

The Americans with Disabilities Act at Thirty

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On July 26, 2020, the Americans with Disabilities Act (ADA) will turn thirty years old. On the day of its birth now three decades ago, President George H. W. Bush declared “let the shameful wall of exclusion finally come tumbling down.”¹ Over these many years, that goal has been slowly approaching, but much work remains in the area of disability rights. While the failures of the ADA have been many, its successes have been paradigm shifting. This commentary is meant to celebrate those successes, and to wish that paradigm shifting law a happy 30th birthday. Part I discusses the history of disability rights leading up to the ADA. Part II discusses the current status of the ADA with reference to some of its key successes and failures. Finally, Part III takes a glimpse into the future of this very important statute.

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1. Derek Warden, *Four Pathways of Undermining Board of Trustees of the University of Alabama v. Garrett*, 42 U. ARK. LITTLE ROCK. L. REV. 555, 559 (2020).

I.

A GLIMPSE INTO THE PAST

Prior to discussing the ADA itself, it is important to discuss the terrifying history of disability discrimination that led to the passage of the ADA. In the 1927 opinion of *Buck v. Bell*,² the Supreme Court allowed those with disabilities (and those perceived to have disabilities) to be forcibly sterilized. Declaring that “three generations of imbeciles are enough,”³ Justice Holmes found that it was “better for all the world” that those with disabilities be wiped out.⁴ Indeed, so awful was this decision that the Nazis relied on *Buck* at Nuremburg to support their use of eugenics and forced sterilizations.⁵

Unfortunately, the shame of *Buck* is not dead: it was cited approvingly in *Roe v. Wade*,⁶ it remains good law,⁷ and the Fifth Circuit Court of Appeals appeared extremely close to relying on it recently.⁸ There, the court was tasked with determining whether responses to the Covid-19 pandemic could include a prohibition on abortions. In reaching the conclusion that states were free to do so, the court relied on *Jacobson v. Massachusetts*. The court relied on *Jacobson* because it was one of the two cases *Roe* expressly mentioned as limiting the general right to privacy. The other opinion *Roe* cited was *Buck*. It would be helpful if, when courts are deciding such matters, they clearly state that they place no reliance on *Buck*. Thankfully, the court did not ultimately cite it; however, the animus underlying *Buck*’s holding remains a threat to disability rights. *Buck* lurks around every corner, and in some surprising places. Indeed, Louisiana still has a forced sterilization and forced abortion statute directed at persons with disabilities.⁹

Nevertheless, after *Buck* and its eugenics movement died away, the nation began viewing people with disabilities differently. Political figures exposed the horrors of mental health asylums, documentaries showed the American public

2. 274 U.S. 200 (1927).

3. *Id.* at 207.

4. *Id.*

5. Michael G. Silver, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 871 (2004).

6. 410 U.S. 113, 154 (1973).

7. Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN’S L.J. 122, 123 (1993).

8. In Re: Greg Abbott, 954 F. 3d 772, 785 (5th Cir. 2020) (noting that *Jacobson* was one of two cases the *Roe* Court cited as limiting the right to abortion; the other opinion *Roe* cited was, of course, *Buck*).

9. La. Code Civ. Pro. art. 4566(G) (2018). I will note here that many of the arguments used in support of physician assisted suicide mirror those used to support the eugenics movement: compassion, finances, speeding up what comes naturally, and more. Many who support assisted suicide note that there are numerous procedures in place to protect people from abuse. To this, I remind people that all the procedures on Earth could not protect Carrie Buck from being sterilized.

the failures of these institutions,¹⁰ and the federal government reacted by creating a network of Protection and Advocacy Systems (P&As). These P&As are now known for bringing impact litigation cases on behalf of those with disabilities. These entities are empowered through various statutes: Protection and Advocacy for Individuals with Development Disabilities, Protection and Advocacy for Individuals with Mental Illness, and Protection and Advocacy of Individual Rights, to name a few.

