

CAN THE U.S. USE A RESERVATION TO ALLEVIATE
SOVEREIGNTY CONCERNS REGARDING THE CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES?

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How is it possible that a treaty that according to our Supreme Court offers no recourse, no change in American law, no access to American courts, how is it possible that such a treaty could threaten anybody in our country? The answer is simple, it doesn't, and it can't.

— Secretary of State, then Senator from Massachusetts, John Kerry.¹

In short, there is no reason for our country to give up our sovereignty to the United Nations when it comes to providing benefits and protections for the disabled in America. Furthermore, it would be an egregious move to deny parents of children with disabilities the right to do what they think is in their child's best interest in exchange for some illegitimate claim that disabled Americans will have better treatment abroad. CRPD must be defeated.

— Former Sen. Rick Santorum²

I. INTRODUCTION

All eyes are watching as the United States contemplates ratification of the United Nations Convention on the Rights of Persons with Disabilities. This Note first examines the Convention on the Rights of Persons with Disabilities (CRPD) by describing its purposes, functions, and goals. This examination reveals that the importance of the CRPD cannot be downplayed; for the 650 million disabled persons worldwide, the CRPD serves as a hallmark of international progress towards the empowerment of all people with disabilities.³

Notwithstanding its celebrated formation, however, the CRPD's functionality cued warning sirens for the United States when the Convention

¹ Sunlen Miller, *Bob Dole Can't Sway Republicans to Back UN Disabilities Treaty*, ABC NEWS (Dec. 4, 2012, 3:25 PM), <http://abcnews.go.com/blogs/politics/2012/12/bob-dole-cant-sway-republicans-to-back-un-disabilities-treaty/>.

² Rick Santorum, *This Treaty Crushes U.S. Sovereignty*, WND (Dec. 2, 2012, 8:43 PM), <http://www.wnd.com/2012/12/this-treaty-crushes-u-s-sovereignty/>.

³ INCLUSION FOR ALL: THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 1 (Deborah A. Ziegler ed., 2010).

was debated during the 112th Congress in 2012.⁴ This Note investigates the reasons behind Congress's hesitation in ratifying the Convention, and will do so in the shadow of the United States' strong stance on the rights of the disabled, exemplified by current domestic policy.⁵

Although the United States is a leader in the push for disability rights on an international stage, the CRPD creates possible national sovereignty concerns for the U.S.—concerns, which, if left unaddressed, could threaten the authority of U.S. law according to some U.S. policymakers.⁶ The validity of these concerns about national sovereignty will be addressed within this Note.

Additionally, this Note considers the fine balance between compliance with desirable international treaties and the need to safeguard domestic policy. One often utilized yet controversial method of balancing these subject matters is the use of reservations, understandings, or declarations, more commonly known as “RUDs.”⁷ The history behind RUD usage will be surveyed, along with current attitudes towards these tools.

In light of these considerations, one question remains: Can and should the United States submit a RUD to the CRPD? RUDs have explicit restraints that must be adhered to by any nation utilizing them, including the limitation that a RUD cannot be incompatible with the object and purpose of the treaty.⁸ This Note addresses whether the United States can successfully make a reservation to the CRPD that serves to protect domestic policy while remaining compatible with the CRPD's object and purpose.

Once it is established that it would be a calculated, although advisable, risk for the United States to submit a RUD, the analysis is not over. Just because the United States is of the opinion that the RUD is permissible does not mean that the rest of the world will vehemently agree; other nations may view the RUD as “prohibited” and thus involve the United States in a perilous debate over the RUD's validity.⁹ This Note examines the likelihood

⁴ LUISA BLANCHFIELD ET AL., CONG. RESEARCH SERV., RL 7-5700, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ISSUES IN THE U.S. RATIFICATION DEBATE R42749, at 1–8 (2013), available at <http://www.fas.org/sgp/crs/misc/R42749.pdf>.

⁵ NAT'L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) (2008), reprinted in INCLUSIONS FOR ALL, *supra* note 3, at 74–81.

⁶ Anderson Cooper, *U.N. Treaty 'Could have an Impact,'* AC360 BLOG (Dec. 7, 2012, 11:36 PM), http://ac360.blogs.cnn.com/2012/12/07/u-n-treaty-could-have-an-impact/?hpt=ac_bn1.

⁷ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 131–33 (2d ed. 2007) (defining reservations and explaining their use in multilateral treaties).

⁸ *Id.* at 134–38.

⁹ *Id.* at 138–39.

of this occurring, and answers the provocative question of whether foreign policy dangers outweigh any foreign policy benefits that would result from submitting a reservation to the CRPD.

Decisively, the current state of the international stage suggests that utilizing a reservation for the Convention on the Rights of Persons with Disabilities is well worth the risk. Neither national sovereignty concerns nor potential international backlash to a RUD dwarf the need for ratification of the Convention.

II. BRIEF BACKGROUND OF THE CRPD

The brainchild of disability advocates who worked for decades towards the development of a disability convention, the Convention on the Rights of Persons with Disabilities formally began on December 19, 2001.¹⁰ General Assembly resolution 56/168, passed in December of 2001, created an Ad Hoc Committee tasked with considering “proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach. . . .”¹¹ As the first binding international treaty of its kind, the initial stages of the CRPD garnered the backing of governments, non-governmental organizations (NGOs) and disability people’s organizations (DPOs) alike.¹²

The creation of this Ad Hoc Committee marked the start of the five-year drafting process that ultimately crafted the CRPD.¹³ Over forty nations and 400 different DPOs and NGOs comprised the Ad Hoc Committee, signifying a shift in global policy towards an attitude of respect for individuals with disabilities.¹⁴

On December 13, 2006, the United Nations General Assembly adopted the CRPD.¹⁵ Then, on March 30, 2007, the Convention opened for signatures,¹⁶ indicating the start of a long and multifarious road towards a

¹⁰ Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 288 (2007).

¹¹ G.A. Res. 56/168, U.N. Doc. A/RES/57/229 (Dec. 18, 2002); see also *Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. ENABLE available at <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm> (last visited Sept. 7, 2014) [hereinafter *Ad Hoc Committee Report*] (describing the Ad Hoc Committee’s eight sessions).

¹² Kanter, *supra* note 10, at 288.

¹³ *Ad Hoc Committee Report*, *supra* note 11.

¹⁴ Kanter, *supra* note 10, at 289.

¹⁵ Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD], available at <http://www.un.org/disabilities/convention/conventionfull.shtml>.

¹⁶ *Id.* art. 42.

United States ratification decision.¹⁷ With eighty-two nations signing on its inaugural day, the Convention had the highest number of first-day signatories of any United Nations treaty in history.¹⁸ The CRPD had undoubtedly seized the world's attention, and its momentum would not drastically slow in the weeks and years to come. Since opening for signature, there are now 147 ratifications and accessions to the Convention and 158 signatories to the Convention, including the United States.¹⁹

The objectives and principles laid out in the adopted CRPD primarily came about as a way to combat the abysmal reality of how people with disabilities are disregarded on a global scale. Ten percent of the world's population is living with a disability, 80% of all persons with disabilities live in developing countries, and 20% of the world's poorest people are disabled.²⁰ Further, despite the aforementioned statistics, only forty-five countries have any anti-discrimination or disability-specific laws.²¹ These figures magnify the dire need for a global initiative that aims to level the playing field for individuals living with disabilities. The CRPD was developed to answer that resounding bell of disparity.

The Convention serves as a pioneering international accumulation of ideas, complete with the overarching themes of “dignity of the individual; access to justice; importance of family decision making; and access to education, independent living, and employment.”²² The stated purpose of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”²³ The Convention's predominant principles reflect that the global community has finally stepped up to the plate with regards to the equality of persons with disabilities. As international actors move towards recognizing meaningful inclusion, the quality of life for these individuals is sure to rise.²⁴ Furthermore, the Convention's stated purpose not only provides a helpful insight into the

¹⁷ BLANCHFIELD ET AL., *supra* note 4.

