business-expenses.html#disability%E2%80%93relatedmodifications> [<https://perma.cc/TSN3-V4SX>].

244. *Id.*

245. *Opportunities Fund for Persons with Disabilities*, *supra* note 8.

246. *Enabling Accessibility Fund*, EMP. AND SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/programs/enabling-accessibility-fund.html> [<https://perma.cc/CV2R-BS3P>].

247. *Id.*

## ANALYSIS AND RECOMMENDATIONS

## I. PROBLEMS RATIFYING THE CRPD IN THE U.S.

*A. U.S. Voting History on the CRPD*

In contrast to Canada's rapid adoption of the CRPD, the U.S. Senate has failed to ratify the treaty on two occasions since the United States became a signatory to the CRPD in 2009. The U.S. Senate first considered ratification in July 2012, after the Senate Committee on Foreign Relations voted to send the CRPD—subject to certain reservations, understandings, and declarations—to the full Senate.<sup>248</sup> The proposed reservations covered three potential incompatibilities between specific CRPD provisions and U.S. law: federalism, non-regulation of private conduct, and obligations related to torture, cruel, inhumane, or degrading treatment.<sup>249</sup> The understandings and declarations dealt with a number of CRPD provisions which the Senate Committee on Foreign Relations felt were not in direct contradiction to U.S. law, but required clarification.<sup>250</sup> Although every Senate Democrat, as well as eight Senate Republicans, voted to ratify the CRPD with these conditions, the resolution fell five votes short of the two-thirds majority requirement.<sup>251</sup>

In late 2013, the CRPD again received consideration by the Senate Committee on Foreign Relations.<sup>252</sup> For a second time, the committee “approved

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248. *American Bar Association: CRPD*, *supra* note 218. A reservation is a statement made by a Member State “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that [Member] State.” Vienna Convention on the Law of Treaties, *supra* note 179, at art. 2(1)(d). Reservations may not be “incompatible with the object and purpose of the treaty.” *Id.* at art. 19. “Unlike reservations, [understandings and] declarations merely classify the [Member] State’s position and do not purport to exclude or modify the legal effect of the treaty.” *Glossary of Terms Relating to Treaty Actions*, *supra* note 173.

249. S. Rep. No. 113-12, at VIII(F)(1) (2012).

250. *Id.* at VIII(F)(2)-(3) (2012). Topics for clarification included the CRPD’s effects on the First Amendment; economic, social, and cultural rights; the U.S. military; legal definitions of key terms; health care; and homeschooling. *Id.* at VIII(F)(2) (2012). The U.S. also declared that the CRPD would not be self-executing and the current U.S. law already satisfies the minimum protection requirements of the CRPD. *Id.* at VIII(F)(3) (2012).

251. *Roll Call Vote, 112th Congress – 2nd Session, On the Resolution of Ratification (Resolution of Ratification Treaty Doc. 112-7)*, U.S. Senate (Dec. 4, 2012, 12:06 PM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=2&vote=00219#position](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00219#position) [<https://perma.cc/J63T-EFTM>]. The eight Senate Republicans voting in favor of CRPD ratification were: Ayotte (NH), Barrasso (WY), Brown (MA), Collins (ME), Lugar (IN), McCain (AZ), Murkowski (AR), and Snowe (ME). *Id.*

252. The Senate Committee on Foreign Relations held hearings on the CRPD on November 5 and 23, 2013. *American Bar Association: CRPD*, *supra* note 218.

a resolution of advice and consent to ratification for the treaty.”<sup>253</sup> This time, the CRPD and proposed reservations never made it to the Senate floor for a full vote, meaning the treaty reverted to the Senate Committee on Foreign Relations at the end of the 113th Congress.<sup>254</sup> As of the date of this Note, the Senate has not reconsidered ratification for the CRPD since the end of the 113th Congress.

*B. Arguments Against CRPD Ratification in the U.S.*

Republican opposition was led by former Senator Rick Santorum, the Heritage Foundation, and a few homeschooling organizations.<sup>255</sup> One argument against ratification was that, because U.S. disability law already exceeded the requirements of the CRPD, the treaty would do very little to change disability rights in the U.S. while unnecessarily subjecting the U.S. to oversight by international committees.<sup>256</sup> During committee hearings, the Heritage Foundation presented a short history of the “abuses of treaty communities,” concluding that “[t]he U.S. has reason to expect that the experts on the CRPD Committee will give short shrift to U.S. sovereignty, laws, regulations and norms, and embark on similar forays in pursuit of a broader agenda of social engineering unrelated to disability rights.”<sup>257</sup>