Apart from enabling entities to advocate for those with disabilities, the federal government also created substantive legal protections. For example, Congress saw that the educational system for children with disabilities was lacking, and, in response, enacted what is now called the Individuals with Disabilities Education Act (IDEA) in 1975.¹¹ Furthermore, Congress enacted the Rehabilitation Act of 1973, § 504 of which prohibits discrimination against those with disabilities by entities that receive federal financial assistance.¹²

But even in the wake of these major pieces of legislation, vast amounts of discrimination remained. Many entities did not (and to this day, do not) receive federal funds: court houses, private employers, many state agencies, and many private schools. The consequence of these entities not receiving federal funds was that they did not need to comply with the Rehabilitation Act, and so they remained inaccessible to people with disabilities. And even when entities were compliant with the IDEA, it was still possible to discriminate against children with disabilities.¹³ The general civil rights statute 42 U.S.C. § 1983, which allows suits for violations of constitutional rights, was of no use to those with disabilities (except largely in the prison setting), because disability status was only protected by rational basis scrutiny, making it difficult for plaintiffs to prevail on constitutional claims.¹⁴ State laws that were aimed at preventing discrimination were all but useless, and the Supreme Court, in *Pennhurst v. Halderman*,¹⁵ held such state laws were virtually unenforceable in federal court. In short, all previous attempts at ending disability discrimination had fallen far short of what was necessary.

More was needed. In the 1980s, Congress began investigating passage of a new law that would address the gaps left by previous legislation. It was hotly debated in both houses of Congress and, for a moment, it appeared as if this new

10. Derek Warden, *A Worsened Discrimination: How the Exacerbation of Disabilities Constitutes Discrimination by Reason of Disability Under title II of the ADA and § 504 of the Rehabilitation Act*, 46 S. U. L. REV. 14, 27-28.

11. 20 U.S.C. §§ 1400-1482 (West 2019).

12. 29 U.S.C. § 794 (2018).

13. *CG v. Pa. Dep't. of Educ.*, 734 F.3d 229, 235 (3rd Cir. 2013) (“compliance with the IDEA does not automatically immunize a party from liability under the ADA.”). One could see why this is quite easily. The IDEA was meant for education and the guarantee of a Free Appropriate Public Education. It does not necessarily prohibit all forms of discrimination against those with disabilities.

14. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

15. 465 U.S. 89 (1984).

law—the Americans with Disabilities Act—would fail. Some wanted it to fail because of the cost of accommodations and modifications the new law required. Then, on the eve of the final vote, countless Americans with disabilities descended on the Capitol Building, in what became known as the Capitol Crawl.¹⁶ Famously, eight-year-old Jennifer Keelan crawled out of her wheelchair and up the Capitol steps. While crawling, she told a reporter “I’ll take all night if I have to.”¹⁷ Their tactics worked, and the ADA was passed by sweeping majorities in both Chambers. On July 26, 1990, the ADA was signed into law.

II.

UNDERSTANDING THE PRESENT

A. *The ADA’s Technical Framework*

The ADA took elements from several prior pieces of federal civil rights laws such as Title VII and was ultimately modeled on the Rehabilitation Act of 1973. As enacted, the ADA begins with the broad and awe-inspiring declaration that Congress intends “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced daily by people with disabilities.”¹⁸

The law then goes on to define disability. As the law stands, a disability is: (1) a physical or mental impairment that substantially limits one or more major life activities (2) having a record of such an impairment or (3) being regarded as having such an impairment. The law then goes on to offer examples of major life activities and bodily functions, and further definitions.¹⁹

After these general provisions, Congress divided the remainder of the ADA into five titles. Title I governs employment. Title II governs the practices of public entities. There is a split among the circuits as to whether Title II also covers employment practices by public entities.²⁰ The ultimate effect of this is that individuals with disabilities in some circuits have an alternate avenue of relief. Further, as explained elsewhere, Title II may validly abrogate state sovereign immunity in the employment context even where Title I does not.²¹ Title III regulates the activities of places of public accommodations such as sporting arenas and restaurants. Here, too, there is a difference among the circuits as to the scope of the law. Title IV is potentially the least litigated area of the law

16. Warden, *Four Pathways*, *supra* note 1 at 559.

17. Samantha Michaels, *The Americans with Disabilities Act is Turning 25. Watch the Dramatic Protest that Made It Happen*, MOTHER JONES, (July 25, 2015) <https://www.motherjones.com/politics/2015/07/americans-disabilities-act-capitol-crawl-anniversary/> [<https://perma.cc/V34P-YQPA>].

18. 42 U.S.C. § 12101 (b)(4).

19. *Id.* at § 12102 (1).

20. Warden, *Four Pathways*, *supra* note 1 at 572.

21. *Id.* at 574.

and addresses telecommunications. Finally, Title V of the ADA is a sort of storage shed for the whole law. It regulates, among many other issues, the construction of the law generally and with other laws, portends to abrogate state sovereign immunity, prohibits retaliation and coercion, provides for attorney's fees, and extends protection of the ADA to instrumentalities of Congress.