¹⁸ Kanter, *supra* note 10, at 288.

¹⁹ *CRPD and Optional Protocol Signatures and Ratifications*, U.N., <http://www.un.org/disabilities/documents/maps/enablemap.jpg> (last visited Sept. 22, 2014).

²⁰ *Convention on the Rights of Persons with Disabilities: Some Facts about Persons with Disabilities*, U.N., <http://www.un.org/disabilities/convention/facts.shtml> (last visited Sept. 7, 2014).

²¹ *Id.*

²² INCLUSION FOR ALL, *supra* note 3, at 2.

²³ CRPD, *supra* note 15, art. 1.

²⁴ INCLUSION FOR ALL, *supra* note 3, at 5 (discussing how global advocacy is one of the most powerful ways to ensure that the rights of people with disabilities are “supported and strengthened”).

reasons behind the establishment of the treaty, but it also becomes tremendously important when determining whether any reservations, understandings, or declarations to the CRPD would be valid.²⁵

Moving from ideology to functionality, the CRPD creates two implementation tools that aim to enhance the Convention's foundational theories.²⁶ These two mechanisms are the Committee on the Rights of Persons with Disabilities (the Committee or Expert Committee) and the Conference of States Parties (the Conference).²⁷

The Committee is a body of experts that reviews individual states' implementations of the Convention.²⁸ The Committee examines each state's periodic reports to see what measures have been taken to further the goals of the CRPD.²⁹ It is important to note that after the Committee scrutinizes a state's period report, it will then return "such suggestions and general recommendations on the report as it may consider appropriate."³⁰ Importantly, however, the recommendations given by the Committee are advisory only; none of their decisions are binding upon states.³¹

This Committee's oversight power is heightened if a state has signed onto the CRPD Optional Protocol—a separate but related international treaty that establishes two procedures "aimed at strengthening the implementation and monitoring of the Convention."³² The two procedures created by the Optional Protocol are a petition process and an inquiry process.³³ These mechanisms provide the authority to receive complaints from individuals whose rights have allegedly been breached in violation of the Convention, and subsequently undertake inquiries into the content of those petitions.³⁴ Essentially, the Protocol operates on the same foundation as the Convention, but its signing dictates that nations can be held to a higher standard of accountability than if the nation had solely signed or ratified the Convention itself.³⁵

²⁵ AUST, *supra* note 7, at 136.

²⁶ CRPD, *supra* note 15, arts. 34, 40.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* arts. 35–36.

³⁰ *Id.* art. 36.

³¹ S. REP. NO. 112-6, at 5 (2015), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112erpt6/html/CRPT-112erpt6.htm>.

³² *Convention on the Rights of Persons with Disabilities: Questions and Answers*, U.N. UNABLE (2008–2009), <http://www.un.org/disabilities/default.asp?navid=23&pid=151>, reprinted in *INCLUSION FOR ALL*, *supra* note 3, at 54–73.

³³ CRPD, *supra* note 15, arts. 34–39.

³⁴ *INCLUSION FOR ALL*, *supra* note 3, at 55.

³⁵ *Id.*

The second implementation tool used by the Convention to enrich its inclusion objectives is the Conference of States Parties.³⁶ The Conference meets regularly to discuss matters regarding implementation of the treaty (i.e., debating proposed amendments, etc.).³⁷ Although the specifics of the Conference are left unaddressed by the CRPD's textual language, its main purpose is the creation of a forum for consideration of any implementation matters.³⁸

It is with these foundational ideas and implementing mechanisms in mind that the CRPD has been presented to the potential ratifying countries. Although the terms of the Convention seem straightforward, the Convention, like most major multilateral treaties, is bursting with areas of potential conflict and confusion. While many nations have confidently ratified the Convention, many have refused to do so.³⁹ Captivated by fears over national sovereignty, some nations and their citizens simply do not think the CRPD's rewards outweigh its risks.⁴⁰

III. THE UNITED STATES AND THE CRPD: A HISTORY

In December 2012 the U.S. Senate failed to ratify the CRPD falling a mere five votes short of the required super majority vote.⁴¹ The vote to not ratify was due to a variety of concerns; most importantly, there was concern whether the Convention could stretch its authority beyond the U.S.'s ratified intent.⁴² The Senate was afraid that the Convention could one day interfere with the functioning of the United States' federalist system.⁴³

Congress's worries are best articulated as falling under the umbrella of national sovereignty; the centerpiece of the United States' anxiety toward the Convention is derived from the belief that the treaty could supersede U.S.

³⁶ *Id.* at 65.

³⁷ *Id.*

³⁸ CRPD, *supra* note 15, art. 40.

³⁹ *Convention and Optional Protocol Signatures and Ratification: Countries and Regional Integration Organizations*, U.N. ENABLE, <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> (last visited Sept. 7, 2014).

⁴⁰ See BLANCHFIELD ET AL., *supra* note 4, at 1–8 (“In debates regarding U.S. ratification of CRPD, the treaty’s possible impact on U.S. sovereignty has been a key area of concern.”); Anderson Cooper, *Farris: U.N. Treaty ‘Is a Law,’* AC360 BLOG (Dec. 11, 2012, 12:55 AM), <http://ac360.blogs.cnn.com/2012/12/11/farris-u-n-treaty-is-a-law/?iref=allsearch> (discussing how the treaty would give the U.N. power to control parents’ decisions for their children).

⁴¹ BLANCHFIELD ET AL., *supra* note 4, at 1.

⁴² *Id.* at 16–18.

⁴³ *Id.*

law and thus gain authority over U.S. domestic policy.⁴⁴ A careful examination of the United States' historical dealings with the CRPD reveals that the reluctances to ratify are not arbitrary or rare. Hesitations to ratify the CRPD, emanating from the fear of diminishing national sovereignty, are deeply entrenched within the minds of many U.S. policymakers.

A timeline of events exposes the reality that numerous United States policymakers in differing branches of the federal government have expressed apprehension over what the CRPD's effects would be upon U.S. government.⁴⁵ Although the U.S. played a fundamental role in the creation of the CRPD, there is a marked history of reluctance to adhere to its standards.⁴⁶ Whether the hesitation is derived from a President or Congress, lawmakers have never been unified toward ratification of the CRPD.⁴⁷

Specifically regarding the CRPD, the ratification process was interrupted during the full Senate vote.⁴⁸ Before that failing vote, however, several important steps were taken. First, from 2002 to 2006, the Ad Hoc Committee negotiated the Convention's text.⁴⁹ It is important to note that the U.S. participated in every session during this four-year period,⁵⁰ and, in 2006, the Bush Administration openly favored other countries' adoption of the General Assembly resolution, while also noting that there would be no signing or ratifying of the treaty by the United States because of national sovereignty concerns.⁵¹

Several years and an administration change later, President Obama signed the CRPD in July 2009, and in May 2012 it was transmitted to the Senate for advice and consent to ratification.⁵² By a vote of 13–6 the U.S. Senate Committee on Foreign Relations, reported the CRPD favorably to the full Senate.⁵³ Finally, in December 2012 by a vote of 61–38, the full Senate voted against ratification of the CRPD.⁵⁴ The initial battle was over, but the debate certainly lacked a sense of closure.

This sequence of events leading up to the full Senate vote acted as a roadblock to ratification of the Convention, but proponents of the

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Convention did not halt their campaign. The resilience of the pro-ratification supporters, in addition to the importance of the underlying principles behind the Convention, signifies the need to carefully dissect the ratification debate.