The other predominant argument against U.S. ratification of the CRPD involved fear that the treaty would increase the prevalence of abortion.<sup>258</sup> This argument points to Article 25 of the CRPD, which requires that parties “[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.”<sup>259</sup> This provision “could be interpreted as ensuring that persons with disabilities are provided access to free or affordable abortions, assuming such access is provided to non-disabled persons by the state party.”<sup>260</sup> Due to the heated political climate in the U.S. surrounding abortion, it was uncertain whether the definition of “reproductive health” should include abortions.<sup>261</sup> Therefore,

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253. *Id.*

254. *Id.*

255. Albert R. Hunt, *On Disabilities Treaty, the Right Fights With the Right*, N.Y. TIMES (Feb. 23, 2014), <https://www.nytimes.com/2014/02/24/us/politics/on-disabilities-treaty-the-right-fights-with-the-right.html> [<https://perma.cc/4UX2-4WXW>] [hereinafter Hunt].

256. *Convention on the Rights of Persons with Disabilities: Hearing on Treaty Doc. 112-7 Before the S. Comm. on Foreign Relations*, 112th Cong. 2 (2012) (statement of Steven Groves, Heritage Foundation).

257. *Id.*

258. *Id.*

259. *Convention on the Rights of Persons with Disabilities*, *supra* note 10, at art. 25.

260. *Convention on the Rights of Persons with Disabilities: Hearing on Treaty Doc. 112-7 Before the S. Comm. on Foreign Relations*, 112th Cong. 8 (2012) (statement of Steven Groves, Heritage Foundation).

261. *Id.*



those who feared the expansion of abortion within the U.S. wanted the Senate Committee on Foreign Relations to “clarify the nature of the Convention regarding that phrase and its relationship to abortion” before they would vote in favor of CRPD ratification.<sup>262</sup>

## II. THE U.S. SENATE MUST RATIFY THE CRPD

### *A. Arguments in Favor of CRPD Ratification in the U.S.*

Political leaders in the United States routinely emphasize the need for American leadership, particularly the importance of leading by example. At his acceptance speech, then President-Elect Joe Biden said that “at our best, America is a beacon for the globe ... [leading] not by the example of our power, but by the power of our example.”<sup>263</sup> As the preeminent world power, it is always important that the U.S. take a leadership role in the expansion of human rights, regardless of what class of persons are involved. However, this is especially true when it comes to disability law. U.S. law, particularly the ADA, provided the framework for the CRPD.<sup>264</sup> This makes it all the more perplexing when the U.S. refuses to endorse many of its own policies on an international stage.

In addition to the negative symbolic messages conveyed by the U.S. Senate’s refusal to ratify the CRPD, the U.S. is also passing up opportunities to guide the interpretation and enforcement of the CRPD. By ratifying the CRPD, the U.S. would further its influence on the freedoms and human rights enjoyed around the world through involvement on the Committee on the Rights of Persons with Disabilities.<sup>265</sup> Members of the Committee “shall be elected by States Parties [to the CRPD].”<sup>266</sup> As a voting entity, the U.S. would have a hand in selecting the body which reviews reports from each Member State regarding the country’s implementation of disability laws—based primarily on the U.S. model—after ratifying the CRPD.<sup>267</sup> Furthermore, as a party to the CRPD, experts from the U.S. could run for positions on the Committee, thus representing the U.S. in the greatest leadership role available under the treaty.

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262. *Id.*

263. President-Elect Joe Biden, Acceptance Speech (Nov. 7, 2020) (speech available at Washington Post, *President-Elect Joe Biden’s Full Acceptance Speech*, YOUTUBE (Nov. 7, 2020) <https://www.youtube.com/watch?v=UkqWtrj1oAk> [<https://perma.cc/TW2F-RUQW>]).

264. *CRPD One-Pager*, *supra* note 213.

265. *See generally* Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 34.

266. Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 34, § 4. The Committee Members are elected with “consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.” Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 34, § 4.

267. *See* Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 36.

The U.S. stands to benefit domestically from the CRPD as well. Because the CRPD is based predominantly on U.S. disability law, there is no major legislation needed to bring U.S. law into compliance with the treaty post-ratification.<sup>268</sup> However, as seen in Canada, the CRPD encourages countries already boasting robust disability laws to create supplementary policies and programs.<sup>269</sup> These new plans provide specific steps meant to advance the employment protections and opportunities that are sought, but currently unrealized, by the existing antidiscrimination laws.

