

ARTICLES

DUAL FEDERALISM, CONSTITUTIONAL OPENINGS, AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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ABSTRACT

The Convention on the Rights of Persons with Disabilities (“CRPD”) represents a historic achievement for the global disability rights movement. Yet, when the U.S. Senate refused to ratify it on December 4, 2012, its influence on American law and policy seemed doomed. The Founders, after all, had conceived of a constitutional vision where the federal government acts as the ultimate arbiter of questions of international policy. Under this vision of “dual federalism”—which dominated how the legal profession understood U.S. involvement in foreign affairs for over a century—only the federal political branches have the power to make and implement international laws like the CRPD. But, as I show in this Article, dual federalism has not endured. “Subnational entities”—cities, counties, and states—have become key decision-makers in areas once dominated by the federal government, such as immigration and international trade. As it turns out, they have also become champions of the CRPD.

This Article explains that “foreign affairs federalism” is at the heart of this paradigm shift. This new status quo reveals that the Constitution leaves ample room for subnational entities to engage on issues of international scale. In many cases, it has enabled local and state governments to act antagonistically—or “uncooperatively”—toward the federal government. In others, it has empowered subnational entities and federal actors to work hand-in-hand—or “cooperatively”—to drive national foreign affairs priorities. This Article shows that U.S. subnational entities have implemented the CRPD in accordance with principles of uncooperative and cooperative foreign affairs federalism. From an uncooperative perspective, subnational entities have denounced the Senate’s refusal to ratify the CRPD through resolutions and other expressive policies. From a cooperative perspective, the supported decision-making (“SDM”) movement serves as an exemplar case study. Embedded in Article 12 of the CRPD, SDM represents a shift away from guardianship law and toward the ability of people with disabilities to make life decisions on their own. This Article shows that the ongoing flourishing of SDM laws across the United States is due in large part to alliances between state-level disability rights organizations and the federal executive branch.

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TABLE OF CONTENTS

INTRODUCTION	347
I. CRPD NON-RATIFICATION IN CONTEXT	353
A. <i>A Disability Rights Trailblazer</i>	354
1. <i>Substantive Protections</i>	355
2. <i>The Convention's Inclusive Negotiation Process</i>	357
B. <i>The CRPD in the Senate</i>	358
1. <i>The Reasons for Non-Ratification</i>	360
a. <i>Domestic Disability Legislation</i>	360
b. <i>Policy Explanations</i>	362
II. SUBNATIONAL ENTITIES AS CHAMPIONS OF THE CRPD	365
A. <i>Dual Federalism No Longer</i>	366
B. <i>Uncooperative Expressions of Subnational Support</i>	371
1. <i>Examples</i>	371
a. <i>Local Governments</i>	372
b. <i>States</i>	375
2. <i>An Expressivist Analysis</i>	377
III. SUPPORTED DECISION-MAKING LAWS IN THE UNITED STATES ...	382
A. <i>A Synthesis of Article 12's Drafting History</i>	383
B. <i>SDM in the United States</i>	388
1. <i>Planting the SDM Seed</i>	389
2. <i>Article 12 in Legislation</i>	393
3. <i>Article 12 in Case Law</i>	405
B. <i>SDM and Cooperative Foreign Affairs Federalism</i>	407
IV. CONCLUSION	410

Like other formal institutions, treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of treaties.

—Beth Simmons¹

INTRODUCTION

The Convention on the Rights of Persons with Disabilities (“CRPD”) represents a landmark achievement for the global disability rights movement. The only human rights treaty adopted by the United Nations (“U.N.”) so far in the twenty-first century, the CRPD has worked to provide comprehensive civil, political, and social rights to people with disabilities.² Perhaps more strikingly, it came into existence through an unprecedented negotiations process that involved cooperation between both nation-states and members of civil society—namely, Disabled Peoples’ Organizations (“DPOs”), which are non-governmental groups organized and led by people with disabilities.³ But whatever the CRPD’s success in bringing disability rights to the forefront of contemporary human rights work, its influence on American law and policy seemed unlikely when the U.S. Senate refused to ratify it on December 4, 2012.⁴

Recall that the Founders conceived of a constitutional vision where the federal government would act as the sole and ultimate arbiter of questions of

¹ BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 125 (2009).

² See Michael Ashley Stein, Janet E. Lord, & Penelope J.S. Stein, *The Law and Politics of US Participation in the UN Convention on the Rights of Persons with Disabilities*, 2 EUR. Y.B. DISABILITY L. 29, 35 (2010) (“The CRPD holistically combines civil and political rights with economic, social, and cultural rights in an effort to manifest the Vienna Declaration’s notion that human rights are truly ‘indivisible and interrelated and interconnected.’”) (quoting World Conference on Human Rights, 14–25 June 1993, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23 (12 July 1993)).

³ See Janet E. Lord, David Suozzi, and Allyn L. Taylor, *Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance*, 38 J.L. MED. ETHICS 564, 567–68 (2010) (explaining the crucial role that DPOs played in the CRPD’s negotiation process).

⁴ Under an orthodox understanding of foreign affairs law, the Senate would have to ratify a treaty for it to have domestic influence because other entities, including local and state governments, lack the power to carry out obligations under international law by themselves. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620 (1997) (explaining the conventional idea that “[t]he federal government has the exclusive power to conduct foreign relations free from interference by states.”). This understanding, rather unfortunately, prevails among experts. See *infra* note 22 and accompanying text.

foreign policy: “If we are to be one nation in any respect, it clearly ought to be in respect to other nations,” wrote James Madison in the *Federalist No. 42*.⁵ On this view, only representatives of the federal political branches have the necessary power to make, implement, and comply with international treaties. And without the constitutionally mandated two-thirds vote of approval in the Senate, such treaties become dead letters with neither force of law nor formal authority.⁶ This vision has crystallized as one of “dual federalism,” where the “powers relating to war and peace, armies and fleets, treaties and finance” belong to the federal government, not to the states.⁷

For well over a century after the country’s founding, dual federalism dominated how jurists, policymakers, and scholars understood American involvement in foreign affairs.⁸ Wisdom and practice dictated that diplomacy and other forms of international policymaking were the business of federal actors. In the meantime, states were to oversee domestic matters, such as the health and well-being of their populations. Starting in earnest around the Second World War, however, the seemingly rigid boundaries of dual federalism began to crumble.⁹ From that point forward, the pressures of globalization and the fast-increasing interconnectedness of the world’s societies made differentiating foreign from domestic activities a matter of art rather than science.¹⁰ An unpredicted phenomenon of national scale also started taking hold. American “subnational entities”—a term I will use to denominate cities, counties, and states—became key players in areas of foreign affairs once dominated by the federal government.¹¹

5 THE FEDERALIST NO. 42, at 91 (James Madison) (Michael A. Genovese ed., 2009); see also Ernest A. Young, *Foreign Affairs Federalism in the United States* 259, 260, in THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019) (“The 1789 Constitution, which replaced the [Articles of Confederation], aimed both to centralize the conduct of foreign policy in the national government and to enable that government to bring the states into line.”) (internal citation omitted).

6 The two-third vote requirement, along with the signature of the President, are unique to the U.S. legislative system, under obligation from the Constitution. See U.S. Const. art. II § 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”).

7 THE FEDERALIST NO. 45, *supra* note 5, at 100 (James Madison) (Michael A. Genovese ed., 2009).

8 See Young, *supra* note 5, at 261 (“[Dual federalism] dominated American constitutional law for over a century; courts invalidated state regulation impinging on interstate commerce and limited national legislation regulating intrastate affairs.”).

9 See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

10 See Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 883 (2006) (“[I]t seems that globalization marks a real transformation of, and perhaps departure from the current national order in which sovereignty, understood as the absolute control of the nation, through its political institutions, over the whole national territory and its populace played a major role.”).

11 See *infra* Part II.A.

Cities and states—such as Philadelphia through its status as a “sanctuary city” and California through its divisive “Save Our State” initiative—became active decision-makers on questions of immigration policy.¹² Subnational entities worked to mitigate global warming by forming accountability agreements with foreign entities and even vowed to comply with treaties that the federal government had shunned, such as the Paris Agreement.¹³ As I show in this Article, moreover, local and state governments have also become champions of the CRPD and international disability rights.¹⁴ But what structural issues led to this new paradigm? What, as a legal matter, has justified subnational entities to defy so openly the rules, norms, and expectations of dual federalism?

Enter “foreign affairs federalism.”¹⁵ This now-prevailing regime is remarkable, and of considerable interest to legal scholars, because it reveals that orthodox understandings of federal constitutional power rested on a fallacy: that the Constitution vests exclusive authority to the federal government on issues of international importance.¹⁶ In reality, the Constitution leaves much room for subnational entities to engage on matters

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- ¹² See Andrea Silva, *How California’s Prop. 187 Is Still Shaping Immigration Policy—25 Years After It Passed*, WASH. POST. (Nov. 25, 2019), <https://www.washingtonpost.com/politics/2019/11/25/how-californias-prop-is-still-shaping-immigration-policy-years-after-it-passed/> [https://perma.cc/6C58-CR4Y] (explaining that Proposition 187 “denied public, social, educational and health services to undocumented immigrants in California”); David Gambacorta & Kavitha Surana, *Even in Philadelphia, One of the Most Determined Sanctuary Cities, Refuge Is Elusive*, PROPUBLICA (Oct. 18, 2018, 5:00 AM), <https://www.propublica.org/article/even-in-philadelphia-one-of-the-most-determined-sanctuary-cities-refuge-is-elusive> [https://perma.cc/PN7H-AMRK] (writing that Philadelphia has “wore its sanctuary reputation like a badge of honor” and has tried to find “ways to outmaneuver ICE’s enforcement efforts.”).
- ¹³ See generally Jean Galbraith, *Two Faces of Foreign Affairs Federalism and What They Mean for Climate Change Mitigation*, 112 AM. J. INT’L L. UNBOUND 274, 274 (2018); Dana R. Fisher, *Understanding the Relationship Between Subnational and National Climate Change Politics in the United States: Toward a Theory of Boomerang Federalism*, 31 ENV’T & PLAN. C: GOV’T & POL’Y 769, 771–781 (2012).
- ¹⁴ See *infra* Part II–III.
- ¹⁵ In this Article, I draw a lot from Michael Glennon and Robert Sloane’s remarkable book on the question of foreign affairs federalism. See generally MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* (2016). But their book is, of course, by no means exhaustive. See generally Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225–26 (1999); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 167 (2001); Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 768 (2013); Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 52 (2016); Young, *supra* note 5, at 259.
- ¹⁶ See generally Sarah H. Cleveland, *Crosby and the One-Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); see also GLENNON & SLOANE, *supra* note 15, at 31 (“Doubtless the United States constitutionally must, at times, speak with one voice. . . . But [it] does not, in fact, always speak with one voice in foreign relations.”).

of foreign affairs and human rights.¹⁷ From this standpoint, therefore, foreign affairs federalism constitutes the foundation from which subnational entities have promoted the CRPD on U.S. soil. And it is, in the same spirit, the engine that has propelled much human rights advocacy and mobilization across the country.

Scholarship has also shown that foreign affairs federalism is a nuanced, multi-flavored doctrine that entails more than mere subnational participation on issues of international dimension. In many instances, it has enabled subnational entities to act antagonistically—or “uncooperatively”—toward the federal government.¹⁸ That is, local and state governments have adopted foreign affairs policies that conflict with those adopted by the federal government. In other situations, foreign affairs federalism has empowered subnational entities and federal actors to work hand-in-hand—or “cooperatively”—to drive national foreign affairs priorities.¹⁹

This Article draws on original research to show that this pattern of “uncooperative and cooperative foreign affairs federalism” accords with how local and state governments have championed the CRPD.²⁰ From an uncooperative standpoint, many cities and counties have denounced the Senate’s refusal to ratify the CRPD through resolutions and other expressive policies.²¹ Several states have also enacted measures to push the Senate in the direction of ratification. These expressions of discontent have done little to convince the requisite supermajority of sixty-seven senators to ratify the Convention, to be sure. Despite the spearheading and overwhelmingly bipartisan work on disability rights in the United States—notably through

¹⁷ See *infra* Part II.A.

¹⁸ “Uncooperative federalism” commonly refers to Jessica Bulman-Pozen and Heather Gerken’s canonical essay on the question. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009). Scholars have since studied and applied the conception widely. See *infra* note 126 and accompanying text. And it is not dissimilar from Yishai Blank’s conception of the novel “World-State-Locality” trinity, where, he argues, “local governments can now use international law in their struggle against their states and other localities” Blank, *supra* note 10, at 889.

¹⁹ “Cooperative federalism” does not, of course, limit itself to questions of foreign affairs. See Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015) (“Cooperative federalism has been described as ‘a partnership between the States and the Federal Government, animated by a shared objective.’”) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)); see also generally Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696 (2001); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012).

²⁰ See Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2138–39, n. 24 (2017) (collecting “scholarly work addressing state and local engagement in foreign affairs”).

²¹ See *infra* Part II.B.

the passage of the landmark Americans with Disabilities Act (“ADA”)²²—a stubborn coalition of conservative senators has persistently prevented the country from joining the rest of the world in ratifying the CRPD. Even so, I argue that the subtle resistance on the part of local and state governments has accomplished two expressive purposes.²³ The first is to signal to the rest of the world that U.S. subnational entities are committed to the international causes of disability justice and human rights. The second, less obvious purpose serves to reaffirm the role played by subnational entities in the U.S. system of federalism.

From a cooperative perspective, the supported decision-making (“SDM”) movement serves as a case in point. During the CRPD negotiations, SDM was a construct that certain key stakeholders, namely DPOs, fervently supported.²⁴ SDM came in response to concerns about guardianship laws, and more specifically, how they had become a mechanism systematically used to usurp the dignity and decision-making ability of people with disabilities.²⁵ Ultimately enshrined in Article 12 of the CRPD, SDM has become a way to empower people with disabilities to make life decisions without having to depend on the approval and decision-making powers of others.²⁶

The adoption of SDM laws began gaining real traction at the end of President Barack Obama’s first term. In October 2012, a roundtable convened under the auspices of the U.S. Administration for Community Living (“ACL”) and the American Bar Association (“ABA”) to find concrete

²² See generally 42 U.S.C. §§ 12101–12213 (2009).

²³ See *infra* Part II.C.2.

²⁴ See *infra* Part III.A.

²⁵ See *id.*

²⁶ As Anna Nilsson and Lucy Series remark, that SDM does not appear explicitly in the language of Article 12 is intentional: “Ambiguity was a necessary cost of unity for the advocacy strategy of disability organizations participating in the negotiations of the Convention” Anna Nilsson & Lucy Series, *Article 12 CRPD: Equal Recognition Before the Law*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* 339, 341 (Ilias Bantekas et al. eds., 2018). That said, a consensus exists around the idea that Article 12 was meant, at least in substantial part, to move past a system of substituted decision-making toward one of supported decision-making. See *infra* Part III.A. See also generally Andrew Peterson, Jason Karlawish & Emily Largent, *Supported Decision Making With People at the Margins of Autonomy*, *AM. J. BIOETHICS*, Nov. 2021, at 1–21; Emily A. Largent & Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, 23 *J. HEALTH CARE L. & POLY*, 271 (2021); but see Nina A. Kohn, *Legislating Supported Decision-Making*, 58 *HARV. J. LEGIS.* 313 (2021) (offering a thought-provoking critique of current SDM statutes laws, including the idea that they may, in fact, disempower individuals with disabilities despite their stated intentions).

ways to reform guardianship in ways consistent with Article 12.²⁷ This roundtable marked the beginning of an effort on the part of the executive branch, through the ACL, to help galvanize state-level SDM advocacy across the nation. At least eighteen states and the District of Columbia have enacted SDM laws since then, and many more remain in the legislative process.²⁸ Although not all these states have been influenced by the ACL, legislative records and other primary sources show that many among them have passed SDM laws on account of grassroots advocacy supported by ACL-provided grants. These findings, along with several state court decisions that have integrated Article 12 language in their reasoning, show the influence that the CRPD has had on shaping the U.S. guardianship reform movement.²⁹ They also illustrate that federal–state coordination was necessary to mobilize SDM advocacy within U.S. borders.