Congress directed various agencies to issue implementing regulations. For example, Congress directed the Attorney General to issue guidelines implementing Title II of the ADA, the part of the ADA governing public entities. In addition to these regulations, the Attorney General has also issued technical assistance manuals, and general comments to the law. The commentaries are vast, to say the least.²²

B. *The ADA's Successes and Setbacks*

In some of the Supreme Court's earliest cases, it appeared as if the Court would live up to the mandate that the ADA, as remedial legislation, should be construed broadly. In the context of a Title III case, the Court gave a rather expansive interpretation of the definition of disability for an HIV positive individual.²³ Further, it held that Title II of the ADA applied to prisons.²⁴ Then, to the delight of plaintiffs, the Court held that Title II of the ADA allows for both private rights of action and damages, though not punitive damages.²⁵ This ruling allowed "private attorneys general" to enforce the ADA, thereby giving the law teeth.

But, most profoundly, the Supreme Court held in *Olmstead v. L.C.* that Title II of the ADA prohibited the unjustified institutionalization of persons with disabilities.²⁶ To reach its conclusion, the Court appeared to mix introductory provisions of the ADA and several of its regulations with the general purposes of the statute.²⁷ That ruling now impacts not just institutions, but also State Medicaid programs.²⁸ Indeed, *Olmstead*-like rules even apply to prisons.²⁹ Volumes of literature could be written on the watershed nature of *Olmstead*; but, for purposes of this commentary, it suffices to say *Olmstead* was to the disability rights movement as *Brown v. Board of Education* was to the civil rights

22. See 28 C.F.R. Pt. 35, App. A.

23. The breadth of *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998), can be seen where the Court states, "[i]n the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."

24. Pa. Dep't. of Corr. v. Yeskey, 524 U.S. 206, 209 (1998) ("Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt").

25. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

26. 527 U.S. 581 (1999).

27. Derek Warden, *Ex Tenebris Lux: Buck v. Bell and the Americans with Disabilities Act*, 51 U. TOL. L. REV. 57, 72 (2019).

28. *Townsend v. Quasim*, 328 F. 3d 511 (9th Cir. 2003).

29. 28 C.F.R. § 35.152 (b)(2).

movement.³⁰ In my view, *Olmstead* was the final nail in the coffin to the horrific institutionalization practices of the *Buck v. Bell* and *Pennhurst v. Halderman* eras.

But intermixed with these important successes were significant setbacks. The Court gave very narrow interpretations to the definitional sections of the ADA in cases such as *Toyota Manufacturing, Kentucky Inc. v. Williams*,³¹ and *Sutton v. United Airlines*.³² So horrific were these decisions that they prompted Congress to respond with the ADA Amendments Act of 2008, which specifically mentioned these cases as erroneous.³³ Then came *Board of Trustees of the University of Alabama v. Garrett*,³⁴ a case which may well belong in the pantheon of error known as the anticanon.³⁵ There, the Court ruled that Title I of the ADA did not validly abrogate state sovereign immunity, meaning that plaintiffs cannot sue a state or state agency to enforce Title I's provisions. The reasoning of the Court has been heavily criticized as misunderstanding the history of disability discrimination adduced by Congress.³⁶

Granted, the negative impact of that opinion may not be as dramatic as many presumed.³⁷ After *Garrett*, many questioned whether any part of the ADA validly abrogated state sovereign immunity. In two opinions, the Court dispensed those fears. In *Tennessee v. Lane*,³⁸ the Court held that Title II Part A of the law did abrogate state sovereign immunity where the fundamental right of access to the courts was involved. In *U.S. v. Georgia*,³⁹ the Court held that where state conduct violates both the Constitution and the ADA, there is proper abrogation. One interesting question that *Georgia* prompts is this: given the plaintiff's ADA claims about accommodations and physical constructions, does this mean that at least some architectural requirements of the ADA are incorporated into the Eighth Amendment? If so, how far does this incorporation go?

30. Mary C. Cerreto, *Olmstead: The Brown v. Board of Education for Disability Rights Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47, 53-54 (2001).

31. 534 U.S. 184, 198 (2002) (“We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the 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.”).

32. 527 U.S. 471, 488 (1999) (finding “that disability under the Act is to be determined with reference to corrective measures . . .”).

33. PL 110–325, September 25, 2008, 122 Stat 3553 § 2.

34. Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

35. Warden, *Four Pathways*, *supra* note 1 at 562. Indeed, it may well be the case that *Buck* and *Pennhurst* also belong in the disability rights anticanon.