IV. THE UNITED STATES RATIFICATION DEBATE

Despite the obvious battle between those who support the CRPD and those who oppose its ratification, the apprehensions associated with the treaty are hard to pin down at first glance. In order to better understand the debate, the arguments for and against ratification must be examined.

A. The Foundations of the Anti-Ratification Argument

First, there are extreme national sovereignty fears associated with the ratification of the treaty. On the surface, the concerns associated with ratifying the CRPD revolve around how U.S. laws would interact with the provisions of the treaty—essentially, which sovereignty would win out?⁵⁵ This argument jumps to the conclusion that ratifying the CRPD would make the United States vulnerable to the policies of other nations (i.e., that the European countries would interpret certain provisions to mean that disabled children cannot be homeschooled, etc.).⁵⁶

The true root of the apprehension is traced back to the uncertainty of the Expert Committee's power restraints in light of the United States Constitution's Supremacy Clause.⁵⁷ The Supremacy Clause states, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."⁵⁸ The CRPD Expert Committee serves as an implementation body with the purpose of periodically examining state's compliance. Thus the scope of the Committee's power is the driving point behind the ratification debate.⁵⁹ While treaty committees do not technically possess binding power, many treaty committees are nevertheless viewed with hesitation.⁶⁰ A powerful treaty committee that operates in a parallel fashion to the Constitution's Supremacy Clause has presented novel concerns in the last few decades. A historical tendency towards the enhancement of power for treaty bodies

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 15.

⁵⁸ U.S. CONST. art. VI, cl. 2.

⁵⁹ INCLUSION FOR ALL, *supra* note 3, at 65.

⁶⁰ BLANCHFIELD ET AL., *supra* note 4, at 16.

creates a foreboding question mark as to how the CRPD Committee would operate.

There are currently nine human rights treaty bodies that serve to monitor the core human rights treaties that the bodies are associated with.⁶¹ These treaties include: Committee on the Rights of Persons with Disabilities (CRPD), Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture, Committee on the Rights of the Child (CRC), Committee on Migrant Workers, and the Committee on Enforced Disappearances.⁶²

These treaty bodies, including the Expert Committee of the CRPD, are self-categorized as legal examiners.⁶³ This legal label is partially what drives the angst behind questions about how a treaty body's interpretation of a treaty would affect ratifying countries. The assertion that the bodies are legal in nature is magnified by the fact that three treaties—the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention Against Enforced Disappearances—unambiguously require interpreting bodies to give consideration to the “usefulness of the participation of some persons having legal experience.”⁶⁴ In fact, nearly all treaty bodies are comprised of a large number of members with a legal background.⁶⁵ Legal representation reinforces the idea that treaty bodies are not mere guidance givers; their opinions may ultimately have some force.

Opposition to the CRPD is driven by concern that the Expert Committee may exceed its stated boundaries and become a powerful monitoring body that is capable of interfering with the lives and freedoms of the people of the United States.⁶⁶ These worries are not without support. When the actions of other United Nations treaty monitoring bodies are examined, the results show

⁶¹ UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Human Rights Bodies*, OHCHR, <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> (last visited Sept. 7, 2014).

⁶² *Id.*

⁶³ Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905, 913 (2009) (discussing the role of treaty bodies in the interpretation of human rights treaties).

⁶⁴ *Id.* at 913.

⁶⁵ *Id.* at 917.

⁶⁶ BLANCHFIELD ET AL., *supra* note 4, at 16 (“Specifically, critics are concerned that committee recommendations and decisions could supersede U.S. laws and presume authority affecting the lives, freedoms, and decisions of private citizens.”).

a modern trend towards bodies whose power exceeds their original purpose.⁶⁷

An inspection of other United Nations treaty bodies reveals that these bodies have gone far beyond the confines laid out for them in the Vienna Convention on the Law of Treaties (VCLT).⁶⁸ The VCLT created the basics of how a human rights treaty monitoring body should act.⁶⁹ A body's proper role is to perform in accordance with these limited powers: monitor the periodic reports of the States Parties, honor States Parties' requests to send a delegation during the consideration of their States Party's periodic report, issue summaries of States Parties' compliance in treaty body annual reports, and issue collective, non-binding, and non-critical comments, suggestions, and recommendations on States Parties' periodic reports.⁷⁰

The bodies are to carry out these limited roles under the guideline of using "good faith" to interpret the "ordinary meanings" of the treaties' texts.⁷¹ On a most basic level, when these limited powers are mixed with the necessity of using good faith, the outcome should be that all U.N. treaty bodies are limited in scope. Despite that expected outcome, however, there is a trend towards expansion of authority—the very concept that the individuals against the ratification of the CRPD fear most.⁷²

The first of the nine human rights treaty monitoring bodies was limited to giving "general comments," a term that was interpreted to mean simplified and non-States Party specific.⁷³ Any general comments given by the treaty bodies were rare and not directed at any particular country, following the lead of the Commission on Human Rights in monitoring periodic reports on the Universal Declaration of Human Rights.⁷⁴ This tradition soon began to change in favor of sweeping observations and comments that targeted specific ratifying nations.⁷⁵ The modern general comment came about in the early 1990s and does not mirror the cautious practices outlined by the VCLT rules.⁷⁶ "Most of the general comments read like a judicial opinion interpreting a statute. They incorporate other treaties, conventions, and

⁶⁷ Joanne Pedone & Andrew R. Kloster, *New Proposals for Human Rights Treaty Body Reform*, 22 J. TRANSNAT'L L. & POL'Y 29, 48 (2012–2013).

⁶⁸ *Id.*

⁶⁹ *Id.* at 34.

⁷⁰ *Id.*

⁷¹ *Id.* at 35.

⁷² *Id.* at 48.

⁷³ *Id.* at 38–39.

⁷⁴ *Id.*

⁷⁵ *Id.* at 40–43.

⁷⁶ *Id.* at 44–45.

statements extraneous to the treaty, and their opinions often go far beyond the text of the treaty.”⁷⁷ In this view, the interpretations of human rights bodies wield tremendous power, including potentially the power to undermine the ratified treaty language.

There are three prominent examples of monitoring body overreach: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)’s Committee; the Convention on the Rights of the Child (CRC) Committee; and the Committee on the Elimination of Racial Discrimination (CERD Committee), created by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁷⁸ These examples exemplify why anti-CRPD ratifiers have concrete worries about how the CRPD’s Expert Committee could potentially attempt to shape the future of U.S. domestic law.

First, CEDAW is a United Nations treaty that is often described as an international bill of rights for women.⁷⁹ CEDAW aims to define what constitutes discrimination against women, and it also establishes an agenda for national actions designed to end discrimination against women.⁸⁰ Articles 17–22 of CEDAW create the CEDAW Committee, a monitoring body that reviews the States Parties’ periodic reports on compliance with the treaty.⁸¹ The CEDAW Committee is only granted three powers: making suggestions and general recommendations, inviting specialized agencies to submit reports on the implementation of CEDAW, reporting annually to the U.N. General Assembly on its activities.⁸²

Importantly, the treaty does not authorize “concluding observations,” or observations referring to a State Party-specific evaluation issued after the evaluation of State Party periodic reports.⁸³ These concluding observations generally include criticisms of the States Parties’ implementation of the treaty, in addition to steps that should be taken to remedy the concerns.⁸⁴ Although these concluding observations are often used by U.N. human rights

⁷⁷ *Id.* at 45.

⁷⁸ *Id.* at 49–64.

⁷⁹ *U.N. Women: United Nations Entity for Gender Equality and Empowerment of Women, Convention on the Elimination of All Forms of Discrimination Against Women: Text of Convention*, U.N., <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Sept. 7, 2014).

⁸⁰ *Id.*

⁸¹ Convention on the Elimination of All Forms of Discrimination Against Women, arts. 17–22, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW].