This Article proceeds in three Parts. In Part I, I overview two features of the CRPD that have made it a trailblazer in disability policy: its comprehensive protections for people with disabilities and its inclusive negotiation process. I then contrast these achievements with the Convention’s reception in the United States, paying particular attention to the different legal, policy, and political reasons that senators offered to oppose the treaty’s ratification. In Part II, I provide the constitutional and normative justifications underpinning foreign affairs federalism. I then explore how local and state governments have exercised their autonomy to champion the CRPD through expressive policies. Leaning on subnational resolutions pushing for CRPD ratification, I argue that these policies have enabled local and state governments to show support for international disability justice and human rights, and to reaffirm their role in the American system of federalism. In Part III, I examine the SDM movement in the United States and argue that Article 12 was a necessary but not sufficient factor in bringing it about. I explain that the drafters of the CRPD codified SDM as a way of moving away from the ubiquitous use of guardianship, a system that has often usurped the dignity and decision-making ability of people with disabilities. I conclude with a discussion about how the CRPD has come to influence SDM policymaking in the United States, focusing on

²⁷ See Roundtable, *Beyond Guardianship: Supported Decision-Making by Individuals with Intellectual Disabilities*, AM. BAR ASS’N (2012), <https://rethinkingguardianshipnc.org/wp-content/uploads/sites/1731/2021/06/Beyond-Guardianship-Supported-Decision-Making-by-Individuals-with-IDD-2012.pdf> [<https://perma.cc/R9T9-2Y4K>] (last visited May 21, 2022).

²⁸ See generally Part III.B.

²⁹ See generally *id.*

how the federal government has created the infrastructure necessary to implement Article 12 policy in several states across the country.

I. CRPD NON-RATIFICATION IN CONTEXT

This Part explores the Senate's decision not to ratify the CRPD. For the reader familiar with the Senate's recent treatment of human rights treaties, it may tell an old story: The U.N. adopts a landmark human rights treaty, which the Senate then declines to ratify for reasons that appear, at least on the surface, entirely partisan.³⁰ But, seen in a different light, I would consider the discussion below as setting the stage for a more nuanced understanding of the CRPD's reception in the United States. It is a prelude of sorts to a story that opposes the claim that the Convention's impact on U.S. disability rights died in the Senate.³¹ The reality is more dynamic and revelatory of the unpredictable ways in which human rights norms can shape domestic policy agendas.³²

Below, I first provide an overview of the CRPD, spotlighting some of the features that have made it a trailblazer in disability policy. I then provide the justifications behind the Senate's decision not to ratify the CRPD. This discussion gives rise to an enigma that has puzzled many foreign affairs and

³⁰ See Jean Galbraith, *Human Rights Treaties in and Beyond the Senate: The Spirit Of Senator Proxmire*, in FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME, AND JUSTICE IN HONOUR OF ROGER S. CLARK 507, 508–09 (Suzannah Linton, et. al. eds., 2015) (explaining that, since 1994, when the United States ratified the Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture, no other human rights treaty has received ratification).

³¹ See Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 TOURO L. REV. 301, 343 (2019) ("In fact, the defeat of the ratification of the CRPD marks the beginning of what has become a new wave of United States isolationism and antipathy towards the international legal order."); see also *Statement on Senate CRPD Vote*, DISABILITY RTS. EDUC. & DEF. FUND (Feb. 19, 2013), <https://dredf.org/2013/02/19/statement-on-todays-senate-crpd-vote/> [<https://perma.cc/EUS7-G77X>] ("By not ratifying the Treaty, the US fails to advance the human rights principles it once championed in the Americans with Disabilities Act of 1990, the landmark disability civil rights law upon which the CRPD is largely based."); Ted Kaufman, *The Senate Refuses to Lend Support for People with Disabilities*, DEL. ONLINE (Mar. 22, 2014, 5:22 PM), <https://www.delawareonline.com/story/opinion/columnists/ted-kaufman/2014/03/22/the-senate-refuses-to-lend-support-for-people-with-disabilities/6726001/> [<https://perma.cc/XZ46-8X84>] ("CRPD will probably come up for a vote again in the full Senate this summer. Without a change of six votes, disabled people around the world will needlessly be denied equal opportunities, and the United States will lose some of its international moral authority.").

³² For a discussion of the myriad ways in which human rights implementation occurs within domestic legal frameworks, see generally Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 WASH. L. REV. 449 (2008).

disability rights experts: Did the Senate reject a Convention that was inspired, at least in part, by U.S. disability law and policy?³³ As I explain below, the answer is “yes.”

A. *A Disability Rights Trailblazer*

The U.N. General Assembly adopted the CRPD and its Optional Protocol in December 2006.³⁴ The CRPD then opened for signature on March 30, 2007. That day, eighty-two states parties signed onto it—the largest ever number of signatories to a U.N. treaty on an opening day.³⁵ On May 3, 2008, the CRPD entered into force after receiving its 20th ratification.³⁶ Today, the CRPD has 164 signatories and 184 states parties.³⁷

The CRPD is a remarkable achievement not least because it is the “most rapidly negotiated”³⁸ human rights treaty ever and “the first comprehensive human rights treaty of the 21st century. . . .”³⁹ It also possesses two qualities that make it a disability policy trailblazer: the substantive protections it affords to people with disabilities and its highly inclusive process of negotiation.⁴⁰

³³ See JOHN R. VAUGHN, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD) (May 12, 2008) (“During the six years of the drafting of the Convention, . . . [t]he U.S. delegation drew on our nation’s prolific experience with disability laws and policies in providing guidance on the foundational principles of the Convention.”). I also offer more support for this point *infra* Part II.B.1.a.

³⁴ G.A. Res. 61/611 (Dec. 13, 2006).

³⁵ See *Convention on the Rights of Persons with Disabilities*, U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> [<https://perma.cc/JQL4-VUUY>] (last visited May 21, 2022).

³⁶ See *Entry Into Force*, U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/entry-into-force.html> [<https://perma.cc/SMB5-LM4Y>] (last visited May 21, 2022); see also CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ADVOCACY TOOLKIT, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. I, V (2008), http://www.ohchr.org/Documents/Publications/AdvocacyTool_en.pdf [<https://perma.cc/VR L6-STA3>] (discussing the development and ratification of the CRPD).

³⁷ *Status of Treaties*, U.N. TREATY COLLECTION (2008), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en [<https://perma.cc/VRL 6-STA3>].

³⁸ Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 2 (2008).

³⁹ U.N., *supra* note 35.

⁴⁰ See Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 177 (2008) (“Indeed, the physical presence and substantive input of persons with disabilities in the treaty development process cannot be over-emphasized as having affected both the substantive outcomes described above, and the procedural guarantees that followed.”).

1. Substantive Protections

The CRPD's protections encompass "the spectrum of life activities of persons with disabilities."⁴¹ They arise from a "purpose" that does not lack in ambition: "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."⁴² The CRPD's definition of "persons with disabilities" is similarly comprehensive, covering all "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."⁴³ Together, the CRPD's protections and the breadth of people to whom it applies have created "a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights."⁴⁴

The CRPD's structure is straightforward. The first nine Articles set out definitions,⁴⁵ interpretive provisions,⁴⁶ and general principles that are applicable throughout the Convention's implementation,⁴⁷ including those of "non-discrimination,"⁴⁸ "equality of opportunity,"⁴⁹ and "equality

⁴¹ Michael Ashley Stein, *A Quick Overview of the United Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679, 679 (2007). For an exhaustive analysis of the CRPD's fifty articles, see generally THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY (Ilias Bantekas et al. eds., 2018).

⁴² Convention on the Rights of Persons with Disabilities, May 3, 2008, Art. 1, 2515 U.N.T.S. 3 [hereinafter CRPD].

⁴³ *Id.*, Art. 1.

⁴⁴ Kayess & French, *supra* note 38, at 2.

⁴⁵ See generally CRPD, Art. 2. The definition of "reasonable accommodation" in the CRPD is highly analogous to the "reasonable accommodation" language in the ADA. Compare CRPD, Art. 2 ("Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.") with 42 U.S.C. § 12112(b)(5)(A) (2009) (defining discrimination in the workplace as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

⁴⁶ See Kayess & French, *supra* note 38, at 26 ("Articles 1 and 2 of the CRPD are interpretive. Article 1 sets out the general purpose of the convention Article 2 defines five key terms used repeatedly throughout the convention.")

⁴⁷ See *id.* at 27–28 (2008) (explaining that Articles 8 and 9 are "undoubtedly two of the greatest challenges to the international community.").

⁴⁸ See CRPD, *supra* note 42, Art. 3.

⁴⁹ *Id.*, Art. 5.

between men and women.”⁵⁰ They also provide benchmarks with which states parties are to comply. For example, states parties must “modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”⁵¹

Articles 10 through 30 enumerate the “specific human rights and fundamental freedoms” that the Convention protects.⁵² They include equal recognition before the law (Article 12)—the idea that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”⁵³ to which I will return in much more detail in Part III.⁵⁴ They also include freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15); liberty of movement and nationality (Article 18); health (Article 25); habilitation and rehabilitation (Article 26); and participation in political and public life (Article 29).

The final twenty Articles—Articles 31 through 50—focus on process. For example, Article 31 requires states parties to amass “statistical and research data” to facilitate proper implementation of the CRPD.⁵⁵ And Article 33 requires designating “one or more focal points within government for matters relating to the implementation of the present Convention. . . .”⁵⁶

Articles 34 through 39 also set up the Committee on the Rights of Persons with Disabilities (“CRPD Committee”), a designated body of international experts that monitors the Convention’s implementation progress.⁵⁷ Under Article 35, states parties have to submit to the CRPD Committee “a comprehensive report on measures taken to give effect to [their] obligations” within two years of entering into the Convention, and they have to do so every four years thereafter.⁵⁸ After receiving these reports, the CRPD Committee can then make recommendations based on its

⁵⁰ *Id.*, Art. 7.

⁵¹ *Id.*, Art. 4(b).

⁵² Kayess & French, *supra* note 38, at 28.

⁵³ CRPD, *supra* note 42, Art. 12(2).

⁵⁴ As I will explain in detail *infra* Part III, Article 12 and the ways in which states parties have interpreted and implemented it in domestic law are largely responsible for the flourishing of supported decision-making laws in the United States.

⁵⁵ *See generally* CRPD, *supra* note 42, Art. 31.

⁵⁶ *Id.*, Art. 33.

⁵⁷ *See Committee on the Rights of Persons with Disabilities*, U.N. OFF. OF HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> [<https://perma.cc/W7EE-57JL>] (May 21, 2022).

⁵⁸ CRPD, *supra* note 42, Art. 35(1)–(2).

interpretation of the reports and follow up with the states parties concerned.⁵⁹

Finally, Articles 41 through 50 include common treaty provisions, such as designating the U.N. Secretary-General as the Convention's depository (Article 41); providing guidelines for reservations (Article 46); and detailing the process for amending the Convention (Article 47).

2. *The Convention's Inclusive Negotiation Process*

The CRPD's drafting process also "broke new and inclusive ground."⁶⁰ One theme that united the negotiations was "that those whose interests are directly affected by an issue must participate meaningfully in decision-making concerning that issue."⁶¹ A five-word mantra—one that activists have long used to describe the global disability rights movement⁶²—came to symbolize the negotiations: "Nothing about us without us."⁶³

DPOs were key during the negotiations. The Ad Hoc Committee tasked a Working Group in 2003 to prepare a draft text that would serve as a basis

⁵⁹ *Id.*, Art. 36(1).

⁶⁰ Stein & Lord, *supra* note 40, at 177.

⁶¹ Lord, Suozzi & Taylor, *supra* note 3, at 567. U.N. officials recognized as much the day Ecuador became the 20th ratifying country, officially marking the Convention's entry into force. Under-Secretary-General for Economic and Social Affairs Sha Zukang stated that the CRPD "could not have happened without the strong dedication and commitment of both member countries and the global disability community." Sha Zukang, *Remarks by Mr. Sha Zukang, Under-Secretary-General for Economic and Social Affairs on the Occasion of the 20th Ratification of the Convention on the Rights of Persons with Disabilities*, U.N. DEP'T OF ECON. & SOC. AFFS. (Apr. 4, 2008), <https://www.un.org/development/desa/disabilities/remarks-by-mr-sha-zukang-under-secretary-general-for-economic-and-social-affairs-on-the-occasion-of-the-20th-ratification-of-the-convention-on-the-rights-of-persons-with-disabilities.html> [https://perma.cc/XZ2G-E5DK]. High Commissioner for Human Rights Louise Arbour echoed similar thoughts: "Persons with disabilities and their supporters have led the struggle for a very long time to bring this about." Louise Arbour, *Arbour Welcomes Entry into Force of "Ground-Breaking" Convention on Disabilities*, U.N. DEP'T OF ECON. & SOC. AFFS. (Apr. 4, 2008), <https://www.un.org/development/desa/disabilities/arbour-welcomes-entry-into-force-of-ground-breaking-convention-on-disabilities.html> [https://perma.cc/PFK4-KK47].

⁶² See generally JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (2000).

⁶³ See, e.g., Kayess & French, *supra* note 38, at 4 ("[T]he formulation and future implementation of the CRPD has been framed repeatedly . . . based on the principle of 'nothing about us without us.'"); Michael L. Perlin, "A Change Is Gonna Come": *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 489 ("One of the hallmarks of the process that led to the publication of the UN convention was the participation of persons with disabilities and the clarion cry, 'Nothing about us, without us.'").

for negotiations between states parties.⁶⁴ Among the Working Group were twelve prominent DPOs from around the globe, including Inclusion International, Disabled Peoples' International, the World Network of Users and Survivors of Psychiatry, and the World Federation of the Deaf.⁶⁵ This level of “civil society”⁶⁶ participation was “unprecedented in the normal course of treaty development at the United Nations.”⁶⁷ As noted by Rosemary Kayess and Phillip French, the negotiations had “the highest level of participation by representatives of civil society, overwhelmingly that of persons with disability and disabled persons organisations, of any human rights convention in history.”⁶⁸

* * *

Because of its comprehensive protections for people with disabilities and inclusive negotiation process, the CRPD constitutes a milestone in the history of human rights law. Yet, despite these pathbreaking features, enthusiasm for the Convention was not uniformly shared among U.S. federal policymakers. In the next sub-Part, I provide the legal and policy justifications for this phenomenon and emphasize how, in the end, political divides determined the Convention's fate in the U.S. Senate.

B. *The CRPD in the Senate*

President Obama signed the CRPD on July 30, 2009, fulfilling his 2008 presidential campaign promise to reverse the Bush Administration's resistance to becoming party to the Convention.⁶⁹ President Obama's signature did not impose any positive legal obligation on the United States, to be sure,⁷⁰ but it did enable his administration to pursue a necessary step

64 U.N. Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on the Prot. & Promotion of the Rts. & Dignity of Persons with Disabilities, Rep. of the Working Grp. to the Ad Hoc Comm., U.N. Doc. A/AC.265/2004/WG/1 (2004), <https://www.un.org/esa/socdev/enable/rights/ahcwgreport.htm> [<https://perma.cc/4MQH-N6UX>] [hereinafter U.N. Ad Hoc Comm.].

65 *Working Group on a Convention*, U.N. ENABLE (2007), <https://www.un.org/esa/socdev/enable/rights/ahcwg.htm> [<https://perma.cc/6NED-9X4Q>].

66 See U.N. Ad Hoc Comm., *supra* note 64.

67 Stein & Lord, *supra* note 40, at 177.

68 Kayess & French, *supra* note 38, at 3–4.

69 See generally S. REP. NO. 112-7 (2012); see also Stein, Lord & Stein, *supra* note 2, at 40 (explaining that despite the interconnection between many aspects of the CRPD and U.S. disability law, the Bush Administration participated but only superficially in the CRPD negotiations).

70 See Thomas D. Grant, *The U.N. Convention on the Rights of Persons with Disabilities (CRPD): Some Observations on U.S. Participation*, 25 IND. INT'L & COMPL. REV. 171, 173 (2015) (“Where a treaty is subject to ratification, a State that has signed the treaty is obliged ‘to refrain from acts which would

toward ratification: transmitting the treaty to the Senate for advice and consent.

The advice and consent process began some three months later, with a thorough assessment of the treaty by the Senate's Committee on Foreign Relations ("SCFR"). After a preliminary hearing on the subject, the SCFR favorably reported the CRPD to the Senate on July 26, 2012, by a vote of thirteen to six.⁷¹ But the division along party lines in the SCFR's vote was a foreshadowing of what was to come on the full Senate floor: No Democrat opposed ratification, while the six dissenting votes came from Republicans.⁷²

Five out of the six minority senators expressed their views in the SCFR report.⁷³ Their text opened with a telling quote from President Thomas Jefferson, principal author of the Declaration of Independence, that appeared to capture the essence of their position: "Peace, commerce, and honest friendship with all nations—entangling alliances with none."⁷⁴ American exceptionalism thus emerged, at least in rhetorical form, as a countervailing force against ratification. In reality, however, the dissenters were likely signaling the beginning of a partisan deliberation process, one that may have had less to do with promoting exceptionalism than fulfilling party prerogatives.⁷⁵

Shortly after the SCFR's assessment, the ratification vote in the full Senate occurred on December 4, 2012. The Convention received a majority vote of approval,⁷⁶ but it still fell six votes short of the two-thirds needed to

defeat the object and purpose of [the] treaty' until such time that it has 'made its intention clear not to become a party to the treaty.'" (quoting Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, Art. 18, 1155 U.N.T.S. 336.).