36. Stephen Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 UNIV. PENN. J. CONST. LAW 281, 312 (2002) (“To the extent that the Court was contesting the evidence Congress produced, however, [the Court’s reasoning] is implausible”).

37. Warden, *Four Pathways*, *supra* note 1 at 563–566.

38. 541 U.S. 509 (2004).

39. 546 U.S. 151 (2006).

III.

THE PATH FORWARD

The ADA was a major success all around, even with its setbacks. But the ADA's future is not set in stone. For example, members of Congress recently tried to alter Title III of the ADA in order to protect businesses.⁴⁰ This was done to purportedly stop expensive damages or “drive-by” ADA plaintiffs.⁴¹ These members of Congress failed to consider a number of important factors, however. First, these businesses have had 30 years to comply. Second, “drive-by” plaintiffs are often necessary to bring the world into compliance with the ADA. Third, Title III of the ADA does not allow for damages, so saying that it does is actually a lie. And, finally, where Title II helps people with disabilities leave institutions, Title III ensures they have places to go and services to use, and is therefore a necessary component of the ADA's overall statutory scheme.

Callousness and opposition to the fundamental principles of the ADA have also presented themselves in other ways. President Donald Trump is known to have mocked a reporter with a disability. His administration revoked guidance on the rights of students with disabilities⁴² and, most shockingly, pulled some guidance on the *Olmstead* decision.⁴³ From a practical standpoint, this is a signal that the executive has little interest in pursuing these claims anymore. Further still, litigants could and would cite these guidelines in litigation to enforce their rights under the law.⁴⁴ Their repeal means these generally favorable guidelines cannot be cited.

This political callousness unfortunately appears to be bipartisan. Former Vice President Joe Biden, is known to have petted a disability rights advocate in a remarkable display of unintentional ableism.⁴⁵ Another politician, California

40. ADA Education and Reform Act of 2017 H. R. 620—115th Congress (2017-2018).

41. Steptoe & Johnson LLP, *House Passes Bill to Curb “Drive-By” ADA Lawsuits*, LEXOLOGY.COM, <https://www.lexology.com/library/detail.aspx?g=45174ec4-6428-46d3-a394-3697b2da2434> [<https://perma.cc/HZ4Y-4HMG>] (last visited July 11, 2020). The somewhat derogatory phrase “drive-by ADA plaintiffs” refers to those who sue for ADA violations even though they are perceived as not actually suffering any discrimination.

42. Moriah Balingit, *DeVos rescinds 72 guidance documents outlining rights for disabled students*, WASH. POST (Oct. 21, 2017), <https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/> [<https://perma.cc/2PNW-FYTG>].

43. United States Department of Justice, *Withdrawn Technical Assistance and Guidance Documents*, ADA.GOV, https://www.ada.gov/withdrawn_olmstead.html [<https://perma.cc/ZD3K-ZJ99>] (last visited May 30, 2020).

44. See e.g., *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199, 1202-03 (D. Or. 2012).

45. Andrew Pulrang, *Disability Etiquette Lessons From A Campaign Encounter Gone Wrong*, FORBES (Feb 4, 2020, 2:43 PM) <https://www.forbes.com/sites/andrewpulrang/2020/02/04/disability-etiquette-lessons-from-a-campaign-encounter-gone-wrong/#5f6c25152f61> [<https://perma.cc/BK3V-EV9A>].

Senator Kamala Harris, appears to have applauded the use of the ableist term “retarded” at a rally.⁴⁶

But, despite these concerns, it appears that the ADA will endure for generations to come. Just as the law sought to integrate persons with disabilities into American society, the law has integrated itself into that same society.⁴⁷ Most Americans know about the law and recognize its symbols wherever they may be found, and even those without disabilities benefit in numerous ways from the changes made to our nation by means of the ADA.⁴⁸ Further still, as a matter of self-preservation, Americans would be reluctant to repeal the law. As we age, we will all encounter a disability at some point in our lives.

Moreover, should we repeal or diminish the ADA, we would be abandoning our standing and influence in the world relating to the protection of people with disabilities. The ADA did not simply physically and emotionally change our country. It inspired legislation all around the world.⁴⁹ As our Declaration of Independence became a model for freedom fighters across the globe, the ADA became a model for disability rights advocates everywhere.⁵⁰ Indeed, perhaps the greatest achievement of the ADA in the international community is its inspiring of the Convention of the Rights of Persons with Disabilities. That Convention was signed by President Barack Obama but failed ratification in the Senate by five votes.⁵¹ Sadly, it appears that the CRPD will not come back for consideration any time soon.