⁸² *Id.* arts. 21–22.

⁸³ *Id.*

⁸⁴ Pedone & Kloster, *supra* note 67, at 38.

treaty monitoring bodies, there is no source of authority for such observations based upon either the VCLT or the explicit contents of the treaties.⁸⁵

Despite a lack of unambiguous power, the CEDAW Committee has disregarded the good faith limitations of the VCLT and has expanded the treaty provisions to concepts that were not contemplated by the states.⁸⁶ The most prominent example of the CEDAW Committee overstepping its bounds can be seen in the context of abortion.⁸⁷ Human rights treaties have left abortion matters up to States Parties, as finding any one solution to this controversial topic has proven unmanageable.⁸⁸

Accordingly, CEDAW's text is absolutely silent on the topic of abortion.⁸⁹ However, in 1999, a full twenty years after the treaty was first adopted, the CEDAW Committee stated that Article 12 of the CEDAW treaty includes a right to abortion.⁹⁰ Article 12 states:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.⁹¹

And from that ambiguous and broad language, the CEDAW Committee derived a tangible rule: Article 12 encompasses a right to abortion.⁹² The declaration of the right to abortion represented a new interpretation of Article 12—one that did not go without consequence.⁹³ Soon after, the CEDAW Committee began using concluding observations to impose the right upon states,⁹⁴ criticizing upwards of eighty nations for restricting abortions, including a particularly strong reprimand towards Rwanda.⁹⁵

⁸⁵ *Id.* (“[T]he authority for issuing concluding observations is almost nonexistent. In fact, this phrase does not appear in any of the treaties.”).

⁸⁶ *Id.* at 50.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ CEDAW, *supra* note 81.

⁹⁰ Pedone & Kloster, *supra* note 67, at 50–51.

⁹¹ CEDAW, *supra* note 81, art. 12.

⁹² See Pedone & Kloster, *supra* note 67, at 50–51.

⁹³ *Id.* at 52.

⁹⁴ *Id.*

⁹⁵ *Id.* at 52–53.

This flexing of muscles by the CEDAW Committee may have come as a result of pressure from lobbyist organizations, or it could have been a means of self-promotion.⁹⁶ Lobbyists, complete with enormous financial backing, ran a conference in Glen Cove, New York with the aim of having a “dialogue” with representatives of six major human rights treaty bodies. The treaty bodies agreed to the dialogue in hopes of expanding their activities in the field of women’s health, specifically targeting reproductive and sexual health.⁹⁷ Although the content of the dialogue is unknown, this strong outside influence, combined with the CEDAW Committee’s self-promotion, seems to reinforce the fears of some U.S. policymakers that are hesitant to ratify the CRPD.

The autonomous nature of U.N. human rights treaty monitoring bodies is not limited to the actions of the CEDAW Committee. The CERD Committee also has a history of overexpansion.⁹⁸ The first of the binding international human rights treaties, CERD presented a unified condemnation of racial discrimination, as all States Parties agreed to actively eradicate any such discrimination.⁹⁹ The CERD Committee has four basic functions, as laid out by the treaty’s text: reviewing States Parties’ reports and requesting further information from the States Parties as necessary; submitting an annual report to the U.N. General Assembly on its activities, including any suggestions and general recommendations based on the examination of States Parties’ reports; facilitating resolution of State Party complaints regarding other States Parties alleged treaty violations; and considering communications from individuals or groups claiming to be victims of treaty violations by the State Party after explicit consent from the subject State Party.¹⁰⁰ The Committee, following modern trends towards an enlargement of power, has not limited itself to the confines of the treaty’s substantive provisions.¹⁰¹ CERD’s Committee has issued unauthorized concluding observations and has consistently shown a willingness to exert influence.¹⁰²

⁹⁶ *Id.* at 54.

⁹⁷ *Id.*

⁹⁸ *Id.* at 57–58.

⁹⁹ *Id.* at 57.

¹⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination, arts. 9, 11–14, Jan. 4, 1969, 660 U.N.T.S. 195.

¹⁰¹ Pedone & Kloster, *supra* note 67, at 58.

¹⁰² *Id.* (“Yet the greater problem has not been the practices themselves, but rather the authority with which the CERD Committee presumes to act. For example, a good faith read of this mandate might include some procedural form of concluding observations or general comments, but these formats cannot be read to authorize authoritative interpretations of the CERD or to enforce non-treaty commitments . . . on States Parties. The CERD Committee’s narrow mandate simply does not provide it with such powers.”).

Most notably, the CERD Committee has redefined the critically important term “racial discrimination.”¹⁰³ Regardless of any positive effects an evolving definition of “racial discrimination” may have, it is the States Parties—not the Committee—that should be behind the alteration of the concept.¹⁰⁴ Contravening the good faith obligation within the VCLT, the treaty body provided the stimulus for expanding “racial discrimination” beyond its original focus on apartheid and legal segregation.¹⁰⁵

The Committee Chairman has since admitted that without certain general recommendations made by the Committee in the 1990s, states might not have recognized the necessity of “pulling unintended de facto discrimination and discrimination against indigenous people into the definition of racial discrimination.”¹⁰⁶ This overreach has not gone unnoticed; it is surely a reason why the CRPD has encountered resistance in the United States Senate.¹⁰⁷

Finally, the last concrete example of U.N. treaty body overextension can be seen within the CRC, which came into force in 1990 and recognizes a number of rights possessed by children.¹⁰⁸ The Committee on the Right of the Child (CRC Committee or the Committee) was created to examine the progress made by the States Parties in achieving the realization of the obligations undertaken in the CRC.¹⁰⁹ Notably, the CRC Committee has a broader textual mandate than any other human rights treaty body.¹¹⁰

Unlike other monitoring bodies, the CRC Committee openly welcomes advice from third-parties and has authorized direct communication with individual States Parties.¹¹¹ These powers are exemplified under three main themes. First, third-party specialized U.N. agencies are “entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate”—a feature unique to the CRC.¹¹² This feature allows the Committee to choose agencies

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 59.

¹⁰⁵ *Id.* at 58–59.

¹⁰⁶ *Id.* at 60.

¹⁰⁷ BLANCHFIELD ET AL., *supra* note 4, at 16.

¹⁰⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 [hereinafter CRC].

¹⁰⁹ *Id.* art. 43.

¹¹⁰ Pedone & Kloster, *supra* note 67, at 64.

¹¹¹ See CRC, *supra* note 108, arts. 43, 45 (explaining that States Party directly participate in the CRC committee election process and that the Committee welcomes advice from specialized agencies).

¹¹² *Id.* art. 45(a).

to include within its discussions, magnifying how the Committee's foundation of knowledge is expanding.

The CRC treaty body mandate is also broader because it has a forwarding power. When a state submits a five-year compliance report to the CRC Committee, and the state subsequently indicates a necessity for either technical assistance or advice from a third-party specialized U.N. agency, the Committee is then approved to forward the report to the agency with any comments the Committee has related to that particular request.¹¹³

Lastly, and perhaps most importantly, the CRC Committee mandate is more expansive than any other human rights treaty in terms of direct contact with States Parties. The CRC states that the Committee is sanctioned to directly make "suggestions and general recommendations" to a State Party, and is also authorized to transmit such reports straight to the State Party.¹¹⁴

However, this extensive textual foundation has not quelled the thirst of the Committee.¹¹⁵ Although this is perhaps the least telling of the three treaty body, even the CRC Committee has overstepped its bounds to a certain degree.¹¹⁶ The Committee has issued general "comments" rather than "recommendations," it has held days of thematic discussion without any supervision by the U.N. Secretary General, and it has issued concluding observations in contravention of the VCLT.¹¹⁷

B. The Anti-Ratification Argument Relating Specifically to the CRPD

The above analysis of the breadth of the powers of the CEDAW, CERC and CRD Committees exemplifies why some U.S. policymakers are concerned over what ratification of the CRPD could mean in terms of U.S. sovereignty. Human rights treaty enforcement bodies are far from inept entities—for better or for worse, their actions have far-reaching impacts. Those persons opposing ratification of the CRPD cite three specific provisions that, in their opinion, invite the potential for trouble.¹¹⁸ These provisions include: the lack of an explicit definition of "disability" within

¹¹³ Pedone & Kloster, *supra* note 67, at 65.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 67 ("[T]he bottom line is that it sees itself as issuing 'general comments on thematic issues,' which goes beyond its treaty mandate and risks creating an institutional culture of legal noncompliance. A critical reevaluation is necessary.")