⁷¹ S. REP. NO. 112-6, at 7 (2012). The SCFR's report included testimony from senators who had experienced important involvement in the passage of the ADA, including most notably Senator Tom Harkin (D.-Ill.), who received glowing comments from his Democratic colleagues on the SCFR. *See id.* at 21 (documenting Senator John Kerry lauding Senator Harkin for helping knock down "barriers to employment and Government service" for people with disabilities through his work on the ADA). Throughout his testimony, Senator Harkin emphasized that his and the Senate's work on the ADA was a precondition for the CRPD's success across the world. *See id.* at 26 ("Well, thanks to the ADA and other U.S. laws, America has shown the rest of the world how to honor the basic human rights of children and adults with disabilities.").

⁷² *Id.* at 6.

⁷³ *Id.* at 17–19.

⁷⁴ *Id.* at 17. The quote by President Jefferson came from the President's first inaugural address on March 4, 1801. *See* Thomas Jefferson, *First Inaugural Address*, AVALON PROJECT AT YALE L. SCH., https://avalon.law.yale.edu/19th_century/jefinau1.asp [<https://perma.cc/5M2T-VR7T>] (last visited May 21, 2022).

⁷⁵ *See generally infra* Part I.B.1.b.

⁷⁶ *See* S. REP. NO. 112-7, *supra* note 69.

ratify an international treaty.⁷⁷ The vote was once again largely along party lines, with all of the Democrats and eight Republicans voting for ratification, while thirty-eight Republicans voted against.⁷⁸

After the vote, the Senate returned the CRPD to the SCFR by protocol. Although the SCFR reassessed the Convention two years later, on July 28, 2014—once again recommending that the Senate give its advice and consent to its ratification⁷⁹—the Senate declined to proceed with a vote.⁸⁰ The Senate instead referred the CRPD back to the SCFR, where it has lain ever since. The United States thus became, and remains, one of a handful of countries to not ratify the CRPD, and the only permanent member of the U.N. Security Council to have signed but not ratified it.⁸¹

1. *The Reasons for Non-Ratification*

Two broad justifications fueled the Senate's decision to not ratify the CRPD. Before examining them, however, some words of caution are necessary: These justifications are important not because of their merits, which are debatable at best and unfounded at worse, but because they highlight the deep partisanship brought about by the ratification deliberation process. They in turn bring into stronger light the platform that subnational entities later used to champion the CRPD. The first justification was that U.S. disability legislation, and in particular the ADA⁸², is robust enough to protect the rights of Americans with disabilities. The second was that ratifying the Convention would conflict with objectives of a specific segment of the Republican wing of the Senate, notably on issues of abortion, national sovereignty, and parental rights.

a. *Domestic Disability Legislation*

Throughout the ratification debate, both wings of the Senate proudly acknowledged the array of legal protections afforded to people with

⁷⁷ The two-third vote requirement, along with the signature of the President, are unique to the U.S. legislative system, under obligation from the Constitution. *See* U.S. Const. art. II (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”).

⁷⁸ *See Roll Call Vote 112th Congress—2nd Session*, U.S. SENATE (Dec. 4, 2012), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00219 [<https://perma.cc/2K36-YAMB>].

⁷⁹ S. REP. NO. 113-12, at 8 (2014).

⁸⁰ S. REP. NO. 112-7, *supra* note 69.

⁸¹ *See* U.N. TREATY COLLECTION, *supra* note 37 (listing the signatories and ratifiers of the CRDP).

⁸² *See generally* 42 U.S.C. §§ 12101–12213 (2009).

disabilities, including most notably the overwhelmingly bipartisan ADA. For example, Senator John Kerry (D-Mass.), one of the authors of the first SCFR report, recognized that the United States has “a comprehensive network of existing federal and state disability laws and enforcement mechanisms,” enumerating some thirteen statutes to this effect.⁸³ The minority senators affirmed much of the same sentiment, stating that the country “has already set the highest standard for treatment of and assistance to the disabled; so much so that the drafters of this Convention used U.S. laws and regulations to build its framework.”⁸⁴

Furthermore, the Obama Administration even proposed,⁸⁵ and the SCFR adopted,⁸⁶ a reservation to the CRPD that made “clear that the United States will limit its obligations under the Convention to exclude the narrow circumstances in which implementation of the Convention could otherwise implicate federalism or private conduct concerns.”⁸⁷ The reason for this reservation was that “[i]n the large majority of cases, existing federal and state law meets or exceeds the requirements of the Convention,” so no new “implementing legislation” is needed to fulfill the treaty’s mandates.⁸⁸

Accordingly, the disagreement between Democrats and Republicans did not center on the CRPD’s effect on domestic disability rights policy. Both parties agreed that the ADA had set the gold standard, and that pre-existing laws already fulfilled the Convention’s demands. Instead, their disagreement centered on the utility of ratifying a Convention that was, on one hand, no better than useless at home and, on the other, of questionable value abroad. In the second SCFR report, Senator Jeff Flake (R-Ariz.) concisely made this point:

As the United States is the leader on disabilities policy in the world, I’m not certain higher ground is even a possibility. The [ADA] has been the law of the land since 1990 and is recognized as the gold standard. In fact, it serves as the basis for much of this treaty. In addition, the United States Agency for International Development already administers programs across the globe aimed at helping the disabled.⁸⁹

⁸³ See S. REP. NO. 112-6, *supra* note 71, at 6. Senator Kerry also noted that “disability nondiscrimination provisions have been integrated into statutes of general applicability to federal policies and programs.” *Id.*

⁸⁴ *Id.* at 18.

⁸⁵ S. REP. NO. 112-7, *supra* note 69, at 1.

⁸⁶ See S. REP. NO. 112-6, *supra* note 71, at 7.

⁸⁷ *Id.* at 6–7.

⁸⁸ *Id.*

⁸⁹ S. REP. NO. 113-12, *supra* note 79, at 37.

On these views, the legal developments in disability rights that had occurred before the CRPD's entry into force became tools that Democrats and Republicans used in contrasting ways. Democrats wanted to export their legislative successes abroad and become leaders in international disability policy. By contrast, opposing Republicans questioned whether doing so was even possible or useful.⁹⁰ But their differences did not stop there. More decisive of the CRPD's fate were policy and political concerns that surfaced on the right side of the aisle between the SCFR's vote and that of the Senate.

b. Policy Explanations

I should emphasize at the outset that a comprehensive examination of the policy concerns raised during the deliberation process would go beyond the scope of this Article. Still, several are worth analyzing here because of their ultimate impact in shaping public discourse about the ratification process.⁹¹

Abortion. One consistent concern was that ratifying the CRPD would become a vehicle for pro-choice policy. The locus of this concern was Article 25, which requires states parties to “[p]rovide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, *including in the area of sexual and reproductive health . . .*”⁹² Although Article 25 does not specifically mention abortion, nor does any credible authority support the claim that the right to abortion is covered by the CRPD,⁹³ the dissenting senators argued that it

⁹⁰ Said otherwise, in the words of Senator Flake, “it would appear that ratification of this treaty would be little more than a symbolic gesture. I remain concerned that ratifying a treaty for purely symbolic purposes would dilute the importance and integrity of the treaty process altogether.” *Id.* at 38.

⁹¹ For an in-depth analysis of policy concerns raised by senators during the ratification debate, I would recommend a report written by the Congressional Research Service. See LUISA BLANCHFIELD & CYNTHIA BROWN, CONG. RSCH. SERV., *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: ISSUES IN THE U.S. RATIFICATION DEBATE* 15–20 (2015).

⁹² See CRPD, *supra* note 42, Art. 25 (emphasis added).

⁹³ To this effect, Amnesty International, an openly pro-choice organization, has stated that “[t]here is no generally accepted right to abortion in international human rights law.” *Women, Violence and Health*, AMNESTY INT’L (2005), <https://www.amnesty.org/en/documents/act77/001/2005/en/> [<https://perma.cc/WY8S-Q9JH>]; see also Andrea Stevens, *Pushing a Right to Abortion through the Back Door: The Need for Integrity in the U.N. Treaty Monitoring System, and Perhaps a Treaty Amendment*, 6 PENN ST. J.L. & INT’L AFFS. 70, 76 (2018) (“No U.N. human rights treaty speaks of a right to abortion, and . . . neither does customary international law provide for such a right.”). That said, a movement may be developing in that direction. See, e.g., Rachel Rebouché, *Abortion Rights as Human Rights*, 25 SOC. & LEG. STUD. 765 (2016).

leaves ample room for a pro-choice interpretation.⁹⁴ They thus claimed that domestic democratic processes are better suited than international law to make judgments about this “highly controversial”⁹⁵ subject.

National Sovereignty. Another policy concern was that the CRPD Committee would overshadow domestic policymakers in the Convention’s interpretation and implementation in the United States. For example, the minority senators in the second SCFR report argued that “while an American might be a member of the Committee, it is clear that even having such a representative would not fully provide the United States with the opportunity to have our national interests represented”⁹⁶ So American policy, the argument continued, “would be subjected to the oversight and commentary of the CRPD committee, which could issue unlimited recommendations that the U.S. would be expected to implement.”⁹⁷

The congressional record makes clear, however, that this position represented an incorrect interpretation of the U.S. stance toward ratification. As I have already noted, the SCFR included a declaration in the resolution of advice and consent stating that “current United States law fulfills or exceeds the obligations of the Convention”⁹⁸ This declaration meant that the United States would reject any policy recommendation made by the CRPD Committee because, at least in theory, no room for increased compliance would be possible. And even if ratified, the CRPD would not be

⁹⁴ Reporting about the controversy surrounding Article 25 of the CRPD also abounded during the ratification debate in the Senate. See, e.g., Brian Tashman, *Religious Right Groups Work to Defeat Treaty on Rights of People with Disabilities, Falsely Claim it Sanctions Abortion*, RIGHT WING WATCH (Nov. 29, 2012, 4:40 PM), <https://www.rightwingwatch.org/post/religious-right-groups-work-to-defeat-treaty-on-rights-of-people-with-disabilities-falsely-claim-it-sanctions-abortion/> [<https://perma.cc/P4G4-FQL9>] (arguing that the Republicans’ concern about a pro-choice interpretation is misguided); Grace Melton, *U.N. Disabilities Treaty Leaves Door Open for Abortion Advocates*, DAILY SIGNAL (Aug. 1, 2012), <https://www.dailysignal.com/2012/08/01/u-n-disabilities-treaty-leaves-door-open-for-abortion-advocates/> [<https://perma.cc/C6WA-T7J3>] (arguing that “[t]he full Senate should refuse to ratify the CRPD . . . and decline to give abortion advocates yet another U.N. document to use in their arsenal.”).

⁹⁵ The minority senators effectively used the same language in both reports. S. REP. NO. 112-6, *supra* note 71, at 18; S. REP. NO. 113-12, *supra* note 79, at 33.

⁹⁶ See S. REP. NO. 112-6, *supra* note 71, at 34.

⁹⁷ Grace Melton, *Another U.N. Convention that Poses Threats to U.S. Sovereignty*, DAILY SIGNAL (July 13, 2012), <https://www.dailysignal.com/2012/07/13/another-u-n-convention-that-poses-threats-to-u-s-sovereignty/> [<https://perma.cc/M55F-QY3E>].

⁹⁸ S. REP. NO. 112-6, *supra* note 71, at 14. For reference, a declaration under international law constitutes a country’s interpretation of a treaty matter and does not “exclude or modify the legal effect of a treaty.” See *Glossary*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#declarations [<https://perma.cc/YR2H-9APU>] (last visited May 21, 2022) (“Declarations can . . . be treaties in the generic sense intended to be binding at international law.”).

self-executing, meaning that the CRPD Committee by itself would have no ability to provide enforceable rights to Americans.⁹⁹

Parental Rights. A third policy concern was that ratifying the CRPD would usurp parental autonomy by empowering the state to make education and health care decisions for children with disabilities.¹⁰⁰ Article 7 requires that in state actions “concerning children with disabilities, the best interests of the child shall be a primary consideration.”¹⁰¹ According to Senator Richard John Santorum (R-Pa.), this Article would have “put the government, acting under U.N. authority, in the position to determine for all children with disabilities what is best for them.”¹⁰² Yet, again in the resolution of advice and consent, the SCFR stated that “nothing in Article 7 requires a change to existing United States law,”¹⁰³ thereby undercutting the argument that the CRPD would usurp parental decision-making on issues of child development.

These policy issues represent only a snapshot of those raised during the ratification debate, but they nonetheless illustrate the political opposition that the CRPD elicited. As I explain below, however, local and state governments picked up where the Senate left off in varying ways—some concrete and others symbolic—and their championing of the CRPD continues to this very day.

⁹⁹ See S. REP. NO. 112-6, *supra* note 71, at 14.

¹⁰⁰ Homeschooling advocates, in particular, had cited this concern to support their opposition to ratification. See, e.g., Maggie Severns, *Bob Dole Battles Home-Schoolers*, POLITICO (July 22, 2014, 12:17 AM), <https://www.politico.com/story/2014/07/bob-dole-home-school-legal-defense-109201> [<https://perma.cc/4YDQ-ZNU6>] (stating that the president of the Homeschool Legal Defense Association said that the CRPD “could infringe on the rights of parents whose children have disabilities”).

¹⁰¹ CRPD, *supra* note 42, Art. 7(2).

¹⁰² Rick Santorum, *This Treaty Crushes U.S. Sovereignty*, WND (Dec. 2, 2012, 8:43 PM), <https://www.wnd.com/2012/12/this-treaty-crushes-u-s-sovereignty/> [<https://perma.cc/5LU8-89R3>]. Senator Santorum’s position was not without opposition. See, e.g., Dana Millbank, Opinion, *Santorum’s New Cause: Opposing the Disabled*, WASH. POST (Nov. 26, 2012), https://www.washingtonpost.com/opinions/santorums-new-cause-opposing-the-disabled/2012/11/26/9ab0605a-3829-11e2-b01f-5f55b193f58f_story.html [<https://perma.cc/449D-BBQ8>] (“The treaty requires virtually nothing of the United States.”).

¹⁰³ S. REP. NO. 112-6, *supra* note 71, at 14. Senator Chris Coons (D.-Conn.) reaffirmed this point the day of the ratification vote, saying that the CRPD “does nothing to empower an international convention of bureaucrats to direct the schooling of children in Delaware, West Virginia, Indiana, or in Massachusetts.” 158 CONG. REC. S7370 (2012).

II. SUBNATIONAL ENTITIES AS CHAMPIONS OF THE CRPD

This Part and the next make up the heart of this Article. They examine subnational efforts to uphold the CRPD within U.S. borders. For the skeptical reader, what follows may appear unremarkable. Subnational entities have, after all, a long history of championing human rights treaties when the Senate has failed to ratify them.¹⁰⁴ So what makes the CRPD an interesting case?

My answer is two-fold. First, I use original research to show how local and state governments have exercised their constitutional autonomy to support the CRPD through expressive means. This discussion contributes to an underdeveloped literature using expressivism as a theoretical framework to examine subnational involvement in human rights and other issues of global importance. Second, I analyze the flourishing of SDM laws across the country. Because SDM derives from Article 12 of the CRPD,¹⁰⁵ these laws constitute a unique case study to understand the Convention's impact on U.S. disability law and policy.

But, before I proceed with these matters, I will bring to the fore two necessary threshold issues: What as a matter of law empowers local and state governments to participate in foreign affairs policy? And beyond the

¹⁰⁴ Glennon and Sloane have made this point concisely:

Human rights have been another common concern [for local governments]. The United States declined to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). But that did not deter San Francisco from adopting local ordinances to implement portions of it. San Francisco's efforts, in turn, prompted other states and cities to call for regulations and implementation. Coalitions in Chicago, Los Angeles, and Atlanta have urged federal legislators to approve CEDAW. Similarly, the federal government's recalcitrance in implementing the Convention on the Elimination of All Forms of Racial Discrimination, which the United States ratified but declared non-self-executing, did not deter local officials in Iowa, California, and New York from enacting local implementing legislation.

GLENNON & SLOANE, *supra* note 15, at 63–64 (footnotes omitted); *see also* COLUM. L. SCH., HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 10 (2012) (discussing local cities and states that have passed resolutions on the Convention on the Rights of the Child); Galbraith, *supra* note 20, at 2151 (“Sometimes state and local government activity in relation to foreign affairs occurs against a backdrop of federal inaction, as is the case with the incorporation of unratified human rights treaties into the municipal law of progressive cities.”).