In light of all the law has done and can do, what present should we give the ADA on its 30th birthday? From a social standpoint, the American people could become ever more vigilant in protecting the law. We could challenge political and social leaders who seek to diminish the ADA. We could ensure that people do not abuse accessible parking tags. We could donate to non-profits that bring ADA claims.

46. Derrick Bryson Taylor, *Kamala Harris Apologizes for Her Reaction to ‘Mentally Retarded’ Remark About Trump*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/us/kamala-harris-trump-apologizes.html> [<https://perma.cc/P2UL-PKAE>].

47. Indeed, most millennials or “Gen Z’s” do not even remember a world without the ADA. From the stores we shop in, to the services we use, from our satellite communications, to our places of work—all would look much different without the ADA.

48. Joseph Shapiro, *In Helping Those with Disabilities, ADA Improves Access for All*, NPR (July 24, 2014, 4:19 AM), <https://www.npr.org/2015/07/24/423230927/-a-gift-to-the-non-disabled-at-25-the-ada-improves-access-for-all> [<https://perma.cc/F87H-AB3X>].

49. Joseph Shapiro, *How a Law To Protect Disabled Americans Became Imitated Around the World*, NPR (July 24, 2015, 4:28 PM), <https://www.npr.org/sections/goatsandsoda/2015/07/24/425607389/how-a-law-to-protect-disabled-americans-became-imitated-around-the-world> [<https://perma.cc/Y9TT-8WYR>].

50. *Id.*

51. Rosalind S. Helderman, *Senate rejects treaty to protect disabled around the world*, WASH. POST (Dec. 4, 2012), https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5_story.html [<https://perma.cc/LH32-JGPE>].

Courts can also give excellent presents to the ADA in the future. Perhaps the courts could give a great present to the ADA by incorporating it into our Constitution via various concepts or clauses, such as Substantive Due Process, alternative theories of Equal Protection, a combination of clauses and national legal customs, or the Ninth Amendment. The federal courts could finally realize that Title II of the ADA actually covers everything public entities do, instead of relying on hair-splitting distinctions about what constitutes an “input or an output.”⁵² The Fifth Circuit could finally join other circuits and adopt the deliberate indifference model for damages actions under Title II of the ADA.⁵³ And all circuits could and should adopt simple *respondeat superior* for such claims.⁵⁴ The Supreme Court could and should revisit *Garrett*, and find that Title I of the ADA validly abrogates state sovereign immunity. Indeed, even if the Court never returns to *Garrett*, the lower courts should find that Title II of the ADA applies to employment claims and validly abrogates state sovereign immunity in the employment context.⁵⁵

From a litigation standpoint, plaintiffs and their counsel could also give a number of birthday presents to the ADA. Litigants ought to bring more methods of administration claims to reach deep within public entities’ systems to cure discrimination at its conception.⁵⁶ Litigants should argue that the exacerbation of disabilities constitutes discrimination by reason of disability.⁵⁷ Moreover, attorneys representing those with disabilities should work with their local bar chapters to establish disability rights committees.

From a political standpoint, legislatures across the country and at the national level could give a wealth of presents to the ADA. States, such as Louisiana, could and should repeal their forced sterilization statutes. The state legislatures should allow persons with disabilities to marry (many states do not).⁵⁸ States and the federal government could split their litigation type *parens patriae* powers with the Protection and Advocacy Systems to make these entities

52. Warden, *Four Pathways*, *supra* note 1 at 572-74.

53. Derek Warden, *Fifth Indifference: Clarifying the Fifth Circuit’s Intent Standard for Damages Under Title II of the Americans with Disabilities Act*, 7 *Tex. A&M L. Rev. Arguendo* 1 (2019).

54. Thankfully, the Fifth Circuit and several others appear to have already allowed a simple *respondeat superior* model of imposing liability in ADA Title II cases. *Delano-Pyle v. Victoria County, Tex.*, 302 F. 3d 567, 574-575 (5th Cir. 2002).

55. Derek Warden, *Four Pathways*, *supra* note 1 at 574.

56. *See generally*, *Methods of Administration*, 10 *HOUSTON L. REV.: OFF THE RECORD* 39 (2020).