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 68.

¹¹⁸ See S. REP. NO. 112-6 (2012) (statement of Steve Groves, Bernard and Barbara Lomas Fellow, Margaret Thatcher Center for Freedom, The Heritage Foundation), available at <http://www.gpo.gov/fdsys/pkg/cRPT-112erpts6.htm>; BLANCHFIELD ET AL., *supra* note 4, at 15–20.

Article 1; parental authority questions derived from Article 7(2); and the boundaries of reproductive health as presented in Article 25.¹¹⁹

First, the CRPD does not specifically define disability.¹²⁰ Although Article 1 does explain characteristics that would qualify a person to be considered “disabled,” opponents of ratification cite the lack of a clearly-defined demarcation.¹²¹ The absence of a definition troubles opponents because it leaves room for interpretation by the CRPD Expert Committee. Further, certain U.S. Senators take the stance that if the ADA can contain a functional definition of disability, then this revolutionary international disability treaty should surely be capable of doing the same.¹²² In essence, the lack of a definition raises red flags. The lack of a definition raises the concern that the Committee will interpret “disability” in way contrary to U.S. domestic law, potentially expanding the CRPD’s coverage to subject matters not contemplated at ratification

Further, the text of Article 7 also creates concerns. Article 7(2) states: “In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.”¹²³ Opponents of ratification are fearful that this provision would empower the Disabilities Committee—not U.S. parents or even U.S. domestic law—with the ability to make educational and treatment-related choices for American children with disabilities.¹²⁴ The primary example of this manifestation of fear can be seen in homeschooling advocates.¹²⁵ Homeschooling promoters believe the Committee could declare homeschooling to be inconsistent with the best interests of the child under Article 7(2).¹²⁶ This potential stripping of authority from American parents, in light of the modern expansion of international treaty monitoring bodies, is cause for uproar according to these advocates.¹²⁷

Finally, Article 25 of the treaty is also a controversial portion of text. In part, Article 25 requires states to:

¹¹⁹ CRPD, *supra* note 15, arts. 1, 7, 25.

¹²⁰ *Id.*

¹²¹ *See id.* art. 1; S. REP. NO. 112-6, at 9 (“It stands to reason that an international treaty designed to end discrimination on the basis of ‘disability’ should provide a working definition of that term, yet the Convention provides none.”).

¹²² S. REP. NO. 112-6, *supra* note 118.

¹²³ CRPD, *supra* note 15, art. 7.

¹²⁴ BLANCHFIELD ET AL., *supra* note 4, at 18.

¹²⁵ *Reject the UNCRPD FAQ*, HSLDA, <http://www.hslda.org/landingpages/crpd/analysisandfaq.aspx> (last updated Aug. 28, 2014).

¹²⁶ BLANCHFIELD ET AL., *supra* note 4, at 18.

¹²⁷ *Reject the UNCRPD FAQ*, *supra* note 125.

a. Provide 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; [and] b. [P]rovide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons; . . .¹²⁸

The main concern with Article 25 is that the term “sexual and reproductive health” would be interpreted to include the right to an abortion.¹²⁹ This possibility is especially prominent because of the CEDAW Committee’s prior interpretation of CEDAW Article 12.¹³⁰ The United Nations has been markedly reluctant to explicitly use the term abortion, making it likely that Article 25 of the CRPD could be interpreted to cover abortion-related issues despite the term never being used within the article’s text.¹³¹ As reflected in the analysis of the committees of CEDAW, CRC, and CERD, this abortion issue is not immaterial; international human rights committees have shown they are willing to exceed the scope of their traditional enforcement body powers.¹³² If the CRPD Disability Committee decides to attempt to enforce abortion rights via Article 25 of the CRPD, there could be a strong impact upon all States Parties, including the United States.

The final prong of the argument against ratification of the CRPD cites already-enacted U.S. disability laws.¹³³ The U.S. has already shown a definitive commitment to the equal treatment of individuals with disabilities through many existing laws and policies that promote equality, including the U.S. Constitution’s Equal Protection Clause, the Americans Disabilities Act

¹²⁸ CRPD, *supra* note 15, art. 25.

¹²⁹ BLANCHFIELD ET AL., *supra* note 4, at 19.

¹³⁰ S. REP. NO. 112-6, *supra* note 118; *see supra* notes 90–92 and accompanying text.

¹³¹ Steven Groves, *Congressional Testimony on the Convention on the Rights of Persons with Disabilities (Treaty Doc. 112-7)*, HERITAGE FOUNDATION (July 12, 2012), available at http://www.foreign.senate.gov/imo/media/doc/Steven_Groves_Testimony.pdf (“Apparently unwilling to use the term ‘abortion’ in the debate, the proponents of establishing abortion as a human right use phrases such as ‘reproductive rights’ and ‘sexual and reproductive health’ as euphemisms for ‘abortion rights.’ The use of one such euphemism in the text of the Convention has extended the abortion debate into the realm of disability rights.”).

¹³² *See* Pedone & Kloster, *supra* note 67, at 50–52, 58, 67.

¹³³ BLANCHFIELD ET AL., *supra* note 4, at 10.

(ADA), the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act (IDEA).¹³⁴ Because strong policies regarding equality for disabled persons already exist, opponents of ratification ask why the U.S. should expose itself by ratifying a risky international treaty. For them, any foreign policy benefits gained by ratification do not outweigh the conceivable dangers.¹³⁵ Below, these pre-existing protections are considered.

First, the U.S. Constitution provides for the equal protection of individuals with disabilities.¹³⁶ The Fourteenth Amendment provides, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹³⁷

In practice, this Amendment, along with the Fifth Amendment, has meant that when there is any governmental discrimination against individuals with disabilities, a rational basis scrutiny test will be applied to that discrimination.¹³⁸ Further, the Eighth Amendment of the Constitution is also pertinent. That Amendment bars the infliction of “cruel and unusual punishments.”¹³⁹ One example of this Amendment’s effect upon people with disabilities is seen in the 1976 case *Estelle v. Gamble*.¹⁴⁰ There, the U.S. Supreme Court held that a deliberate indifference to prisoners’ medical needs, including any needs of disabled prisoners, equates to cruel and unusual punishment under the Eighth Amendment.¹⁴¹ These two Amendments reinforce the idea that the U.S. has already taken sufficient measures to protect against discrimination of the disabled, thus making ratification of the CRPD superfluous.

The CRPD’s opponents also cite the domestic laws enacted by the United States that aim to protect the disabled. The ADA, enacted in 1990, is an influential bipartisan act that provides sweeping protections for individuals

¹³⁴ *Id.* at 10–15.

¹³⁵ *Id.* at 16–17.

¹³⁶ U.S. CONST. amend. XIV, § 1.

¹³⁷ *Id.*

¹³⁸ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Heller v. Doe*, 509 U.S. 312 (1993).

¹³⁹ U.S. CONST. amend. VIII.