¹⁰⁵ I will cover this topic in far more specificity *infra* Part III. But several works, at this juncture in this Article, can serve as primers on the relationship between supported decision-making laws and Article 12. *See, e.g.*, Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 92 (2012); Kristin Booth Glen, *Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project*, 39 CARDOZO L. REV. 495 (2017); Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111 (2013).

question of legality, what are the normative implications of such involvement?

A. Dual Federalism No Longer

Debates among legal scholars about the legality of subnational involvement in foreign affairs have a long history.¹⁰⁶ But current consensus suggests that, as a general rule, subnational entities are entitled to issue policies that adhere to unratified international law instruments like the CRPD. This consensus explains why in recent years cities and states have complied with international agreements that the federal government has shunned, including in the areas of climate policy,¹⁰⁷ gender equality and women's rights,¹⁰⁸ and immigration.¹⁰⁹ Two core premises—one constitutional, the other normative—appear to underpin this still-developing trend.

The Constitutional Premise. As Jean Galbraith explains, the Constitution “bestows a cornucopia of foreign affairs powers upon the federal government and explicitly limits the powers of the states.”¹¹⁰ Article I authorizes

¹⁰⁶ See Goldsmith, *supra* note 4, at 1622 (arguing that “it is no longer true, if it ever was, that the national political branches prefer federal regulation of all (or even most) issues that can be characterized as involving foreign relations.”); Young, *supra* note 15, at 167 (arguing against the Supreme Court’s “attempt to define and police a subject matter boundary—here, ‘foreign’ versus ‘domestic’—that is increasingly under pressure from forces of economic, technological, and political integration.”); Galbraith, *supra* note 13, at 274 (discussing subnational involvement in the area of climate change policy during the Trump Administration).

¹⁰⁷ See, e.g., Robinson Meyer, *Dozens of States Want to Keep America’s Broken Climate Promise*, THE ATLANTIC (Dec. 9, 2019), <https://www.theatlantic.com/science/archive/2019/12/24-states-are-still-paris-theyre-also-cutting-emissions/603250/> [<https://perma.cc/C29K-D3JF>] (showing how states have committed themselves to Paris Accord principles); Rebecca Bromley-Trujillo, *Despite Trump, Many Cities and States are Fighting Climate Change. Including Pittsburgh.*, WA. PO. (June 6, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/06/despite-trump-pittsburghs-working-on-slowing-climate-change-so-are-many-other-cities-and-states/?nid> [<https://perma.cc/H4BM-UVEF>] (explaining how American cities pronounced their support for the Paris climate accord).

¹⁰⁸ See, e.g., *Background*, CITIES FOR CEDAW, <http://citiesforcedaw.org/background/> [<https://perma.cc/7XEX-5TRZ>] (last visited May 21, 2022) (“Cities for CEDAW is a campaign to protect the rights of women and girls by passing ordinances establishing the principles of CEDAW in cities and towns across the United States.”).

¹⁰⁹ See, e.g., Bethany Allen-Ebrahimian, *U.S. Cities Want to Join U.N. Migration Talks that Trump Boycotted*, FOREIGN POL’Y (Dec. 5, 2017, 5:22 PM), <https://foreignpolicy.com/2017/12/05/u-s-cities-want-to-join-u-n-migration-talks-that-trump-boycotted/> [<https://perma.cc/9CPZ-EMT3>] (“Cities in the United States are petitioning for formal inclusion in a U.N. global compact on migration just days after the White House withdrew from the accord.”).

¹¹⁰ Galbraith, *supra* note 20, at 2131; see also Goldsmith, *supra* note 4, at 1619 (describing the “four means” by which the Constitution bestows plenary, not exclusive, foreign affairs power to the federal government).

Congress to regulate commerce with foreign countries, to declare war, and to raise and support an army.¹¹¹ Article II installs the President as the commander-in-chief of the military and empowers them to enter into treaties on behalf of the United States.¹¹² By contrast, Article I provides that states cannot “enter into any Treaty, Alliance, or Confederation,” and it also prohibits states from entering into war with foreign countries and entering into international agreements with the approval of Congress.¹¹³

By the same token, the U.S. Supreme Court has on many occasions interpreted the Constitution to grant the federal government what appears to be exclusive authority over foreign affairs matters. In *United States v. Belmont*, the Court stated that “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”¹¹⁴ In *United States v. Pink*, the Court echoed this idea, affirming that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.”¹¹⁵ And in *Zschernig v. Miller*, the Court invalidated an Oregon probate law because it had “more than ‘some incidental or indirect effect in foreign countries’”¹¹⁶

That said, scholars have come to agree that the embedded dual federalism principle in *Belmont*, *Pink*, and *Zschernig*—which holds illegal any invasion by a subnational entity “into the field of foreign affairs which the Constitution entrusts to the President and the Congress”—is a red herring.¹¹⁷ Distinguishing between exclusive and plenary federal power is necessary to demarcate where the federal government and subnational entities belong in foreign affairs decision-making.¹¹⁸ A second part of this conundrum, according to Galbraith, is that the Court’s doctrine “is not always a reliable guide to practice in foreign relations law, because the Court’s interventions are sporadic, discrete, and heavily limited by justiciability doctrines” like

¹¹¹ See U.S. Const. art. I.

¹¹² See U.S. Const. art. II.

¹¹³ See U.S. Const. art. I. Glennon and Sloane explain that the Framers modeled these restrictions on the Articles of Confederation. GLENNON & SLOANE, *supra* note 15, at 17 (“Many of these restrictions on state power were modeled on similar limits in the Articles of Confederation, concerning, for example, prohibitions against engaging in war and entering into international agreements without congressional approval.”) (internal footnotes omitted).

¹¹⁴ *U.S. v. Belmont*, 301 U.S. 324, 331 (1937).

¹¹⁵ *U. S. v. Pink*, 315 U.S. 203, 233 (1942).

¹¹⁶ *Zschernig v. Miller*, 389 U.S. 429, 434 (1968) (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

¹¹⁷ *Id.* at 432 (citing *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)); see, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 2 (1950).

¹¹⁸ See Goldsmith, *supra* note 4, at 1619.

standing.¹¹⁹ The Constitution also does not provide a textual basis for the federal government's exclusivity over foreign affairs. As Michael Glennon and Robert Sloane have suggested, "there are only the express prohibitions and limitations in Article I, Section 10, and, arguably, others that should be inferred."¹²⁰

Clearly, therefore, some cases do exist where subnational involvement would pose a constitutional problem. As an easy example, Massachusetts (where I reside) cannot enter into a bilateral treaty with Canada (where I was born).¹²¹ But, in many if not most other cases, the constitutional problem dissipates. On Glennon and Sloane's account, the reasoning goes as follows: Subnational entities possess great leeway in areas where the federal government has not pronounced itself. And even when the federal government has taken a stance, the assumption under current preemption jurisprudence is that "states may still act unless Congress has clearly said otherwise."¹²²

In this case then, where the Senate has declined to make the CRPD the law of the land, subnational efforts to champion the Convention are not susceptible to colorable constitutional challenges. For one, the expressive policies that local and state governments have issued are immune to challenge under current standing doctrine.¹²³ Furthermore, SDM statutes do not conflict with federal law because they either complement or replace state guardianship statutes that come under the purview of the states' police power.¹²⁴

¹¹⁹ Galbraith, *supra* note 20, at 2134.

¹²⁰ GLENNON & SLOANE, *supra* note 15, at 87–88 (emphasis in original and internal footnote omitted).

¹²¹ See U.S. Const. art. 1, § 10 ("No State shall enter into any Treaty[.]").

¹²² GLENNON & SLOANE, *supra* note 15, at 33; see also Ernest A. Young, *Foreign Affairs Federalism in the United States* 259, 266, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* (Curtis A. Bradley ed., 2019) ("To the extent that [adoptions of nonbinding international law] do not *bind* U.S. entities internationally and are not preempted by affirmative federal legal requirements, it is difficult to object on constitutional grounds.").

¹²³ For example, a hypothetical plaintiff challenging a state-passed resolution would most likely have no means to prove an injury in fact, which is one of the three standing requirements in federal court. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) ("Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" (quoting *Raines v. Byrd*, 521 U.S. 811, 820, n.3 (1997))).

¹²⁴ See Jennifer J. Monthie, *The Myth Of Liberty And Justice For All: Guardianship In New York State*, 80 ALB. L. REV. 947, 949 (2017) ("Guardianship is a state's termination of an individual's legal status or personhood under the law."); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 58 (2004) ("In the United States, the nature and extent of probate court jurisdiction is determined on a statutory basis by each state.").

The Normative Premise. Scholars have also argued that subnational involvement in foreign affairs policy is normatively desirable.¹²⁵ One part of this argument is that cities and states have increasingly succumbed and, in turn, responded to the pressures of globalization—what Yishai Blank defines as the “dissemination, transmission, and dispersal of goods, persons, images, and ideas across national boundaries”¹²⁶—which increases their stakes in transnational developments.¹²⁷ Furthermore, as Glennon and Sloane have suggested, “the conflicting incentives and trends generated by globalization—at once local and global—partially explain the paralysis that increasingly characterizes the federal government’s efforts (or lack thereof) to resolve the problems caused by globalization.”¹²⁸

Another part of the argument is that subnational entities have deep interests in internalizing certain transnational norms in general and human rights standards in particular. According to a study by Columbia Law School’s Human Rights Institute, local and state officials have suggested that human rights “empowers and elevates public service by affirming the essential connection between government actors and the constituents they serve and accentuating the human values that motivate public service.”¹²⁹ “Localizing human rights,” to borrow Gaby Oré Aguilar’s phrase, thus becomes a vehicle through which subnational entities can find a voice in a space traditionally dominated by national governments and non-local institutions like the U.N. and other nongovernmental organizations.¹³⁰ As a result, as Blank notes, “[o]ne of the most lucid manifestations of the internalization of international norms and of global legal ideas” has occurred locally rather than at the national level.¹³¹

Scholars are not unanimous about the utility of local internationalism, to be sure. For example, Ryan Baasch and Saikrishna Prakash have argued

¹²⁵ Glennon and Sloane identify three factors that account for this phenomenon. See GLENNON & SLOANE, *supra* note 15, at 35–60 (identifying globalization, federal incapacity, and state capacity as three driving factors for local internationalism prominence).

¹²⁶ Blank, *supra* note 10, at 882.

¹²⁷ See Galbraith, *supra* note 20, at 2134 (“[T]he increasingly transnational nature of our society has done much more than raise the likelihood of state and local involvement in transnational issues.”).

¹²⁸ GLENNON & SLOANE, *supra* note 15, at 38.

¹²⁹ COLUM. L. SCH., HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 5 (2012), <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf> [<https://perma.cc/43C3-3GGS>].

¹³⁰ See generally Gaby Oré Aguilar, *The Local Relevance of Human Rights: A Methodological Approach*, in THE LOCAL RELEVANCE OF HUMAN RIGHTS INSTITUTE OF DEVELOPMENT POLICY AND MANAGEMENT (Koen De Feyter et al. eds., 2011).

¹³¹ Blank, *supra* note 10, at 922.

“that the supposed benefits of many voices in foreign affairs are illusory.”¹³² But, to date, this position has not gained much traction. One critique is that it cherry-picks disadvantages rather than making a comprehensive benefit-cost assessment. Local internationalism, and the tension-filled interactions between subnational entities and the federal government it provokes, are fluid and multifaceted:

These interactions are often cooperative ones, with one or both political branches of the federal government providing support for the state or local action through expressions of approval, the provision of funds, or regulatory delegations. At other times, the interactions are far less amiable, involving disagreement between levels of government about particular policies or resistance by state and local governments to federal pressure to undertake certain actions.¹³³

On this account, local internationalism is not necessarily desirable because it brings about optimal policymaking. As Baasch and Prakash have pointed out, local and state governments are not immune to diplomacy failures.¹³⁴ Its desirability lies instead in its dynamism: the constant dueling between cooperative and uncooperative foreign affairs federalism that has elevated subnational entities from observer to participant in areas of international concern.¹³⁵ In the area of disability policy, this dynamism has concretized in the form of both government initiatives in favor of the CRPD and SDM statutes. Furthermore, and more conceptually, it has gradually emerged from an ethos of foreign affairs federalism that invites, or perhaps depends on, a practice of local internationalism that is at once “spontaneous” and responsive to local needs.¹³⁶ As Judith Resnik puts it, “American federalism has served as a major route through which ‘foreign’ law becomes domesticated.”¹³⁷

¹³² See Baasch & Prakash, *supra* note 15, at 52. The authors, in fact, continue by stating that “[t]he states should stand deaf and mute in the foreign arena because they lack the expertise and knowledge necessary to engage in that arena.” *Id.* at 50.

¹³³ Galbraith, *supra* note 20, at 2141.

¹³⁴ See Baasch & Prakash, *supra* note 15, at 48–49, n.5 (listing numerous intrusions into foreign affairs issues such as New York Mayor Rudolph Giuliani expelling Yasser Arafat, Chairman of the Palestinian Liberation Organization, from a concert at Lincoln Center, and New York and New Jersey refusing to allow Soviet emissaries to land in their airports during the Cold War).

¹³⁵ I must here acknowledge the depth of scholarship on cooperative and uncooperative foreign affairs federalism that have informed this Article. See generally Bulman-Pozen & Gerken, *supra* note 18; Galbraith, *supra* note 13; Galbraith, *supra* note 20; Jonathan Remy Nash, *Doubly Uncooperative Federalism and the Challenge of U.S. Treaty Compliance*, 55 *COLL. J. OF TRANSNAT'L L.* 3 (2016); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 *EMORY L.J.* 31 (2007).

¹³⁶ GLENNON & SLOANE, *supra* note 15, at 76.

¹³⁷ Resnik, *supra* note 135, at 34.

B. Uncooperative Expressions of Subnational Support

I now turn to an exploration of how foreign affairs federalism has enabled subnational entities to champion the CRPD here at home. I first provide examples of local and state governments affirming their support for the CRPD through resolutions and other policy initiatives. I then argue that when subnational entities champion unratified treaties through such policies, expressivism serves as a compelling framework for understanding their significance.

1. Examples

Local and state support for the CRPD has consistently clashed with the federal government’s stance on ratification. Expressive policies on the part of local and state governments have become at once symbolic gestures of commitment and concrete means to denounce federal opposition to ratification.¹³⁸ They are, as a result, canonical illustrations of uncooperative federalism—what Jessica Bulman-Pozen and Heather Gerken have described as subnational efforts “to contest and alter national policy.”¹³⁹

¹³⁸ According to Johnathan Nash, the types of subnational initiatives described in this sub-Part would fall squarely under the category of uncooperative foreign affairs federalism. Nash, *supra* note 135, at 12 (describing the “[t]ypology of federal and state government actions with respect to a treaty regime”). In fact, for the reader’s convenience, I replicate here the visual matrix created by Nash that typifies subnational involvement in areas traditionally governed by international treaties like the CRPD:

		State	
		<i>Dissonant</i>	<i>Consonant</i>
Federal	<i>Dissonant</i>	1. No ratified treaty; no voluntary state compliance. <i>Result:</i> Noncompliance	2. Uncooperative Federalism: No ratified treaty; state voluntarily acts in line with treaty. <i>Result:</i> State over-compliance
	<i>Consonant</i>	3. Doubly Uncooperative Federalism: Ratified treaty; state acts inconsistently with treaty. <i>Result:</i> State undercompliance	4. Cooperative Federalism: Ratified treaty; state acts to ensure compliance. <i>Result:</i> Full compliance.

¹³⁹ Bulman-Pozen & Gerken, *supra* note 18, at 1272.

a. Local Governments

California. Cities and at least one county in California were at the forefront of efforts to support the CRPD. In 2007, San Francisco's Board of Supervisors passed a resolution affirming the city's support for the treaty.¹⁴⁰ It requested "that President George W. Bush allow the United States to join the group of nations" that had ratified the Convention.¹⁴¹ The resolution also noted, and denounced, the Bush Administration's opposition to the CRPD.¹⁴²

The Berkeley City Council also issued a resolution in 2007 endorsing the CRPD.¹⁴³ The resolution authorized the mayor to affirm the city's support to the U.N. Secretary-General and the Acting U.S. Representative to the U.N. while urging the Senate to ratify the CRPD.¹⁴⁴ The city's Peace and Justice Commission even established a Subcommittee on the Convention on the Rights of Persons with Disabilities, tasked "to support the Convention, and to strengthen communications about disability rights among governments, academic institutions, and civil societies around the world."¹⁴⁵ The Commission then urged the mayor to once again adopt a resolution calling on the Senate to ratify the CRPD.¹⁴⁶

Still in 2007, the Board of Supervisors of the County of Santa Cruz issued a resolution supporting ratification.¹⁴⁷ Much like what San Francisco did, the Board's resolution required its Chairperson to affirm the County's

¹⁴⁰ *Cal. Resolution 2007-01 In Support of the Historic UN Convention on the Rights of Persons with Disabilities*, S.F. MAYOR'S DISABILITY COUNCIL (Apr. 20, 2007), <https://sfgov.org/sfmdc/resolution-2007-01-support-historic-un-convention-rights-persons-disabilities> [<https://perma.cc/3LKE-GDQR>].