*B. Rebutting Arguments Against CRPD Ratification in the U.S.*

While many political figures, particularly from the Republican Party,<sup>270</sup> argue that the U.S. should not adopt the CRPD due to the reasons previously mentioned, their positions do not hold up to scrutiny for a couple of reasons. First and foremost, the U.S. could adopt the CRPD with declarations and reservations to remedy each of the concerns voiced by opponents of ratification. “[Declarations and] reservations attached to a treaty are part of the treaty ... [meaning that] nothing in [the CRPD] would allow what critics allege.”<sup>271</sup> Any declaration or reservation reasonably tailored to address the concerns raised would likely be permitted by the U.N. because none of the proposed amendments would render the corresponding CRPD provision “incompatible with the object and purpose of the treaty” as prohibited under the Vienna Convention on the Law of Treaties.<sup>272</sup> The U.S. Senate Committee on Foreign Relations included reservations and declarations in the draft treaty sent to the Senate for approval.<sup>273</sup> These provisions

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268. See S. Exec. Rep. No. 113-12, at VIII(F)(3) (2012) (proposing a declaration stating that U.S. law complies with the CRPD be included if the treaty is ratified).

269. Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 27. See, e.g. *Disability-Related Modifications*, *supra* note 243 (listing available tax deductions related to employing persons with disabilities); see also *Opportunities Fund for Persons with Disabilities*, *supra* note 8 (providing “job search supports, pre-employability services, wage subsidies, work placements and employer awareness initiatives to encourage employers to hire persons with disabilities.”); *Enabling Accessibility Fund*, *supra* note 246 (funding projects that make Canadian communities and workplaces more accessible for persons with disabilities).

270. This is not to say that all Republicans oppose ratifying the CRPD. The U.N. was encouraged and aided by the George H.W. Bush Administration during the drafting of the CRPD. *CRPD One-Pager*, *supra* note 213. Former Republican Senators Bob Dole, Bill Frist, John Barrasso, and John McCain have all voiced support for the ratification of the CRPD. Hunt, *supra* note 255.

271. Hunt, *supra* note 255 (quoting Richard L. Thornburgh, who was attorney general during George H.W. Bush’s administration and is an advocate of the treaty).

272. Vienna Convention on the Law of Treaties, *supra* note 179, at art. 19. The reservations, understandings, and declarations proposed by the Senate Committee on Foreign Relations mainly serve to substitute CRPD terms with longstanding U.S. definitions. See generally S. Rep. No. 113-12, at VIII(F) (2012).

273. See generally S. Rep. No. 113-12, at VIII(F) (2012).

cover many of the concerns raised during the Senate hearings.

Notwithstanding the proposed declarations and reservations that render the concerns about the CRPD moot, the alleged issues have been overstated by objecting parties. Although there is an international oversight committee with regards to the CRPD, the real oversight is done from within.<sup>274</sup> The U.S. already has governmental bodies such as the EEOC in place to carry out these functions without relying on international resources. Although parties to the treaty are expected to submit compliance reports to the U.N.,<sup>275</sup> the Committee on the Rights of Persons with Disabilities serves a primarily advisory function.<sup>276</sup> The U.S. would be free to implement changes suggested by the international body, but the real oversight and decision-making authority would continue to vest as currently determined under U.S. law.<sup>277</sup> Therefore, any fear of a centralized global government directly manipulating U.S. law is misguided.

Finally, the CRPD does not promote or expand abortion within ratifying Member States. Article 25 of the CRPD requires ratifying entities to provide persons with disabilities with the “same range, quality and standard of free or affordable health care . . . as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes.”<sup>278</sup> Those opposed to the CRPD for fear that the treaty promotes abortion are focused on the “sexual and reproductive health” portion of the provision. However, the object of Article 25 is to require that persons with disabilities be given equal access to all areas of health care, including sexual and reproductive health, as long as such care is provided to other persons.<sup>279</sup> In other words, the CRPD is relevant to providing abortion access for persons with disabilities only to the extent that the procedure is already available to “other persons” within the ratifying Member State.<sup>280</sup> Therefore, the language in Article 25 of the CRPD does nothing more than state the principle of equal protection under the law, which the U.S. already guarantees under the Fourteenth Amendment.<sup>281</sup>

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274. *See, e.g.*, Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 28.1 (Can.) (designating the Canadian Human Rights Commission as a body responsible for monitoring the Government of Canada’s implementation of [the Convention on the Rights of Persons with Disabilities]).

275. Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 35.

276. *See id.* at art. 36 § 1.

277. *Id.* at art. 33.

278. *Id.* at art. 25 (emphasis added).

279. *Id.* at art. 25.