¹⁴⁰ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁴¹ *Id.* at 104.

with disabilities.¹⁴² The ADA may already fulfill a majority of the obligations imposed by the CRPD, including the responsibilities regarding transportation, accessibility, employment, and equal participation in government and private programs.¹⁴³ Beyond the original provisions, the coverage of the ADA was expanded in 2008 to include even more protections for people with disabilities.¹⁴⁴ The ADA provides expansive safeguards for disabled individuals within the realms of employment, state and local governments, and public accommodations.¹⁴⁵

Further, the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act (IDEA) exemplify a commitment to the equal treatment of individuals with disabilities.¹⁴⁶ The Rehabilitation Act mirrors the ADA, but it operates in the context of federal entities and programs.¹⁴⁷ IDEA calls for the education of children with disabilities by

authoriz[ing] federal funding for special education and related services and, for states that accept these funds, it sets out principles under which special education and related services are to be provided. It requires that states and school districts make available a “free appropriate public education” (FAPE) to all children with disabilities, generally between the ages of three and 21.¹⁴⁸

By accentuating possible encroachments of international treaty power and the United States strong domestic policy regarding disability law, the aforementioned arguments illustrate why some policymakers are hesitant to ratify the CRPD. Arguably, the “what-ifs” seem boundless and the United States has already proven its commitment to equality.

¹⁴² Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2012); *see* BLANCHFIELD ET AL., *supra* note 4, at 11.

¹⁴³ BLANCHFIELD ET AL., *supra* note 4, at 11.

¹⁴⁴ *Id.* (“[T]he 2008 amendments broadened the definition of disability to expand coverage to a wider range of individuals with disabilities.”).

¹⁴⁵ *Id.* at 11–13.

¹⁴⁶ *Id.* at 14–15.

¹⁴⁷ *Id.* at 14.

¹⁴⁸ *Id.*

C. The Pro-Ratification Argument: A Different Spin on Treaty Monitoring Bodies

In many ways, the argument for ratification of the CRPD is less abstract than the argument against it and therefore more credible on its face. On the most basic level, those who support ratification state that it is important for the U.S. to finish what it started. As a leader in the implementation of the CRPD and as an outspoken leader for disability rights, the U.S. should adhere to the recommendations that it helped create. Under this view, ratification would not require any drastic legal changes—the CRPD requires States Parties to consider whether their existing domestic laws satisfy CRPD requirements, or if any new measures are required for compliance.¹⁴⁹ In light of that requirement, the U.S. has already fulfilled most, if not all, of the compliance standards via domestic laws such as the ADA.¹⁵⁰ Because it would not be tedious to comply, and because it would heighten the credibility of U.S. foreign policy, ratification of the CRPD seems ideal.

Further, addressing the specific national sovereignty concerns of those who oppose ratification, supporters of the CRPD fervently reiterate that the treaty is non-binding as to international and domestic law.¹⁵¹ The U.S. has long utilized declarations that emphasize that international human rights treaties are non-self-executing.¹⁵² Self-executing treaties typically act in a transnationalist fashion to “facilitate the domestic application of treaty-based international norms.”¹⁵³ Non-self-executing treaties, on the other hand, are nationalist tools that serve to shield the domestic law of a nation against the treaty’s legal norms.¹⁵⁴ The reasoning behind why courts should hold that non-self-executing treaties are not directly applicable by domestic courts is outside the scope of this Note, but it is widely accepted within the American system that non-self-executing treaties are not domestic law.¹⁵⁵

Although doctrine concerning self-executing nature of treaties is convoluted, one thing is clear: despite there being several human rights treaties ratified by the U.S. with monitoring committees similar to CRPD, there is “no instance where a U.S. federal court or the executive branch has

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1.

¹⁵² *Id.* at 7.

¹⁵³ David Sloss, *Domestic Application of Treaties*, reprinted in *THE OXFORD GUIDE TO TREATIES* 367, 386 (Duncan B. Hollis ed., 2012).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 387.

construed a committee's recommendations or decisions as having the force of law."¹⁵⁶ The backdrop is muddled, but the derived rule is secure.

To further ensure that the CRPD would not directly affect domestic law, supporters of ratification emphasize that submitting a domestic law reservation to the CRPD would be an ultimate problem solver. The reservation would essentially state that any U.S. obligations arising from the CRPD are restricted to measures appropriate to the U.S. federal system, such as the implementation of the ADA.¹⁵⁷ Specifically, the federalism reservation proposed by the Obama Administration reads:

This Convention shall be implemented by the Federal Government of the United States of America to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the obligations of the United States of America under the Convention are limited to the Federal Government's taking measures appropriate to the Federal system, which may include enforcement action against state and local actions that are inconsistent with the Constitution, the Americans with Disabilities Act, or other Federal laws, with the ultimate objective of fully implementing the Convention.¹⁵⁸

If valid, this reservation would alleviate any national sovereignty concerns related to the implementation of the CRPD. To determine the legitimacy of such a reservation, however, it is important to understand what RUDs are and why they are often utilized by parties to international human rights treaties.

V. RUDS: A USEFUL TOOL

A. *How RUDs Developed*

Because both sides of the ratification debate have some valid concerns and objectives, the ideal scenario would be to find a way to ratify the document's uncontroversial provisions while also finding a way to not

¹⁵⁶ BLANCHFIELD ET AL., *supra* note 4, at 16.

¹⁵⁷ *Id.* at 6.

¹⁵⁸ *Id.* at 10.

adhere to the provisions with indeterminate meanings or effects. One way of doing this is to use reservations, understandings, or declarations, commonly referred to as RUDs.¹⁵⁹ A “reservation” is a

unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.¹⁶⁰

This definition can be somewhat misleading due to the use of the term “unilateral,” but the unilateral simply means that the reservation is asserted independently, and thus has not been agreed upon by all of the negotiating states.¹⁶¹

The U.S.’s history of submitting reservations to human rights treaties dates back to the post-World War II era.¹⁶² After World War II, modern human rights treaties began to combat atrocities against mankind and create an organized regime designed to defend the human rights of all persons.¹⁶³ These treaties represented a new era of change, but they also presented a vast array of new challenges to United States policymakers and treaty-makers alike.¹⁶⁴ Human rights treaties’ provisions can both create tension between a nation’s long-held beliefs/rights and produce concerns about the scope of the treaty.¹⁶⁵

When treaties cause tension between a nation’s domestic policy and relevant treaty provisions, the issue of scope becomes fundamental. “Human rights treaties touch on almost every aspect of domestic civil, political, and

¹⁵⁹ Edward T. Swaine, *Treaty Reservations*, reprinted in THE OXFORD GUIDE TO TREATIES, *supra* note 153, at 277.

¹⁶⁰ Int’l Law Comm’n, U.N. Doc. A/66/10, 63d Sess. (2011), *United Nations Guide to Practice on Reservations to Treaties*, available at http://legal.un.org/ilc/texts/instruments/English/draft%20articles/1_8_2011.pdf.

¹⁶¹ AUST, *supra* note 7, at 131.

¹⁶² Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000).

¹⁶³ Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT’L L. 1, 10 (2012).

¹⁶⁴ Bradley & Goldsmith, *supra* note 162, at 400 (“Modern human rights treaties present several challenges for the U.S. constitutional system.”).