57. Derek Warden, *A Worsened Discrimination*, *supra* note 10 at 42. There, I argued that exacerbation is discrimination by reason of disability because, *inter alia*, “the exacerbation of disabilities is a form of discrimination because exacerbation of disabilities is, by its very nature, a harm that only people with disabilities can feel—because those without disabilities can never have disabilities exacerbated. Put another way, when government conduct exacerbates disabilities, it is perpetrating that harm only against persons with disabilities not those without disabilities.”

58. *Tennessee v. Lane*, 541 U.S. 509, 524 (2004).

better capable of representing those with disabilities.⁵⁹ Lastly, and most dramatically, the states could end practices that have a disparate impact on those with disabilities—for example, a state that cares deeply about the social stigma associated with disabilities should prohibit the death penalty so long as that practice has a disproportionate impact on those with various disabilities.⁶⁰

While these suggestions are great presents for the law, we should also look internationally at the ADA. We should seek to export more of our ADA onto the world. Perhaps no act of our government could better achieve delivering the ADA onto the world than for our Senate to finally ratify the Convention on the Rights of Persons with Disabilities. Ratifying the CRPD would not only solidify America's leadership role in the area of disability rights, but it could also solidify and amplify the role of the ADA in American law. First, asserting that a law or right is recognized as part of international law has practical, moral, sociolegal, and normative consequences. In some instances, the law becomes almost "natural law."⁶¹ Thus, ratification of the CRPD would be as if the United States Senate were recognizing some sort of natural law component of disability rights.⁶² Second, in ratifying a treaty or a convention, states may make certain reservations or declarations.⁶³ The declaration here is important because it could address some objections to the CRPD—such as it does not actually include a definition of disability and requires actions be taken "in the best interest of the child."⁶⁴

When ratifying the CRPD, the United States could (and did when the treaty was up for debate) declare its interpretation of the treaty as being in tandem with our ADA.⁶⁵ Thereby, international tribunals or courts of other countries could use interpretations of the ADA to inform the application of the CRPD there.⁶⁶ Moreover, ratification of the CRPD (provided it is ratified as self-executing or enforced by statute), would mean that litigants bringing ADA claims could

59. Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 S.M.U. L. REV. 759, 787 (2016) (discussing the *parens patriae* power to litigate on behalf of citizens).

60. This can be seen most clearly in Louisiana. See, Class Action Complaint and Demand for Jury Trial at ¶ 5, *Hamilton et. al. v. Vannoy, et. al.*, 3:17-cv-00194, (March 29, 2017). Indeed, even if every member of the death row did not have a disability, they would have such a condition very shortly.

61. Stacy Humes-Shulc, *Limiting Sovereign Immunity in the Age Of Human Rights*, 21 HARV. HUM. RTS. J. 105, (2008) ("The importance of human rights today cannot be divorced from the evolution of natural law in centuries past, and exploring the moral and ethical demands of natural law theory will help outline why human rights deserve paramount respect. Natural law helps shape human rights as ethical, not purely legal, demands around which the court must shape positive law.").

62. To be sure, there is disagreement as to which aspects of the CRPD would amount to natural law based "human rights." *Id.* at 131 (noting that the CRPD's right to sport is not a "natural right.").

63. Simon Lester, *Should the United States Use Treaties to Make the World "More Like Us"?*, VA. J. INT'L L. DIG. 1, 6 (2013) (discussing various reservations, declarations, and understandings associated with the CRPD)

64. *Id.* at 5.

65. *Id.* at 6.

66. *Id.* ("[b]eyond specific domestic litigation, treaties can be used to establish norms that push nations in a certain direction.").

simultaneously bring CRPD claims. This allows our courts to interpret and apply both laws in tandem, further driving the jurisprudence on the CRPD.⁶⁷ Therefore, by ratifying the CRPD and wrapping it in the ADA, our nation could raise the ADA to the status of natural law, while exporting our own statutory rules into the international arena. As such, I agree with one scholar who wrote on the 25th birthday of the ADA, that perhaps the greatest present we could give the ADA is to ratify the CRPD.⁶⁸

Happy Birthday, ADA.

67. As one commentator noted, as the treaty stood when it was being considered, there was no way for domestic lawsuits to be brought directly under the treaty; as such, it would either need to be enacted in legislation or changed to provide for domestic enforcement. *See id.* at 5. Nevertheless, treaties can be used to interpret our own laws. *Id.*

68. Lawrence O. Gostin, *The Americans with Disabilities Act at 25: The Highest Expression of American Values*, 313 JAMA 2231, 2234 (2015).