¹⁴¹ *Id.*

¹⁴² *See id.* ("[I]n a departure from the United States' historic role as an international leader in disability and human rights, President George W. Bush has indicated that he will not sign this landmark human rights treaty, which may in turn discourage other countries from signing it.")

¹⁴³ *Cal. Resolution No 63,752—N.S., Supporting the United Nations Convention on the Rights of Persons with Disabilities and Adopting such Convention as City Policy*, BERKELEY CITY COUNCIL (June 26, 2007), <https://www.cityofberkeley.info/citycouncil/resos/2007/63752.pdf> [<https://perma.cc/CG4L-GDNA>].

¹⁴⁴ *Id.*

¹⁴⁵ *Peace & Justice Commission Subcommittee on Convention of the Rights of Persons with Disabilities*, CITY OF BERKELEY PEACE & JUST. COMM. (Sept. 27, 2017), https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/CRPD_agenda_revised_9-27-17.pdf [<https://perma.cc/8577-PZTC>].

¹⁴⁶ *Convention on the Rights of Persons with Disabilities*, CITY OF BERKELEY PEACE & JUST. COMM. (Sept. 15, 2015), https://www.cityofberkeley.info/Clerk/City_Council/2015/09_Sep/Documents/2015-09-15_Item_37_Convention_on_the_Rights.aspx [<https://perma.cc/SVH8-XJWF>].

¹⁴⁷ *Resolution Supporting the United Nations Convention on the Rights of Persons with Disabilities*, CNTY. OF SANTA CRUZ (Aug. 3, 2007), https://sccounty01.co.santa-cruz.ca.us/BDS/Govstream2/Bdsvdata/non_legacy_2.0/Minutes/2007/20070814-390/PDF/017.pdf [<https://perma.cc/BD35-7Q2M>].

support to the U.N. Secretary-General and the Acting U.S. Representative to the U.N.¹⁴⁸

Then, in 2016, the mayor of Oakland took her turn to affirm the city's support for the CRPD, writing a letter to Senators Bob Corker (R-Tenn.) and Ben Cardin (D-Md.), then respectively the Chairman and Ranking Member of the SCFR.¹⁴⁹ The letter emphasized Oakland's strong support for people with disabilities and urged the "Committee to bring the CRPD to the [Senate] floor immediately to be considered and voted on by the full Senate of the United States."¹⁵⁰

Florida. Cities and the largest county in Florida were also active in supporting the CRPD. In 2016, Miami-Dade County's Board of County Commissioners adopted a resolution declaring its commitment to inclusion for people with disabilities.¹⁵¹ In its resolution, the Board cited directly to Article 3 of the CRPD and expressed dedication "to further promote inclusionary practices and accommodations throughout Miami-Dade County."¹⁵²

The same year, the City of Miami Beach issued a similar resolution that praised the CRPD's "support and commitment to the principles of inclusion for individuals with special needs and disabilities."¹⁵³ Miami Beach's mayor and the City Commission also urged "national, state, and local governments to express their commitment to the principles of inclusion and to continue expanding services to children and adults with special needs and disabilities."¹⁵⁴

And in 2019, the mayor of Coral Gables signed a resolution similar to those of Miami-Dade County and Miami Beach.¹⁵⁵ Invoking the

¹⁴⁸ *Id.*

¹⁴⁹ See generally *Mayor's Commission on Persons with Disabilities*, CITY OF OAKLAND (Oct. 17, 2016), <http://www2.oaklandnet.com/oakca1/groups/pwa/documents/agenda/oak061045.pdf> [<https://perma.cc/2DNZ-HYKU>].

¹⁵⁰ *Id.*

¹⁵¹ *Resolution Declaring Miami-Dade County's Commitment to the Principles of Inclusion for Individuals with Disabilities, Including Autism and other Special Needs*, MIAMI-DADE CNTY. (July 6, 2016), <http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2016/161226.pdf> [<https://perma.cc/7V39-MVSU>].

¹⁵² *Id.* ("[T]his Board supports the principles identified by the Convention and is dedicated to further promote inclusionary practices and accommodations throughout Miami-Dade County.").

¹⁵³ R. No. 2016-29572, MIAMI BEACH, FLA. (Sept. 14, 2016), <https://docmgmt.miamibeachfl.gov/WebLink/DocView.aspx?id=245067&undefined&cr=1> [<https://perma.cc/7XXV-BXD7>].

¹⁵⁴ *Id.*

¹⁵⁵ *Americans with Disabilities Act (ADA) Transition Plan*, CITY OF CORAL GABLES (July 2019), <https://www.coralgables.com/media/Labor%20Relations/ADA/2019%20ADA%20Transition%20Plan%20Update%20with%20Exhibits.pdf> [<https://perma.cc/X2EG-DCEL>].

Convention, it expressed support for “principles of inclusion for individuals with autism and other special needs” and urged “action by national, state, and local governments, businesses, and residential communities consistent with these principles.”¹⁵⁶

Others. Cities and at least one county outside of California and Florida also issued resolutions supportive of the CRPD. The Chicago City Council adopted in 2007 a resolution affirming the city’s commitment to Convention principles and urged the Senate to ratify the Convention.¹⁵⁷ The Council also mandated that copies be provided to the U.N. Secretary-General and the Deputy Permanent United States Representative to the U.N. “as a sign of Chicago’s commitment to the importance of the issues raised in the treaty.”¹⁵⁸

The Board of County Commissioners of Multnomah County, Oregon—the seat of which is Portland—also resolved to support the CRPD in 2007,¹⁵⁹ declaring “it is in the best interests of the entire county to support the United Nations Convention on the Rights of Persons with Disabilities.”¹⁶⁰ Similar to the Chicago example, the Board set out to communicate the county’s support to the U.N. Secretary-General and the Deputy Permanent United States Representative to the U.N.¹⁶¹

And years later, on International Day of Persons with Disabilities 2016, New York City Mayor Bill de Blasio affirmed its “commitment to ensuring every person can access the tools they need to live a full, productive and happy life.”¹⁶² He noted that New Yorkers wished to take the opportunity “to honor the 10th anniversary of the adoption of the Convention on the Rights of Persons with Disabilities, and look forward to celebrating the day it is ratified in the U.S.”¹⁶³

¹⁵⁶ *Id.*

¹⁵⁷ See generally *Chicago City Council Passes Resolution Urging U.S. to Sign on to Treaty on the Rights of Persons with Disabilities*, CITY OF CHICAGO MAYOR’S OFFICE FOR PEOPLE WITH DISABILITIES (Nov. 15, 2007), http://old.g3ict.org/press/press_releases/press_release/p/id_40 [<https://perma.cc/PKB3-JH9E>].

¹⁵⁸ *Id.*

¹⁵⁹ *Resolution No. 07-185 Supporting the United Nations Convention on the Rights of Persons with Disabilities*, MULTNOMAH CNTY. (Dec. 6, 2007), <https://multco.us/file/13621/download> [<https://perma.cc/FS4P-YZ84>].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Statement from Mayor Bill de Blasio on International Day of Persons with Disabilities*, N.Y.C. (Dec. 2, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/921-16/statement-mayor-bill-de-blasio-international-day-persons-disabilities> [<https://perma.cc/Q7XA-U3R9>].

¹⁶³ *Id.*

b. States

Hawaii. On three occasions, the Hawaii state legislature affirmed the state's support for the CRPD. In 2010, Hawaii's House of Representatives and Senate issued a joint resolution urging the federal government to ratify the CRPD.¹⁶⁴ One year later, Hawaii reignited its advocacy, this time explicitly criticizing the federal government's sluggishness in taking up the Convention for consideration.¹⁶⁵ And finally, in 2013, the legislature once again issued a joint resolution urging the Senate to ratify the CRPD and certified copies of the resolution to U.N. and federal government officials.¹⁶⁶

Puerto Rico. The Legislative Assembly of Puerto Rico amended a law in 2012 authorizing the appropriation of money for scholarships to families with children in elementary and middle school. The Puerto Rico legislature tailored the amendment to expand "the personal, professional, and labor horizons of people with special needs or with disabilities."¹⁶⁷ It explicitly invoked the CRPD's recognition that "due to their lack of accessibility to basic services and to the development of their aspirations [people with disabilities] do not enjoy the same opportunities as other persons."¹⁶⁸ The Legislative Assembly declared full support for the Convention and found it "necessary to establish a special scholarship for students with disabilities or special conditions who attend self-contained classrooms."¹⁶⁹

Pennsylvania. The Pennsylvania Senate designated December 3, 2013, as International Day of Persons with Disabilities. The state senators acknowledged that "the international disability movement achieved an extraordinary advance in 2006" when the CRPD was adopted.¹⁷⁰ And so, in the Convention's spirit, the Senate resolved "to raise awareness of the goal of full and equal enjoyment of human rights and participation in society by persons with disabilities."¹⁷¹

New Jersey. The General Assembly and Senate of New Jersey issued identical resolutions in 2014 describing the Convention as "a vital framework for creating legislation and policies around the world that

¹⁶⁴ See H. Con. Res. 76, 2010 Leg., 25th Sess. (Haw. 2010).

¹⁶⁵ See H. Con. Res. 231, 2011 Leg., 26th Sess. (Haw. 2011) ("[A]lthough the United States is a signatory to the Convention . . . , it has not yet undertaken legal rights and obligations contained in the Convention.").

¹⁶⁶ See S. Con. Res. 157, 2013 Leg., 28th Sess. (Haw. 2013).

¹⁶⁷ 2012 PR S.B. 2005.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ S. Res. 269, 2013 Leg. (Penn. 2013).

¹⁷¹ *Id.*

embrace the rights and dignity of all persons with disabilities.”¹⁷² The legislature denounced the federal government’s unwillingness to ratify the CRPD “notwithstanding bipartisan support in Congress,” joining the chorus of subnational entities imploring that the Convention be ratified.¹⁷³ The resolutions also required their transmission to the Senate’s majority and minority leaders as well as the Chairman of the Committee on Foreign Relations.¹⁷⁴

California. In 2019, the California legislature joined the U.N. General Assembly in designating April 2 as World Autism Awareness Day.¹⁷⁵ The legislature cited the resolution adopted by the U.N. General Assembly, which invoked in turn the CRPD’s commitment “that children with disabilities should enjoy a full and decent life, in conditions that ensure dignity, promote self-reliance, and ensure the full enjoyment of all human rights and fundamental freedoms on an equal basis with other children without disabilities.”¹⁷⁶

* * *

In short, cities, counties, and states across the country have affirmed their support for the CRPD, with many forcefully denouncing the federal government’s unwillingness to ratify the Convention. These initiatives came from subnational governments that represent the interests of millions of people with disabilities.¹⁷⁷ But these numbers alone, although indicative of the far-reaching subnational advocacy in favor of the CRPD, do not paint the full picture. As I explain below, an expressive analysis of these initiatives gives them more nuance, both from the standpoints of federalism and human rights.

¹⁷² A. Res. 75, 2014 Leg., 216th Sess. (N.J. 2014); S. Res. 69, 2014 Leg., 216th Sess. (N.J. 2014).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ A. Con. Res. 188, 2020 Leg. (Cal. 2020).

¹⁷⁶ G.A. Res 62/139 (Dec. 18, 2007).

¹⁷⁷ Well over one million people with disabilities reside in Hawaii, New Jersey, and Puerto Rico alone. *See generally* YANG-TAN INSTITUTE ON EMPLOYMENT AND DISABILITY AT THE CORNELL UNIVERSITY ILR SCHOOL, 2017 DISABILITY STATUS REPORT HAWAII (2017); YANG-TAN INSTITUTE ON EMPLOYMENT AND DISABILITY AT THE CORNELL UNIVERSITY ILR SCHOOL, 2017 DISABILITY STATUS REPORT NEW JERSEY (2017); YANG-TAN INSTITUTE ON EMPLOYMENT AND DISABILITY AT THE CORNELL UNIVERSITY ILR SCHOOL, 2017 DISABILITY STATUS REPORT PUERTO RICO (2017).

2. *An Expressivist Analysis*

What is expressivism? How does it help frame the efforts outlined above? As a general definitional matter, expressivism is not concerned with the prescriptive nature of law—for instance, the penalty associated with a crime or the liability associated with a breach of contract.¹⁷⁸ Rather, expressivism dwells on how formal government actions can “influence social norms and push them in the right direction.”¹⁷⁹ It is, in other words, “a reminder that the things done by government actors (legislators, executive officials, and judges alike) are important for reasons apart from the ‘tangible’ effects that those actions produce.”¹⁸⁰

Resolutions are exemplary case studies to understand expressivism in practice. Although resolutions are among many methods of expression that subnational entities have used to champion the CRPD, they remain the most commonly employed.¹⁸¹ This is why my focus here is on resolutions and not, say, the City of Berkeley’s creation of a CRPD subcommittee or Puerto Rico’s invocation of the CRPD in its amendment authorizing the appropriation of scholarship money for children with disabilities. Other initiatives, although not outside the scope of this discussion, do not present as crisp of an exposition.¹⁸²

¹⁷⁸ See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1396 (2000) (“[E]xpressivists do not typically confine themselves to prescriptive meaning; they typically claim that legal decisions have *further meaning*, beyond what these decisions prescribe.”).

¹⁷⁹ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996). Along these lines, Richard McAdams offers a useful taxonomy of expressive theories that legal scholars have used to understand the meaning or symbolism of law in society. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 13–16 (2014) (delineating four expressive theories that focus differently on its effects, political dimensions, and normative implications, both from a legal and behavioral standpoint).

¹⁸⁰ Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule*, 33 LOY. L. A. L. REV. 1309, 1317 (2000); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (showing the government’s role in shaping social orthodoxy through non-prescriptive means); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 VAND. L. REV. 77 (2007) (analyzing expressive theory in the context of international law).

¹⁸¹ Other forms of expression in support of the CRPD include the invocation of CRPD principles in education legislation as Puerto Rico did in 2012 and the establishment of a CRPD subcommittee as the City of Berkeley did in 2014. See *supra* notes 168 and 147.

¹⁸² I would, however, commend to the reader not to discount the expressive value of those other subnational initiatives because they serve also to champion the CRPD in important, yet intangible ways. As late as January 25, 2021, the City of Berkeley’s Peace and Justice Commission affirmed its support for the CRPD, noting in its 2019–2020 work plan that the Subcommittee on the Convention on the Rights of Persons with Disabilities has held “held *public* forums on the issue in the spring of 2018 and 2019.” *Peace & Justice Commission Meeting Agenda*, PEACE AND JUSTICE

Black's Law Dictionary defines a resolution as "the adoption of a motion, the subject-matter of which would not properly constitute a statute; *such as a mere expression of opinion . . .*"¹⁸³ Unlike an ordinance or a statute, a resolution is not binding, and as such it is no more than a formal method of communication that governments can use to take a position on a question of policy. In this light, I suggest that resolutions serve two different but interrelated expressive purposes. The first, which I will call the "aspirational purpose," is to signal as widely as possible a commitment to disability justice and human rights. The second is what I will call the "federalist purpose"—the effort to affirm subnational autonomy in the face of federal inaction.

The Aspirational Purpose. Resolutions offer local and state governments the opportunity to proclaim their support for the crucial but often elusive human rights cause.¹⁸⁴ Writing in the context of subnational entities pushing for the ratification of the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), which the federal government signed in 1980 but has never brought to the Senate floor for a vote,¹⁸⁵ Martha Davis has described resolutions as a way "to associate with a global human rights movement rather than establish normative legal baselines at the local level."¹⁸⁶

From this perspective, resolutions are not necessarily meant to create "socially desirable processes or outcomes."¹⁸⁷ Rather, they have an "outward" purpose of affirming support for the global human rights struggle.¹⁸⁸ They aim, as Davis puts it, to "establish and strengthen horizontal relationships with other governmental and nongovernmental

COMMISSION (Jan. 25, 2021), [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_Commissions/Agenda-Packet-PJC-20210125\(1\).pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_Commissions/Agenda-Packet-PJC-20210125(1).pdf) [<https://perma.cc/56Q8-KD46>] (emphasis added).

¹⁸³ *What is RESOLUTION?*, THE LAW DICTIONARY, <https://thelawdictionary.org/resolution/> [<https://perma.cc/5MQC-F756>] (last visited May 21, 2022).