280. *See* Convention on the Rights of Persons with Disabilities, *supra* note 10, at art. 25. Three ratifying countries—Malta, Monaco, and Poland—included reservations or declarations which expressly state that the CRPD does not create or expand abortion rights when applied to domestic laws. *Status of Treaties: Convention on the Rights of Persons with Disabilities*, *supra* note 13.

281. U.S. CONST. amend. XIV, § 1.

### III. INCREASE INCENTIVES FOR THE EMPLOYMENT OF PERSONS WITH INTELLECTUAL DISABILITIES

In countries already protecting persons with disabilities through strong antidiscrimination laws, ratifying the CRPD has led to the adoption of new plans for increasing employment opportunities.<sup>282</sup> These responsive programs and policies would be the greatest domestic benefit to result from U.S. ratification of the CRPD. First, the U.S. must connect more private employers to prospective workers with disabilities. The Department of Labor can accomplish this by expanding its existing job-pairing programs further into the private sector. Currently, the U.S. has plenty of hiring initiatives in place to connect persons with disabilities to open public jobs at the federal and state levels.<sup>283</sup> However, the U.S. government's involvement with private business is mostly limited to providing general information to employers who independently seek these resources.<sup>284</sup> Conversely, Canada offers a wide array of government-funded recruiting and training services to private sector employers.<sup>285</sup> Establishing these services in the U.S. would be very manageable from an administrative perspective, as the U.S. already has equivalent federal agencies to those carrying out the proposed policies in Canada. By simply increasing the number of interviews given to qualified candidates with disabilities, the U.S. would likely see higher employment numbers.

The U.S. must also increase its funding for incentives given to private employers who hire persons with disabilities. These incentives should include subsidies for training and accommodation costs. On the one hand, these associated costs often discourage employers from actively pursuing persons with disabilities to fill a job opening. On the other hand, the price of subsidizing these costs has been shown to be minimal, with the average accommodation requiring only \$600.<sup>286</sup> As demonstrated in Canada, these incentives can be allocated to private businesses through tax benefits or the administration of grants from a fund.<sup>287</sup> By combining lower hiring costs with greater access to qualified

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282. RWA was founded and funded by the Canadian government following Canada's ratification of the CRPD. *Creating Employer Demand for Inclusive Hiring*, ZERO PROJECT <https://zeroproject.org/policy/creating-employer-demand-for-inclusive-hiring/> [<https://perma.cc/9ZDN-GQ5V>].

283. See, e.g. *Workforce Recruitment Program (WRP)*, *supra* note 156.

284. See *Train & Retain*, EMP. AND TRAINING ADMIN., U.S. DEP'T OF LABOR <https://www.careeronestop.org/BusinessCenter/TrainAndRetain/train-and-retain.aspx> [<https://perma.cc/97XF-TESB>].

285. See, e.g. *Hiring Persons with Disabilities*, EMP. AND SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/campaigns/hiring-persons-disabilities.html> [<https://perma.cc/CX57-FKNV>]; see also RWA: *How It Works*, *supra* note 8.

286. *Factsheet on Persons with Disabilities*, DEP'T OF ECON. AND SOC. AFF., U.N., <https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html> [<https://perma.cc/B8FN-KMVR>].

287. See, e.g., *Disability-Related Modifications*, *supra* note 243 (listing available tax

candidates, the U.S. would ease the greatest concerns raised by private employers who have considered hiring persons with disabilities.

#### CONCLUSION

The United States has long been a world leader in protecting human rights. This is especially true when it comes to international disability rights, which are enumerated in a treaty that is largely inspired by the ADA. However, by declining to ratify the CRPD, the U.S. has failed to take an active leadership role in advancing American ideals around the world. Detractors in the U.S. Senate have raised issues with the CRPD that are easily remedied through the usual ratification procedures. Countries that have ratified the CRPD have subsequently taken steps to increase employment opportunities for persons with disabilities, especially in the private sector. Meanwhile, statistics quantifying the employment of persons with disabilities show that the U.S. has fallen behind many ratifying countries, particularly when it comes to persons with intellectual disabilities. Therefore, the U.S. must ratify the CRPD and increase the resources provided to private employers who hire persons with intellectual disabilities in order to regain the distinction as the Land of Opportunity.

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deductions related to employing persons with disabilities); *see also Opportunities Fund for Persons with Disabilities*, *supra* note 8 (providing “job search supports, pre-employability services, wage subsidies, work placements and employer awareness initiatives to encourage employers to hire persons with disabilities.”); *Enabling Accessibility Fund*, *supra* note 246 (funding “projects that make Canadian communities and workplaces more accessible for persons with disabilities.”).