¹⁶⁵ *Id.*

cultural life. In addition, the language of these treaties is often vague and open-ended.¹⁶⁶ Because of such ambiguity, nations seek to affirmatively define the parameters of any vague treaty that they intend to agree upon.¹⁶⁷ Many times countries want to avoid the foreign policy complications of failing to ratify a human rights treaty, while also managing to harmonize the treaty with domestic law.¹⁶⁸

The utilization of RUDs is as an effective way to solve both of the issues presented above. RUDs can both balance policies and define scope; they allow a nation to accept the attractive portions of a treaty while preserving other portions for the control of domestic laws, and they also allow a nation to formulate boundaries as to the treaty's scope.¹⁶⁹

RUD usage first became common practice for the U.S. in the 1970s.¹⁷⁰ As globalization and international cooperation arose post-World War II, the importance of treaties became substantial.¹⁷¹ The U.N. had fifty-one Members in 1945, but by the end of 2006 membership had quickly reached 192.¹⁷² Also, from 1975 to 1995, the amount of multilateral treaties skyrocketed.¹⁷³

The world landscape had changed, as signified by the rush towards treaty ratification, thus international strategies of cooperation changed as well.¹⁷⁴ Despite the fact that reservations are presently used quite frequently, questions remain about their validity in general and about their use in human rights treaties.¹⁷⁵ Many of these questions revolve around interpretations of RUD limitations.¹⁷⁶

B. The Limitations to RUDs

Some scholars doubt the legitimacy of a nation using RUDs in any treaty, for any purpose.¹⁷⁷ While some international law commentators think that

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 416.

¹⁶⁸ *Id.* at 414 (“As for the desirability of ratifying human rights treaties, presidents and the Senate have agreed that a failure by the United States to ratify the major human rights treaties would result in at least two kinds of foreign policy costs.”).

¹⁶⁹ AUST, *supra* note 7, at 131.

¹⁷⁰ *Id.* at 128.

¹⁷¹ *Id.* at 125.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Swaine, *supra* note 159, at 291.

¹⁷⁶ See generally AUST, *supra* note 7, at 133–38 (discussing the three limitations to RUDs).

¹⁷⁷ Bradley & Goldsmith, *supra* note 162, at 401.

RUDs are bad policy, others take the severe stance that RUDs are legally invalid.¹⁷⁸ The main arguments that support those assertions are succinctly stated by Bradley and Goldsmith: “[R]eservations violate international law restrictions on treaty conditions; that the non-self-execution declarations are inconsistent with the Supremacy Clause of the Constitution; and that the federalism understandings are inconsistent with the national government’s responsibility, under both domestic and international law, for treaty violations.”¹⁷⁹

For purposes of a more complete analysis of the soundness of RUD usage, however, it is best to assume that there will be no challenges to the basic employment of a RUD. Nations have utilized reservations for several decades now, and most arguments over RUDs now revolve around interpreting the specific limitations under the VCLT.¹⁸⁰ While nations can object to the usage of any RUD for any reason, they would most likely be ignored unless a large coalition formed. Most small protestations would take the form of an objection to a reservation, a concept that will be discussed later.¹⁸¹ More commonly, RUDs are challenged because they do not conform to the basic rules of the VCLT.¹⁸² The VCLT makes it clear that neither the right to use reservations nor the magnitude of reservation usage is unconstrained.¹⁸³

There are three main limitations to the ability to use a reservation.¹⁸⁴ If any of these limitations are implicated, the reservation is thereby “prohibited.”¹⁸⁵ First, the treaty may not explicitly prohibit the reservation. Second, where the treaty provides that only specified reservations can be made, any other reservations are prohibited. Finally, even if the first and second limitations do not apply, the reservation cannot be incompatible with the object and purpose of the treaty (this is referred to as the “Compatibility Test”).¹⁸⁶

The Compatibility Test is the most controversial and unclear of these limitations.¹⁸⁷ It is often difficult to measure whether a reservation to a

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Swaine, *supra* note 159, at 277; *see also* AUST, *supra* note 7, at 125.

¹⁸¹ AUST, *supra* note 7, at 138–39.

¹⁸² Swaine, *supra* note 159, at 277.

¹⁸³ *Id.* (“The VCLT rules also make it clear, however, that the right to make reservations is not unfettered.”).

¹⁸⁴ AUST, *supra* note 7, at 133–38.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 137.

human rights treaty meets the requirements of the Compatibility Test because there are differing views as to how the test should be applied.¹⁸⁸ The International Court of Justice has openly recognized that states will have mixed beliefs about the application of this test, yet the ICJ has failed to clarify the appropriate interpretation.¹⁸⁹

State objections to reservations due to Compatibility Test issues are rare, although not unheard of.¹⁹⁰ Further, when States do object, they often fail to specify as to the legal ramifications of their objection.¹⁹¹ Article 20(4)(b) of the VCLT states that if there is an objection made by another contracting state to a reservation, that objection “does not preclude the entry into force of the treaty as between the objecting and reserving states *unless a contrary intention is definitively expressed by the objecting State.*”¹⁹² This reflects that objections are both rare and, commonly, inconsequential.

One reason for the rarity of objections to the legality of a reservation based upon the Compatibility Test is that there is a lack of clarity as to the residual relationship is between the reserving state and the other States Parties.¹⁹³ The three possible legal effects are: (1) the reserving state remains bound to the treaty except for the provision(s) to which the reservation related; (2) the invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement; or (3) the invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision(s) to which the reservation related.¹⁹⁴

This complication is important to note because it allows some breathing room for states wishing to submit reservations; the lack of clarity allows states to be bold in their submission of reservations.

VI. CAN THE UNITED STATES SUCCESSFULLY SUBMIT A RUD TO THE CRPD?

A history of the consequences of RUD usage reveals that the U.S. could successfully submit a RUD to the CRPD without drastic results. Very few RUDs blatantly fail the Compatibility Test, thus most reservations are

¹⁸⁸ *Id.*

¹⁸⁹ Swaine, *supra* note 159, at 283.

¹⁹⁰ AUST, *supra* note 7, at 133 (“[M]any states both make reservations and object to reservations, though in fact reservations are generally not objected to.”).

¹⁹¹ *Id.* at 142.

¹⁹² *Id.* at 141 (emphasis added).

¹⁹³ Swaine, *supra* note 159, at 293.

¹⁹⁴ *Id.*

“permitted” even if there is some concern that they are contrary to the object and purpose of the treaty.¹⁹⁵

A clear example of a reservation that fails the Compatibility Test can be seen in Chile’s reservation to the 1984 Torture Convention.¹⁹⁶ Centered upon ending torture and other cruel, inhuman, or degrading treatment or punishment in relation to detention and imprisonment, the Torture Convention expressly precludes the defense of superior orders.¹⁹⁷ Despite that prohibition, Chile submitted a reservation that allowed a torturer to plead the defense.¹⁹⁸ Consequently, several states objected to Chile’s reservation.¹⁹⁹ The states opined that the reservation was incompatible with the object and purpose of the Torture Convention, leading Chile to withdraw the reservation.²⁰⁰ Chile’s reservation was in stark contrast to the object and purpose of the Torture Convention; thus the reservation collapsed.

In most situations, however, there is more ambiguity as to how to handle a RUD that is perhaps incompatible with a treaty. Even when some states object to another state’s reservation, it is rare for the reservation to definitively fail the Compatibility Test. This is exemplified best by an examination of the U.S. reservation to Article 6(5) of the ICCPR.²⁰¹ The U.S. reserved the right, subject to its Constitutional constraints, to “impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”²⁰² Eleven European nations objected to this reservation.²⁰³ The basis of those objections was that the U.S. reservation amounted to a prohibited general derogation from the Covenant’s prohibition on the execution of minors.²⁰⁴

These objections to the use of capital punishment were particularly intriguing because many of the objecting states submitted their own

¹⁹⁵ AUST, *supra* note 7, at 136–38.

¹⁹⁶ *Id.* at 137.

¹⁹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1456 U.N.T.S. 85 (“An order from a superior officer or a public authority may not be invoked as a justification of torture.”).

¹⁹⁸ AUST, *supra* note 7, at 137.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²⁰³ *See id.* (objecting states are: Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, Sweden).