¹⁸⁴ See Anthony J. Langlois, *The Elusive Ontology of Human Rights*, 18 GLOBAL SOC'Y 243, 260 (2004) ("[T]he assimilation of human rights to those measures taken by states to institutionalise human rights reduces and even extinguishes the capacity to claim human rights. In order for us to have human rights, human rights must be more than positive law.").

¹⁸⁵ See *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INT'L (Aug. 25, 2005), https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf [<https://perma.cc/A4VN-DU24>]; see also S. REP. NO. 107-9 (2002).

¹⁸⁶ Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 422 (2008).

¹⁸⁷ Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 88 (2007).

¹⁸⁸ Davis, *supra* note 186, at 418 (2008).

entities worldwide.”¹⁸⁹ The aspirational purpose embodied by resolutions is thus without boundaries: They are amicable gestures of solidarity that occur in spite and not because of U.S.-centric policy tensions, and they reveal their potentiality only when observed in concert with one another.

The Federalist Purpose. Resolutions also offer a time-tested mechanism for subnational entities to reaffirm their role in the American system of federalism. As Justice Anthony Kennedy noted in *Cook v. Gralike*, “when the Constitution was enacted, respectful petitions to legislators were an accepted mode of urging legislative action.”¹⁹⁰ “From the earliest days of our Republic to the present time,” Justice Kennedy continued, “States have done so in the context of federal legislation.”¹⁹¹ And at least since the country declined to ratify the CEDAW, local and state governments have extended this tradition to the realm of treaty ratification.

Dave Fagundes has also observed that although “states have not used their communicative abilities to check the federal government in the robust way that the framers intended, they have taken a more modest role in this respect, using legislative resolutions to urge and to criticize federal action.”¹⁹² Fagundes extended this observation to local governments, implying that municipal and county resolutions can become ways for non-federal actors to elbow their way into national policy discourse.¹⁹³ But I would go one step further and argue that resolutions promote certain federalist values that acquire particular salience when the federal government refuses to join the world in a specific human rights cause.

Consider first the principle of “tyranny prevention,” which describes how local and state governments “can serve as and foster political counterweights to the incumbent powers within the federal government.”¹⁹⁴ What follows is that subnational units “can be the voice of their citizens’ discontent” and use their “political infrastructures to alert their citizens when the federal government adopts policies inconsistent with their citizens’ preferences or best interests.”¹⁹⁵

¹⁸⁹ *Id.* at 422.

¹⁹⁰ *Cook v. Gralike*, 531 U.S. 510, 529 (2001)

¹⁹¹ *Id.*

¹⁹² Dave Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1686 (2006) (footnotes omitted).

¹⁹³ *See id.* (“[T]he expressive capacities of state and local governments may become a particularly important way for these entities to assert their institutional identities and opinions vis-à-vis the federal government.”) (emphasis added).

¹⁹⁴ Cox, *supra* note 180, at 1324.

¹⁹⁵ *Id.* at 1325.

Subnational support for the CRPD, and particularly the resolutions denouncing the federal government's inaction like those issued by San Francisco and Hawaii, are cases in point. They both call out the Senate's decision not to export American wisdom on disability law and policy abroad.¹⁹⁶ As such, they are acts of resistance, albeit "restrained," which are memorialized as part of the country's broader history of subnational opposition to federal policy.¹⁹⁷

Consider then the principle of autonomy, which Bullman-Pozen and Gerken describe as follows:

Autonomy prevents the federal government from quashing the opposition or playing its lawmaking trump card. It creates zones of policymaking independence where states can experiment and depart from federal norms. It gives states the freedom to speak against an overweening federal government. It even allows states to check the national government by holding federal officials accountable for abusing their power.¹⁹⁸

One plausible account under this view is that resolutions help demarcate an area where local and state governments can make pronouncements on issues traditionally dominated by the federal government. For instance, by certifying resolution copies to U.N. officials, which cities (e.g., the City of Berkeley) and states (e.g., New Jersey) have done, the intention is to create alliances between subnational entities and important international players. Local and state officials can then make their voices heard on issues of global importance, and although the force of their voices pales in comparison to those of sovereign nations, the mere act of taking a normative stance can become a symbol of autonomy.

Resolutions are also politically efficient means of promoting perceptions of subnational autonomy,¹⁹⁹ and of attracting the support of ordinary

¹⁹⁶ I think here specifically of an op-ed written by Daniel W. Drezner that puts this idea in far stronger, and facetious, language:

Unlike Law of the Sea, not ratifying [the CRPD] doesn't appreciably harm U.S. interests. It does, however, make the United States look pretty dysfunctional. In essence, the U.S. Senate just rejected a treaty on protecting the disabled that would have globalized the status quo in U.S. law on this issue. To use the parlance of international relations scholars, this is dumber than a bag of hammers.

Daniel W. Drezner, *Praised Be the Glorious Sovereignists who Protect the U.S.A. from . . . from . . . Wait, What?*, FOREIGN POL'Y (Dec. 5, 2012, 1:33 AM), <https://foreignpolicy.com/2012/12/05/praised-be-the-glorious-sovereignists-who-protect-the-u-s-a-from-from-wait-what/> [<https://perma.cc/X5A9-WTVD>].

¹⁹⁷ *Id.*

¹⁹⁸ Bulman-Pozen & Gerken, *supra* note 18, at 1265 (footnote omitted).

¹⁹⁹ See Cox, *supra* note 180, at 1329.

citizens.²⁰⁰ According to Todd Pettys, if subnational units and the federal government “are genuinely to compete for the people’s affection, each must enjoy a broad measure of freedom to select those avenues by which it will try to earn that affection”²⁰¹ From this perspective, then, localities and states will tend to exploit policy initiatives that not only show their uniqueness as compared to other states, but that can also fill policy vacuums left by federal inertia. This idea strongly applies here, where those who support the CRPD will be more “affectionate” toward equally supportive subnational entities than toward the less supportive federal government.

* * *

In short, expressivism offers a powerful framework for analyzing the utility of subnational resolutions. For one, although resolutions appear to be no more than “soft law”—international law parlance used to denote non-binding yet normatively influential policy²⁰²—they are tools that local and state governments have employed to proclaim support for the CRPD, among other human rights treaties. They also buttress traditional principles of federalism, specifically those of tyranny prevention and promotion of subnational autonomy. This dual purpose, along with the amalgamation of local and state promotion efforts outlined above, illustrate the strong support that subnational entities have shown for the CRPD. But the Convention’s influence on subnational policy does not stop there. States across the country have enacted SDM statutes, materializing Article 12’s commitment to recognizing “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”²⁰³ These statutes thus offer a spacious window through which to observe and appreciate foreign affairs federalism in practice.

²⁰⁰ See generally, Todd E. Pettys, *Competing for People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

²⁰¹ *Id.* at 359.

²⁰² Of course, soft law is the subject of much definitional debates between international law scholars in which I do not wish to partake. See, e.g., C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850 (1989) (“There is a wide diversity in the instruments of so-called soft law which makes the generic term a misleading simplification.”); A. E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901, 901–2 (1999) (discussing different features of soft law). My intention here is to pin resolutions within a lexicon that is easily understood by the reader.

²⁰³ United Nations Convention on the Rights of Persons with Disabilities (CRPD), Art. 12(2), <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> [https://perma.cc/J3GB-BU5J] (last visited May 21, 2022).

III. SUPPORTED DECISION-MAKING LAWS IN THE UNITED STATES

It is frequently said that Article 12 of the CRPD is emblematic of the paradigm shift of the Convention. I agree. And it is worth stating what that is before we proceed. It is the deceptively simple proposition that persons with disabilities are “subjects” and not “objects”—sentient beings like all others deserving equal respect and equal enjoyment of their rights.

—Gerard Quinn²⁰⁴

As of this writing, at least eighteen states and the District of Columbia have passed SDM laws, and several more remain in the legislative process. SDM laws are meant “to empower persons with disabilities by providing them with help in making their own decisions, rather than simply providing someone to make decisions for them.”²⁰⁵ Although intuitive to many disability advocates, this concept clashes with traditional systems of guardianship, or substituted decision-making, in which people deemed incompetent (i.e., wards) have to delegate decision-making to others (i.e., guardians).²⁰⁶

In this Part, I explore how certain stakeholders involved in the CRPD’s negotiations, namely DPOs, envisioned SDM as being integral to the Convention’s jurisprudence. I then turn to how American states came to integrate SDM within their systems of law, focusing on the crucial role that the federal government played in fueling and mobilizing disability advocacy at the state level. Finally, I provide an overview of SDM law in the United States, covering statutes that states have passed and case law that has integrated Article 12 language in their reasoning. I conclude with the observation that SDM laws serve as exemplars of cooperative foreign affairs federalism.

²⁰⁴ Gerard Quinn, *Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD* 10 (HPOD Conf., Harv. L. Sch., Feb. 20, 2010), http://www.fedvol.ie/_fileupload/Research/NDE%20Reading%20Lists/Harvard%20Legal%20Capacity%20gq%20draft%202%20Gerard%20Quinn%20Feb%202010.pdf [<https://perma.cc/2RZ8-K8RA>].

²⁰⁵ Kohn, Blumenthal, & Campbell, *supra* note 105, at 1113.

²⁰⁶ See, e.g., Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 558 (2017); Kristin Booth Glen, *Introducing A “New” Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1, 2 (2018); Michael L. Perlin & Naomi M. Weinstein, “*There’s Voices in the Night Trying to Be Heard*”: *The Potential Impact of the Convention on the Rights of Persons with Disabilities on Domestic Mental Disability Law*, 84 BROOK. L. REV. 873, 898 (2019) (“A controversial topic regarding the CRPD . . . is whether Article 12 completely abolishes guardianships.”).

A. *A Synthesis of Article 12's Drafting History*

Article 12 sets out the right to “[e]qual recognition before the law.”²⁰⁷ It requires that nations “reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law,”²⁰⁸ and that they “recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”²⁰⁹ Seen in a different light, Article 12 attempts to codify what Jacobus tenBroek, one of the fathers of the American disability rights movement,²¹⁰ had envisioned a generation before the CRPD’s passage: “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so.”²¹¹

Although Article 12 appears aspirational on its face, even a brief review of its drafting history reveals contentious debates about its practical applications. Captured by the treaty’s *travaux préparatoires* and a rich body of scholarship,²¹² these debates centered on striking the right balance between “concerns of protection” and “participation.”²¹³ In essence, they boiled down to one core question: Between guardianship and SDM, which is most compatible with both protecting the “legal personality” and promoting the

²⁰⁷ CRPD, Art. 12.

²⁰⁸ CRPD, Art. 12(1).

²⁰⁹ CRPD, Art. 12(2).

²¹⁰ See Stein & Lord, *supra* note 40, at 170 (2008) (“Within the disability rights realm, Professor tenBroek made an early and significant contribution to the development of the social model of disability, a civil rights paradigm from which most disability rights advocates, both domestically and internationally, draw their arguments.”) (internal citations omitted).

²¹¹ Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 843 (1966).

²¹² See, e.g., Nilsson & Series, *supra* note 26, at 34; Amita Dhanda, *Legal Capacity in the Disability Rights Convention*, 34 SYRACUSE J. INT’L L. & COM. 429 (2006–2007); Nandini Devi, Jerome Bickenbach & Gerold Stucki, *Moving Towards Substituted or Supported Decision-Making? Article 12 of the Convention on the Rights of Persons with Disabilities*, 5 EURO. J. DISABILITY RES. 249, 259–63 (2011) (overviewing how the drafters negotiated Article 12); Tara J. Melish, *An Eye Toward Effective Enforcement: A Technical-Comparative Approach to the CRPD Negotiations*, HUM. RTS. & DISABILITY ADVOC., 70, 84–88 (2013) (explaining Disability Rights International’s involvement in Article 12’s negotiation process). The United Nations has also kept up to date the records spanning from the First Session to the Eighth Session of the CRPD’s negotiations. See *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. DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html> [<https://perma.cc/RDH2-2VX7>] (last visited May 21, 2022).

²¹³ Dhanda, *supra* note 212, at 438.

“legal capacity” of people with disabilities?²¹⁴ Throughout the CRPD’s negotiations, which spanned eight sessions of an Ad Hoc Committee between 2002 and 2006, this question divided the Convention’s drafters.²¹⁵ And although a comprehensive exposition of the process would defy the scope of this work, I nevertheless extract some key insights here.

On one side of the debate were many nations that advocated for a conception of equal recognition that allowed for guardianship. For example, in an early foundational draft crafted in 2003 during a regional workshop in Bangkok, guardianship was the chosen model for regulating the administration of property. Article 25 stated that “[w]here a person with intellectual disability is not able to exercise this right, the legal guardian of that person shall be entitled to exercise the right on behalf of, and in the interests of, that person.”²¹⁶ In another draft submitted by representatives from India, guardianship also appeared in the context of protecting the right to work and social security.²¹⁷ With these drafts thus re-emerged the assumption that certain people with disabilities, particularly those with mental and psychosocial disabilities, lack the ability to make decisions for themselves. This assumption has a long history, from the time of Cicero through the medieval period and right up to modern times.²¹⁸ In Ancient Rome, guardianship laws empowered the state to limit the decision-making capacity of people considered “incompetent,” including slaves, women, children, and foreigners.²¹⁹ Still today, countries in all populated continents

²¹⁴ Nilsson and Series define legal personality as “the ability to bear rights and duties under law” and legal capacity as “whether and how one can exercise, claim, or defend those rights.” Nilsson & Series, *supra* note 26, at 340.

²¹⁵ *Id.* at 343.

²¹⁶ *Chair’s Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, U.N. ENABLE (Dec. 2003), <https://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm> [<https://perma.cc/2FJ9-AUAE>].

²¹⁷ *Draft Convention—India*, U.N. ENABLE, <https://www.un.org/esa/socdev/enable/rights/wgcontrib-india.htm> [<https://perma.cc/V94A-ZMNU>] (last visited May 21, 2022) (encouraging financial institutions to support the self-employment of “parents/guardians” and ensuring that people with disabilities have “access to legal guardianship for the protection of their person as well as of their property”).

²¹⁸ Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 218–19 (1975) (discussing the history of guardianship while focusing the historical analysis on medieval England).

²¹⁹ See ARLENE S. KANTER, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW: FROM CHARITY TO HUMAN RIGHTS* 238–39 (2015) (discussing the origins of guardianship laws); see also Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 561 (2017) (“Under Roman law, guardianship limited the legal capacity of slaves, women, children, and foreign nationals.”).

of the world have guardianship laws, while in the United States, all 50 states and the District of Columbia have enacted such statutes.²²⁰

Nevertheless, despite the pervasiveness of guardianship laws at the time of the negotiations, DPOs fervently opposed enshrining guardianship in the treaty's text. In their view, any textual recognition of guardianship would contradict the right to self-determination that the Convention was designed to protect and uphold. Inclusion International, for example, affirmed that "traditional guardianship laws are used to control people's lives and to deny people the right to make decisions on their own behalf."²²¹ The World Network of Users and Survivors of Psychiatry similarly held that "[a]utonomy and self-determination are dependent on having sufficient access to resources so that economic and social coercion do not lead to decision-making that does not reflect the person's own values and feelings."²²²

Although differences between both sides were palpable, not all was lost. The working group, which the Ad Hoc Committee had convened during the second session to produce a draft of the treaty, prepared a first version of the CRPD that strategically blurred the distinction between guardianship and SDM—a first step toward what Amita Dhanda has called a "variegated approach" to the question of legal capacity.²²³ It laid out the general principle that "persons with disabilities have full legal capacity on an equal basis as others, including in financial matters . . ."²²⁴ But it went a step further, creating a safeguard mechanism where people with disabilities could delegate decision-making to others, but only in specific circumstances.²²⁵

²²⁰ See *Guardianship*, WORLD HEALTH ORG., http://www.mindbank.info/search?search_text=%22guardianship%22&page=1 [https://perma.cc/4YNX-ZSTG] (last visited May 21, 2022) (showing that countries like Japan, China, Sweden, United Kingdom, Canada, Finland, Australia, Malta, and Uzbekistan all have guardianship laws); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandated of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 176 (2010).

²²¹ *Id.*

²²² *Contribution by World Network of Users and Survivors of Psychiatry (WNUSP)*, U.N. ENABLE (Dec. 30–31, 2003, & Jan. 5, 2004), <https://www.un.org/esa/socdev/enable/rights/wgcontrib-wnusp.htm> [https://perma.cc/F25P-NXG9].

²²³ See Dhanda, *supra* note 212, at 440.

²²⁴ *Draft Article 9, Equal Recognition as a Person Before the Law*, U.N. ENABLE, <https://www.un.org/esa/socdev/enable/rights/ahcwgreporta9.htm> [https://perma.cc/DCN8-4P7R] (May 21, 2022).