²⁰⁴ AUST, *supra* note 7, at 137.

reservations regarding other articles of the Covenant.²⁰⁵ The objections by the other states were to different parts of the Covenant in which derogation was not permitted, therefore drawing an interesting parallel between those reservations and the U.S. reservation to a non-derogable article.²⁰⁶ As a result of the objections to Article 6(5), the Human Rights Committee expressed its informal view that a reservation to a non-derogable article would not necessarily fail the Compatibility Test.²⁰⁷ Nevertheless, the Committee did further state that the reservation would place a heavy burden on reserving states to justify the reservation.²⁰⁸ Essentially, despite the plentiful objections to the U.S. reservation, nothing resulted from them and it was never clarified whether the reservation violated the Compatibility Test.²⁰⁹ All states objecting to the U.S. reservation currently affirm that the “objections shall not constitute an obstacle to the entry into force of the Covenant between [the objecting state] and the United States of America.”²¹⁰ Despite the controversy over the RUD, the ramifications have been far from arduous.

Furthermore, objections to constitutional and domestic law reservations have historically had the same inconsequential effects. The 1988 U.S. reservation to the Genocide Convention demonstrates that constitutional reservations are consistently accepted. The reservation stated: “[N]othing in the Convention requires or authorises legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”²¹¹ The U.S. reservation elicited a number of responses from European States, including six objections, but no negative ramifications occurred.²¹² Sweden was the only nation to specify the legal effect of such an objection,²¹³ stating that “[I]ts objection does not constitute an obstacle to the entry into force of the Convention between Sweden and the United States.”²¹⁴ This illustrates that although some states are willing to take the initial step of objecting to a constitutional reservation, it is unprecedented for such objections to create any true setbacks for the reservation.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ ICCPR, *supra* note 202.

²¹¹ *Id.*

²¹² AUST, *supra* note 7, at 147.

²¹³ *Id.*

²¹⁴ *Id.*

In response to the increasing use of constitutional RUDs, the U.S. and the U.K. have taken noteworthy stances on the topic.²¹⁵ Because the U.S. consistently utilizes constitutional reservations, one would expect for the nation to regularly allow other states to submit them as well. This assumption, though logical, has proven false. The U.S. has been unsympathetic towards other nations who utilize constitutional reservations, as exemplified by the response to Colombia's reservation to the Vienna Drugs Convention of 1988.²¹⁶ The U.S. was of the opinion that Colombia's reservation "purports to subordinate Colombia's obligations under the Convention to its Constitution."²¹⁷ The U.S. objection reveals the complexity behind the current state of reservation use: states object to the very same ideas that they later reserve, and a lack of concrete repercussions for questionable reservations indicates that objections are mere vocalizations of displeasure.

The U.S. is not alone in its complex response to and use of constitutional RUDS. The U.K. has adopted a cautious and unrevealing stance to constitutional reservations.²¹⁸ Because constitutional reservations make it extremely difficult to determine their effect on the reserving state's obligations, the U.K. has a history of simply asking the reserving state for clarification rather than objecting to the reservations.²¹⁹

Some nations have also utilized reservations designed to specifically subordinate a human rights treaty to the domestic law of the nation. This type of reservation, particularly when coupled with a constitutional reservation, serves to protect against the very dangers expressed by those who oppose ratification of the CRPD. The consequences of these reservations, similar to the consequences of constitutional reservations, seem minor. This can be seen via an examination of Iran's reservation to the Rights of the Child Convention 1989.²²⁰ Iran reserved the right "not to apply any provisions or articles of the Convention that are incompatible with Islamic laws."²²¹ Although other ratifiers sometimes consider such reservations to undermine a commitment to the purpose of the treaty, other

²¹⁵ *Id.* at 148.

²¹⁶ *Id.* (asserting that it would be contrary to its Constitution for Colombia to extradite its own nationals).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 147 (responding to Korean constitutional reservations made to the ICCPR 1996, the U.K. stated that it was not able to take a position on the purported reservations until it received an indication of the intended effect of the reservations).

²²⁰ *Id.* at 149.

²²¹ *Id.*

states rarely submit an objection with clear legal effects.²²² A rare example of objections that led to a partial withdrawal of domestic law reservations occurred in 1995.²²³ Malaysia submitted a domestic law reservation to the CEDAW Convention 1979 and then subsequently partially withdrew the reservation following some objections.²²⁴

Because the U.S. has the ability to submit a RUD to the CRPD, it should undoubtedly do so. A workable solution would be to attach a declaration that the Convention is “not self-executing and a package of . . . RUDs clarifying that the Convention does not impose any obligations on the United States beyond those offered under existing state and federal laws, such as the Americans with Disabilities Act.”²²⁵ Although submitting a RUD may seem perilous, history has shown that such reservations, though not necessarily welcomed by the international community, are not frowned upon to the extent that other ratifying states will consistently refuse to enforce the treaty between the reserver and the objector. While there are rare instances in which a reservation will create such controversy that the reservation is eventually withdrawn, that situation atypical. Many nations have utilized constitutional or domestic law reservations in the past and will continue to do so despite the multiple limitations of the Compatibility Test. In fact, approximately thirty ratifying states have submitted some form of reservation to the CRPD, indicating that a U.S. reservation will not disturb the treaty itself.²²⁶

²²² *Id.* (explaining that no State’s objections precluded the treaty from force between the reserving State and the objecting State).

²²³ *Id.*

²²⁴ *Declarations, Reservations and Objections to CEDAW*, U.N. WOMEN WATCH, available at <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> (last visited Sept. 7, 2014). The original reservations read as follows:

The Government of Malaysia declared the Malaysia’s accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia’ law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 2(f), 5(a), 7(b), 9 and 16 of the aforesaid Convention

Id. On February 6, 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal as follows: “The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h).”

²²⁵ *Convention on the Rights of Persons with Disabilities: Hearing Before the Senate Foreign Relations Committee*, 113th Cong. (2013) (statement of Timothy Meyer, Assistant Professor of Law, University of Georgia School of Law), available at http://www.foreign.senate.gov/imo/media/doc/Meyer_Testimony.pdf.

²²⁶ CRPD, *supra* note 15.

Although it is likely that the CRPD will be viewed as not self-executing and therefore have no drastic effect upon United States domestic law, there is the possibility that a U.S. court could declare the CRPD's provisions to be the supreme law of the land, in which case the Disability Committee's ability to interpret the provisions could be substantial. Because of that improbable—yet logical—concern, it would be wise to utilize a RUD.

Ratifying the CRPD is an important objective for the U.S. From a foreign policy perspective, ratification would commit the U.S. to further disability equality, and allow the United States to influence in the subject's future.

VII. CONCLUSION

A revolutionary global step towards equality for individuals with disabilities, the U.N. Convention on the Rights of Persons with Disabilities serves as a cornerstone of cooperation and initiative. The CRPD's far-reaching effects could have a significant impact upon the world. The U.S. has been a pioneer of disability equality, enacting domestic legislation such as the ADA and acting as a foreign policy leader in the quest for disability rights.

Despite such commitments to the cause, U.S. ratification of the CRPD is at the center of the debate. Those who oppose ratification cite sovereignty concerns, while supporters firmly contend that the non-binding treaty is needed to show an international commitment to disability rights. One way to satisfy both sides is by use of reservations, understandings, or declarations. By submitting a reservation to the CRPD, the U.S. would commit to the treaty but avoid any concerns about how compliance with the treaty could conflict with domestic laws or the U.S. Constitution.

Utilizing a constitutional or domestic law reservation is potentially hazardous due to the ability of other ratifying states to object to the treaty based on Compatibility Test concerns, but it is the most effective method of appeasing both sides of the aisle. The odds of calamitous consequences arising from a reservation to the CRPD are relatively slim, therefore it is in the United States' best interests to utilize this advantageous tool.