²²⁵ To this effect the text contained the following language:

States Parties shall[] ensure that where assistance is necessary to exercise that legal capacity[,] the assistance is proportional to the degree of assistance required by the person concerned and tailored to their circumstances, and does not interfere with the legal

This provision gave nations substantial discretion in determining the correct balance between promoting autonomy and preserving areas for substituted decision-making. Because of this considerable discretion, however, DPOs remained leery of the working group's proposal. In a footnote to the draft, they clarified "that where others are exercising legal capacity for a person with disabilities, those decisions should not interfere with the rights and freedoms of the person concerned."²²⁶ According to Dhanda, that footnote was textual proof of the latent tension between the negotiating coalitions—an "opposition that had to be addressed before the final draft text for 'legal capacity' in the Convention could be accepted."²²⁷

From that point forward, the stakeholders continued to debate the merits of guardianship versus SDM.²²⁸ Two years after the working group submitted its first draft, the negotiations appeared to have reached a decisive juncture. The European Union (E.U.), with the support of Canada, Australia, Norway, Liechtenstein, Costa Rica, and the United States, submitted a draft of Article 12 that tried to bring together "safeguards required for guardianship with some of the standards desired for supported decision-making."²²⁹ One critical clause read as follows:

States Parties shall ensure that all legislative or other measures which relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to periodic impartial and independent judicial review. The

capacity, rights and freedoms of the person; [and] relevant decisions are taken only in accordance with a procedure established by law and with the application of relevant legal safeguards.

Id. (footnote omitted).

²²⁶ *Id.*

²²⁷ Dhanda, *supra* note 212, at 441.

²²⁸ As Nilsson and Series explain:

The records of the Ad Hoc Committee discussions show that early on many participating states expressed confusion or disagreement about the meaning of 'legal capacity'. Some states distinguished between the 'capacity to hold and bear rights' and the 'capacity to act', arguing that whilst the former could not be limited the latter could be. In part this disagreement mirrored different understandings of legal capacity in the various legal systems. This distinction was strongly opposed by the IDC, as the 'capacity to act' was deemed vital for self-determination.

Nilsson & Series, *supra* note 26, at 345 (footnote omitted).

²²⁹ Dhanda, *supra* note 212, at 450.

safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.²³⁰

State representatives and DPOs heralded the E.U.-submitted draft as a major step forward.²³¹ Some advocates continued to advocate for a version of Article 12 that allowed for guardianship “as a matter of last resort.”²³² But the model embraced by the draft had in all appearance won the day. In fact, as the astute reader will notice, the final version of the CRPD contains only a handful of minor divergences from the text provided above.

Although that version and the one currently enshrined in the CRPD eschew explicit reference to SDM, it was an ambiguity necessary for stakeholders to see the negotiations through.²³³ More importantly, it marked the beginning of a new international understanding of legal capacity, which the CRPD Committee itself recognized as “a shift from the substitute decision-making paradigm to one that is based on [SDM].”²³⁴ But, as Michael Stein has explained, “the scope and operation of legal capacity is still a very controversial issue flowing from the CRPD”²³⁵ For example, the Convention has not stopped countries across the world, including states parties to the Convention, from operationalizing legal capacity through the lens of guardianship.²³⁶ Yet a consensus among scholars, international

²³⁰ *Contribution by Governments: European Union*, U.N. ENABLE (Jan. 30, 2006), <https://www.un.org/esa/socdev/enable/rights/ahc7eu.htm> [<https://perma.cc/ND3H-A7WK>] (setting forth the draft of Article 12 defined the European Union “together with Canada, Australia, Norway, Costa Rica, USA, Liechtenstein”).

²³¹ See Dhanda, *supra* note 212, at 450 (“A large number of States Parties expressed either full or qualified support for [the E.U.-submitted draft]. Most importantly, a majority of the state parties and the IDC saw in the modified text enough commonality that could help them to reach that elusive consensus.”).

²³² *International Convention on the Rights of Persons with Disabilities*, U.N. ENABLE (2006), <https://www.un.org/esa/socdev/enable/rights/ahc7ann2rep.htm#art12fn1> [<https://perma.cc/Z3QB-DTW7>].

²³³ Nilsson & Series, *supra* note 26, at 341 (“[I]t was ambiguity about whether article 12 permitted or prohibited substitute decision-making that enabled states parties who could not envisage abolishing systems of guardianship or deprivation of legal capacity to sign up to the Convention.”).

²³⁴ U.N. Comm. on the Rights of Persons with Disabilities, General Comment No. 1, art. 12, ¶ 1 (Apr. 11, 2014); Andrew Peterson, Jason Karlawish & Emily Largent, *Supported Decision Making With People at the Margins of Autonomy*, AM. J. BIOETHICS 4 (2020) (explaining that Article 12 “is widely regarded as a touchstone for supported decision making”). See also generally Benjamin A. Barsky, Julie Hannah & Dainius Pūras, *Redefining International Mental Health Care in the Wake of the COVID-19 Pandemic*, in MENTAL HEALTH, LEGAL CAPACITY, & HUMAN RIGHTS 244 (Michael Ashley Stein et al. eds., 2021).

²³⁵ Michael Ashley Stein, *China and Disability Rights*, 33 LOY. L.A. INT’L & COMP. L. REV. 7, 19 (2010).

²³⁶ To this effect, Stein has observed that the scope of legal capacity remains the “topic on which the majority of reservations have been made by States when ratifying” the CRPD. *Id.* at 19; see also UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/ViewDetails.aspx?>

policymakers, and advocates has coalesced around the idea that the negotiations surrounding Article 12 were necessary preconditions for the growing recognition of SDM across the world, including in Bulgaria, Canada, Israel, the United Kingdom, and—as I explain below—the United States.²³⁷

B. *SDM in the United States*

The U.S. adoption of SDM is curious considering the Senate’s decision not to ratify the CRPD. For example, Eliana Theodorou has warned “against overstating the salience of international human rights law in accounting for interest in [SDM] in the United States.”²³⁸ By contrast, others could claim that the CRPD was the sole causal impetus for state SDM laws, which would buttress the idea advanced by Glennon and Sloane that subnational entities have an active role in supporting innovations stemming from international developments.

The answer, in my view, is not clear-cut. But strong evidence suggests that the CRPD was a necessary but not sufficient catalyst in bringing about SDM laws in several states. As I show below, the SDM movement in the United States has occurred against a backdrop of financial and research support from national entities, including the U.S. Administration for Community Living (“ACL”) and the American Bar Association (“ABA”), both of which have a strong record of support for the CRPD. This

chapter=4&clang=_en&mtdsg_no=IV-15&src=IND [https://perma.cc/8HFB-Q766] (last visited May 21, 2022) (showing that at least Australia, Canada, Ireland, the Netherlands, and Norway have made reservations concerning the use of substituted decision-making practices). Guardianship laws in other countries have also attracted the attention of disability right advocates because of high-profile lawsuits in European courts. *See, e.g.,* Shtukurov v. Russia (App. No. 44009/05), Eur. Ct. H.R. 90 (2008); Alajos Kiss v. Hungary (App. No. 38832/06), Eur. Ct. H.R. (2010); Stanev v. Bulgaria (App. No. 36760/06), Eur. Ct. H.R. (2012); Sykora v. The Czech Republic (App. No. 23419/07), Eur. Ct. H.R. (2012).

²³⁷ *See generally* Catalina Devandas Aguilar (Special Rapporteur on the Rights of Persons with Disabilities), Report of the Special Rapporteur on the Rights of Persons with Disabilities, U.N. Doc. A/HRC/37/56, at ¶ 41 (Dec. 12, 2017) (“Several countries have also introduced recognition of supported decision-making regimes into their legislation.”); *The Right to Make Choices: International Laws and Decision-Making by People with Disabilities*, AUTISTIC SELF ADVOCACY NETWORK, <http://www.supporteddecisionmaking.org/sites/default/files/asan-toolkit-right-to-make-choices.pdf> [https://perma.cc/3FXG-STUE] (last visited May 21, 2022). For a small sample of scholarship that details the relationship between the CRPD and SDM law, *see generally* Nandini Devi, *Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities*, J. L. MED. ETHICS 792 (2013); Kohn, Blumenthal, & Campbell, *supra* note 105.

²³⁸ Eliana J. Theodorou, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973, 978 (2018).

particularity—that is, the dynamic role that these national entities have played in prompting state action on the issue of SDM—is thus important for understanding the interplay between foreign affairs federalism and Article 12’s implementation on American soil.

1. *Planting the SDM Seed*

In October 2012, two months before the Senate voted against the CRPD, disability rights advocates and organizations held a roundtable in New York City “to discuss the rights of people with intellectual disabilities to make their own decisions, including the impact of the [CRPD].”²³⁹ Organized by the ABA and a sub-agency of the ACL, the meeting entitled *Beyond Guardianship: Supported Decision-Making by Individuals with Intellectual Disabilities* had one goal: “to explore concrete ways to move from a model of substituted decision-making, like guardianship, to one of supported decision-making, consistent with the human right of legal capacity.”²⁴⁰

Scholars have described this roundtable as a turning point,²⁴¹ including Judge Kristin Booth Glen who observed that the meeting was an acknowledgment of “the need for some central entity to gather and disseminate information on SDM.”²⁴² Until then, efforts to promote autonomous decision-making among persons with disabilities had occurred haphazardly. Researchers during the 1990s had tried to find ways to promote self-determination for youth, in part because they had not achieved

²³⁹ Roundtable, *supra* note 27.

²⁴⁰ *Id.*

²⁴¹ See Glen, *supra* note 106, at 501 (“Perhaps the first major meeting in the United States specifically directed at legal capacity and SDM was [the] interdisciplinary roundtable held in New York City in 2012.”); Peter Blanck & Jonathan G. Martinis, “*The Right to Make Choices*”: *The National Resource Center for Supported Decision-Making*, 3 AM. ASS’N ON INT. & DEV. DISABILITIES 24, 27 (2015) (making clear that the roundtable was one of the earliest concerted efforts to advocate broadly for SDM in the United States); Dilip V. Jeste et al., *Supported Decision Making in Serious Mental Illness*, 81 PSYCHIATRY 28, 33 (listing the 2012 roundtable as an important development regarding SDM policy in the United States); Dohn Hoyle, *Reflections on Autonomy*, THE ARC (Oct. 11, 2017), <https://arcmi.org/resource-center/documents/reflections-on-autonomy/> [<https://perma.cc/A433-35NH>] (explaining that the roundtable “meeting was not only affirmation that a number of people had moved ‘beyond guardianship’ but were also committed to doing something about it.”); Resolution, Am. Bar Ass’n 10 (Aug. 2017), <https://health.ucdavis.edu/mindinstitute/centers/cedd/pdf/sdm-aba-resolution.pdf> [<https://perma.cc/8D6V-LKJZ>] (describing the roundtable as the first of its kind on a national scale).

²⁴² Glen, *supra* note 106, at 501.

similar economic and social outcomes as their peers without disabilities.²⁴³ Later, in 2009, the Texas legislature created “a pilot program to promote the provision of supported decision-making services to persons with intellectual and developmental disabilities and persons with other cognitive disabilities who live in the community.”²⁴⁴ But, according to Glen, the Texas pilot program had produced disappointing results, and on the whole, self-determination policies until the 2012 roundtable had lacked the type of unified, human rights-oriented vision that the CRPD had inspired.²⁴⁵

The roundtable was also a way to form consensus around the failures of guardianship as a way of protecting the interests of people with disabilities.²⁴⁶ One argument was that guardianship arrangements had become overused and misapplied, too often usurping the principle that they should be “designed as a last resort, applied only when an individual lacks capacity to make decisions.”²⁴⁷ Another problem was that plenary guardianship orders—where guardians have full decision-making capacity over their wards—were far more common than limited guardianship orders.²⁴⁸ According to a national survey conducted by Pamela Teaster and her colleagues, “there were eleven times more plenary than limited guardianships of property and four times more plenary than limited guardianships of the person.”²⁴⁹ Guardianship orders had in effect become blunt instruments that judges would employ reflexively and with little regard to the needs of the wards.

A second argument was that guardianship routinely led wards to feelings of isolation, helplessness, and loneliness.²⁵⁰ These effects undermined the

²⁴³ See, e.g., Janis Chadsey Rusch, Frank R. Rusch & Mark F. O’Reilly, *Transition from School to Integrated Communities*, 12 REMEDIAL & SPECIAL EDUC. 23 (1991); Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes: A Follow-Up Study of Youth with Mental Retardation or Learning Disabilities*, 63 EXCEPTIONAL CHILDREN 245 (1997).

²⁴⁴ TEX. GOV’T CODE ANN. § 531.02446 (2009) (expired on Sept. 1, 2013).

²⁴⁵ Glen, *supra* note 106, at 508 n.75 (“Although [the pilot program] was able to educate and train a number of volunteers on the principles of SDM, it only established one [SDM agreement].”).

²⁴⁶ See Roundtable, *supra* note 27 (“The Roundtable included conversation about legal and other reforms needed in this country around decision-making, and changes that might lead to the end of guardianship as we know it today.”).

²⁴⁷ Kohn, Blumenthal & Campbell, *supra* note 105, at 1117.

²⁴⁸ See Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL’Y REV. 347, 354 (1998) (“Plenary guardianship continues to be used despite the statutory alternative of limited guardianship.”).

²⁴⁹ Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 233 (2007).

²⁵⁰ See Kohn, Blumenthal & Campbell, *supra* note 105, at 1119–1120 (summarizing studies that indicated that guardianship leads to isolation loneliness and contributes to undermining “wards’ physical and psychological well-being by reducing their sense of control over their own lives.”).

idea that guardianship operated in favor of wards' best interests, and they raised the concern that the initiation of guardianship was in no way tethered to benevolence and concern. Jennifer Wright found to this effect that "the overwhelming majority of guardianships are initiated by someone other than the proposed ward," serving the needs of other, often uninvolved parties.²⁵¹ A third argument was that guardianship ran the risk of contravening Title II of the ADA and its community integration mandate, which Justice Ruth Bader Ginsburg famously elucidated in *Olmstead v. L.C.*²⁵² By curtailing someone's right to decision-making, the argument goes, the state fails to account for less restrictive alternatives like SDM arrangements, presumptively violating the ADA.²⁵³

On these views, the upshot of the 2012 roundtable was the need to formalize a path forward for the development of nationwide SDM efforts.²⁵⁴ The ACL took the lead by creating a grant in 2014 for the creation of a "first-of-its-kind" hub called the National Resource Center for Supported Decision-Making ("NRC-SDM"), which aimed to conduct and disseminate

²⁵¹ Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 INT'L J. L. & PSYCHIATRY 350, 353 (2010).

²⁵² See generally Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandated of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010). The ADA's community inclusion mandate requires states to forego institutional treatment only "when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999).

²⁵³ Title II of the ADA prohibits discrimination of people with disabilities in areas of state and government services, providing that people with disabilities cannot "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1990). As Salzman explains, "when the state appoints a guardian and restricts an individual from making his or her own decisions, the individual loses crucial opportunities for interacting with others." Salzman, *supra* note 252, at 194. Guardianship thus results in a type of segregation "that parallels the isolation of institutional confinement," violating Title II's integration mandate as interpreted in *Olmstead*. *Id.*

²⁵⁴ The roundtable also occurred a few months both the case of Margaret "Jenny" Hatch made national headlines. Called a "hero to the disabled," Ms. Hatch defeated in Virginia state court an attempt to being placed under plenary guardianship. Theresa Vargas, *Virginia Woman with Down Syndrome Becomes Hero to the Disabled*, WASH. POST (Aug. 17, 2013), https://www.washingtonpost.com/local/virginia-woman-with-down-syndrome-becomes-hero-to-the-disabled/2013/08/17/0da21766-062e-11e3-a07f-49ddc7417125_story.html [https://perma.cc/N4DA-SHQ7]. Ms. Hatch's case inspired the creation of the Jenny Hatch Justice Project, which continues to valiantly advocate for self-determination for people with disabilities. See generally THE JENNY HATCH JUSTICE PROJECT, <http://www.jennyhatchjusticeproject.org/> [https://perma.cc/ZEZ2-SMJ5] (last visited May 21, 2022).

research on the benefits of SDM as widely as possible.²⁵⁵ The grant also required the NRC-SDM to allocate funding awards for “state-based projects designed to increase knowledge of and access to [SDM] by older adults and people with intellectual and developmental disabilities.”²⁵⁶ According to the NRC-SDM, projects in fourteen different states have benefited from grants, many of which have since enacted SDM laws, including Delaware, Maine, Wisconsin, Indiana, and Nevada.²⁵⁷

Against this backdrop, two findings start coming into focus. First, although scholars have linked the CRPD with the U.S. SDM movement, they have largely avoided drawing a clear causal pathway between these two phenomena. The historical developments outlined above provide a starting point from which to begin this endeavor. (I do recognize, however, that the history behind the Texas SDM statute, which Theodorou aptly documents, undermines any claim that the CRPD was the *sole* causal impetus for American SDM efforts.²⁵⁸) Second, the ACL was a crucial importer of Article 12 jurisprudence in the United States.²⁵⁹ Not only did the ACL help

²⁵⁵ Peter Blanck & Jonathan G. Martinis, “*The Right to Make Choices*”: *The National Resource Center for Supported Decision-Making*, 3 AM. ASS’N ON INTELL. & DEV. DISABILITIES 24, 28 (2015); see also ADMIN. FOR CMTY. LIVING, *Supported Decision Making Across the Lifespan Planning Grant* (Sept. 21, 2021), <https://acl.gov/grants/supported-decision-making-across-lifespan-planning-grant> [<https://perma.cc/2GC2-F7HC>]. The NRC-SDM was also an immensely valuable tool for me during the drafting process of this Article.

²⁵⁶ *The National Resource Center for Supported Decision-Making Makes Awards for its 2018/2019 State Grant Program*, NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING (Oct. 25, 2018), <http://supporteddecisionmaking.org/news/national-resource-center-supported-decision-making-makes-awards-its-20182019-state-grant> [<https://perma.cc/84T3-SWLQ>].

²⁵⁷ See *id.* (explaining that the NRC-SDM has funded projects in South Carolina, Tennessee, Indiana, Mississippi, Oregon, Minnesota, Delaware, Florida, Georgia, Maine, Nevada, New York, North Carolina, and Wisconsin).

²⁵⁸ I must here commend Theodorou’s work on documenting the factors that led to the enactment of the Texas SDM legislation. See generally Theodorou, *supra* note 238. Theodorou identifies, for instance, that “Texas’s interest in supported decision-making predates the CRPD’s entrance into force,” and that “its interest grew out of the disability rights community’s response to extensive state budget cuts in 2004, which resulted in an overhaul of the state’s Department of Health and Human Services.” Theodorou, *supra* note 238, at 987 (2018). Documentation like the type Theodorou presents is the type needed to nuance and explain how each pro-SDM state came to integrate—or reject—the CRPD in their respective legislative processes.

²⁵⁹ The role that the federal government played in catalyzing SDM laws across the United States is not dissimilar from the role it played at the time the ADA was under consideration. In fact, Lennard Davis has explained that federal actors, and not the disability community, were involved in the most important ADA negotiations. The parallelism here is important to consider. See LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* 150–51 (2015) (“The prenegotiation ground rules agreed upon and signed in blood were that the only people allowed at the negotiating table would be representatives of the Senate and the White House. The House staff, the business community, and the disability community would not be allowed to attend.”).

create the NRC-SDM, but it also provided funding to the ABA to help expand state Working Interdisciplinary Networks of Guardianship Stakeholders (“WINGS”), which have helped propel SDM advocacy in several states, including Alaska and Indiana.²⁶⁰

These findings strengthen the idea that treaty ratification is not the only means by which human rights treaties can make their way into domestic policy. The ACL’s involvement in stimulating SDM policymaking also constitutes a clear example of cooperative foreign affairs federalism. But, before I cover these issues in more detail, I turn to a survey of SDM laws in the United States.

2. Article 12 in Legislation

What follows is a chronological list of SDM laws that states have enacted to date,²⁶¹ as well as SDM laws that remain in the legislative process. Along the way, I highlight legislative and other documentary evidence that shows how Article 12 has influenced legislative efforts at the state level, while also listing other laws that seem to have flourished independently from CRPD jurisprudence. I show that in the District of Columbia and at least nine states—Delaware, Wisconsin, Maine, Alaska, Indiana, Nevada, Minnesota, Colorado, and New Hampshire—the ACL and other CRPD-embracing organizations like the NRC-SDM and the ABA played a crucial role in fueling grassroots SDM advocacy.

²⁶⁰ See ADMIN. FOR CMTY. LIVING, *supra* note 255 (describing the role that WINGS play in expanding state capacity in bringing about guardianship reforms). As I note above, however, the ABA is not the only organization that has funded WINGS. The National Guardianship Network, which has shown little or no support for Article 12 principles, has helped fund WINGS in Texas and Washington, two states that have statutes enabling SDM arrangements on their books.

²⁶¹ I do not cover states that have passed SDM laws in the area of organ transplants, like Maryland, Kansas, Louisiana, New York, Ohio, West Virginia. See *In Your State*, NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://supporteddecisionmaking.org/states> [<https://perma.cc/8QDQ-BY8V>] (last visited May 21, 2022) (listing those states that have passed laws that enable SDM in the context of organ transplants). The reason is that although these laws bolster the position that SDM is growing in popularity across the United States, transplant-oriented laws have little if anything to do with the CRPD. As I have shown in Part III.A., Article 12 derives from the tension between guardianship and SDM. The issue in the area of organ transplants, by contrast, appears to center on discrimination. See, AUTISTIC ADVOCACY, ORGAN TRANSPLANTS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR CLINICIANS, https://autisticadvocacy.org/wp-content/uploads/2014/03/OrganTransplantation_ClinicianGuide_final.pdf [<https://perma.cc/F6MT-TFMK>] (last visited May 21, 2022) (explaining that people with disabilities suffer from the misconception that they cannot make decisions for themselves when comes the time to accessing organ transplants). To include these laws in this discussion might thus run the risk of over-focusing on SDM laws, as opposed to keeping the analysis narrowly oriented on the CRPD’s impact on SDM legislation.

Texas. Texas enacted the Supported Decision-Making Agreement Act in 2015,²⁶² the first of its kind in the country. But it has no explicitly discernible roots in Article 12 jurisprudence. As Theodorou has found, the Texas legislature’s interest in SDM “predates the CRPD’s entrance into force” and passed the statute largely in response to the “nationwide concern about the ability of state courts to process and monitor the enormous influx of guardianship cases predicted to accompany the aging of the population.”²⁶³ Propelling the statute’s enactment was “the traditionally conservative belief that family and private charity, not the state, should provide support to those who need assistance.”²⁶⁴ The Texas SDM statute thus “shows that at least some forms of supported decision-making can have broad appeal in conservative legislatures where lawmakers may be skeptical” of international human rights developments.²⁶⁵

Delaware. Delaware followed suit in 2016.²⁶⁶ Before the Delaware legislature enacted its SDM statute, the Delaware Developmental Disabilities Council (“DDDC”) received a grant sponsored by the NRC-SDM, which played a catalyzing role in driving SDM awareness-raising in the state.²⁶⁷ As part of the deliverables associated with the grant, the DDDC partnered with the Autistic Self Advocacy Network (“ASAN”)—a national disability rights organization with a strong record of support for the CRPD²⁶⁸—to assist with the drafting of the SDM bill that eventually became law.²⁶⁹

²⁶² TEX. EST. CODE ANN. § 1357.002 (2015).

²⁶³ Theodorou, *supra* note 238, at 979–80, 987.

²⁶⁴ *Id.* at 980.

²⁶⁵ *Id.* at 1012.

²⁶⁶ DEL. CODE ANN. tit. 16 §§ 9401a–9410a (2016).

²⁶⁷ See generally NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, FINAL REPORT 2016 DELAWARE 1 (2016), <http://www.supporteddecisionmaking.org/sites/default/files/sdm-cop-2016-delaware.pdf> [<https://perma.cc/6LZA-4KVA>].

²⁶⁸ See, e.g., *The Right to Make Choices: International Laws and Decision-Making by People with Disabilities*, AUTISTIC SELF ADV. NETWORK, THE RIGHT TO MAKE CHOICES: INTERNATIONAL LAWS AND DECISION-MAKING BY PEOPLE WITH DISABILITIES, <https://autisticadvocacy.org/wp-content/uploads/2016/02/Easy-Read-OSF-For-Families-v3.pdf> [<https://perma.cc/67MS-SP3V>] (last visited May 21, 2022); AUTISTIC SELF ADV. NETWORK, ASAN’S INTERNATIONAL SUMMIT ON SUPPORTED DECISION-MAKING AND TRANSITION TO THE COMMUNITY: CONCLUSIONS AND RECOMMENDATIONS (2016), <https://autisticadvocacy.org/wp-content/uploads/2018/06/SDM-Summit-Conclusions-and-Recommendations.pdf> [<https://perma.cc/GK5A-CXQU>]; *White House Celebration of Disability Rights*, AUTISTIC SELF ADV. NETWORK (July 26, 2009), <https://autisticadvocacy.org/2009/07/white-house-celebration-of-disability-rights/> [<https://perma.cc/KR64-JUY2>].

²⁶⁹ See NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, *supra* note 267, at 3 (explaining that the DDDC reviewed model legislation provided by ASAN before introducing a draft bill before the Delaware Senate on April 14, 2016).

Wisconsin. The next state to pass an SDM statute was Wisconsin in 2018.²⁷⁰ The statute stemmed from advocacy efforts by many disability rights organizations,²⁷¹ including the Wisconsin Board for People with Developmental Disabilities (“BPDD”), which, like the DDDC, received a grant from the NRC-SDM.²⁷² Part of the BPDD’s engagement efforts was to craft a draft statute to offer to state legislators.²⁷³ During legislative hearings, the BPDD highlighted the nationwide impact that the NRC-SDM and the CRPD had had on SDM policy.²⁷⁴

District of Columbia. Mere days after Wisconsin enacted its SDM statute, the District of Columbia enacted the Disability Services Reform Amendment Act of 2018, formally authorizing the creation of SDM agreements.²⁷⁵ Unlike the Delaware and Wisconsin SDM statutes, the District of Columbia law did not stem from NRC-SDM grant funding.²⁷⁶ But several features of the statute’s history highlight how the CRPD provided inspiration for its enactment. First, several members of the coalition responsible for the law’s passage had spoken publicly about their support for the CRPD.²⁷⁷ Second, stakeholders during hearings on the bill, including

²⁷⁰ Assemb. 655, 2017 Leg. (Wis. 2017).

²⁷¹ The Wisconsin legislature’s Legislative Council collected documents as part of hearings on the SDM statute, including testimonials by The Arc Wisconsin, Disability Rights Wisconsin, the Greater Wisconsin Agency on Aging Resources, Inc., the Wisconsin Aging Advocacy Network, the Wisconsin Board for People with Developmental Disabilities, and AARP Wisconsin. *See Hearing on Assemb. 655 Before the Assemb. Comm. on Family Law*, 2017 Leg. (Wis. 2017) (statement of Kathy Bernier, State Representative).

²⁷² *See generally* NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, ANNUAL REPORT–2016 WISCONSIN 1 (2016), <http://www.supporteddecisionmaking.org/sites/default/files/sdm-cop-2016-wisconsin.pdf> [<https://perma.cc/2W6V-SLU3>].

²⁷³ *Id.*

²⁷⁴ *Hearing on Assemb. 655 Before the Assemb. Comm. on Family Law*, 2017 Leg. (Wis. 2017), *supra* note 271 (“Nationally, disability organizations, attorneys, courts, and state legislatures are recognizing the value of SDM as an alternative to guardianship. SDM has been endorsed by the [the ACL], which funds the [SDM-NRC], and has gained international recognition, notably in the [CRPD].”).

²⁷⁵ Disability Services Reform Amendment Act, 65.12. D.C. Reg. 002823-46 (Mar. 12, 2018).

²⁷⁶ *District of Columbia: Guardianship Laws*, NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://supporteddecisionmaking.org/state-review/district-columbia> [<https://perma.cc/Z6ED-CM4Q>] (last visited May 21, 2022).

²⁷⁷ Six organizations along with Robert D. Dinerstein formed the coalition that drove the D.C. SDM law’s enactment. *See generally Landmark Law Advances the Rights of D.C. Residents with Disabilities*, QUALITY TR., <https://www.dcqualitytrust.org/2018dclaw/> [<https://perma.cc/TB9T-K2D3>] (last visited May 21, 2022). Among the organizations was Quality Trust for Individuals with Disabilities, which has demonstrated a record of support for the CRPD. *See, e.g.,* Symposium, Cathy Ficker Terrill, Tina Campanella, & Kerri Melda, *Supported Decision-Making: An Agenda for Action*, COUNCIL ON QUALITY & LEADERSHIP (Jan. 2014), <https://www.c-q-l.org/wp-content/uploads/2019/12/CQL-Supported-Decision-Making-Agenda-For-Action-2015.pdf>

Disability Rights D.C. and leading disability rights advocate Robert Dinerstein, linked the importance of the bill with the CRPD.²⁷⁸ Third, the Committee on Human Services, which the D.C. Council charged to review the bill, referred to Dinerstein's scholarship on the CRPD in assessing whether the bill conformed to basic implementation guidelines.²⁷⁹

Maine. The Maine legislature reformed the Maine Uniform Probate Code law in April 2018, recognizing SDM agreements as a less restrictive alternative to guardianship.²⁸⁰ The legislature brought changes to the statute about one year later, although it largely kept in place the parameters that it had set out to ensure the availability of SDM.²⁸¹

Behind the scenes, Disability Rights Maine (“DRM”)—recipient of two NRC-SDM grants²⁸²—spearheaded statewide SDM advocacy efforts. Through its first NRC-SDM grant, DRM helped form a coalition of disability rights organizations dedicated to reforming the guardianship status quo.²⁸³ DRM's outreach and mobilization efforts led it to receive an invitation to a Joint Standing Committee on Judiciary work session to discuss SDM.²⁸⁴ This discussion influenced the Joint Committee to ask the Maine Probate and Trust Law Advisory Commission to write a report on the feasibility and wisdom of adopting SDM in the Maine Probate Code. That

[<https://perma.cc/3CY4-SPQ2>] (associating SDM with the enactment of the CRPD). Dinerstein has also demonstrated clear support for the CRPD through his scholarship. See, e.g., Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 1 (2012).

²⁷⁸ See *Citizens with Intellectual Disabilities Civil Rights Restoration Act of 2017: Hearing on B. 22-154 Before the Comm. on Hum. Services*, 2017 Council (D.C. 2017), (including testimonial documents by Disability Rights D.C. and Dinerstein).

²⁷⁹ See generally COUNCIL OF THE D.C. COMM. ON HUM. SERVICES, REPORT ON BILL 22-0154, THE DISABILITY SERVICES AND REFORM ACT, B. 22-0154 (citing scholarship by Dinerstein on how to implement Article 12 of the CRPD).

²⁸⁰ See H.R. 123, 128th Me. Leg., First Reg. Sess. (2017).

²⁸¹ See An Act to Correct Errors and inconsistencies Related to the Maine Uniform Probate Code and to Make Other Substantive Changes, H.R. Rep. No. 1535, 1st Sess. (Me. 2019); Maine Uniform Guardianship, Conservatorship and Protective Proceedings Act, ME. REV. STAT. tit. 18-C, §§ 5-101–963 (2019).

²⁸² See Disability Rights Maine Symposium, *Supported Decision-Making in Maine*, SUPPORT MY DECISION (2019) (describing that the DRM received grants by SDM-NRC in 2015 and 2017).

²⁸³ See generally STATE GRANT REPORT: DISABILITY RIGHTS MAINE, NAT'L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://www.supporteddecisionmaking.org/sites/default/files/sdm-cop-2016-maine.pdf> [<https://perma.cc/5CRV-9Y6C>] (last visited May 21, 2022).

²⁸⁴ See *id.* at 9. (“On January 28, 2016, DRM was invited to speak on Supported Decision-Making during a work session in which the Judiciary Committee considered the adoption of the [Uniform Probate Code].”).

report ultimately recommended that the legislature incorporate provisions for SDM and proposed a clear path forward to do so.²⁸⁵

Alaska. The next state to enact an SDM law was Alaska late in 2018.²⁸⁶ This law arose through concerted advocacy on the part of the Governor’s Council on Disabilities and Special Education (“the Governor’s Council”), which had received a WINGS grant from the ABA to expand the state’s capacity to make broad guardianship reforms.²⁸⁷ The Governor’s Council was important in mobilizing disability rights stakeholders and getting them to support the enactment of SDM.²⁸⁸ One of its members, Alaska State Representative Charisse Millett, also introduced and sponsored the bill in the legislature.²⁸⁹ Assuming the WINGS grant played a necessary role in stimulating advocacy outreach, what follows then is that the ACL’s efforts to advocate for broad SDM implementation were highly influential in the statute’s enactment. This finding would buttress the conclusion that Article 12, and the ACL’s desire to implement it nationwide, were guiding forces behind the Alaska statute.

North Dakota. The first state to pass an SDM statute in 2019 was North Dakota.²⁹⁰ Although little information exists about the statute’s legislative history, what is clear is that the North Dakota Protection & Advocacy Project (“P&A”), an organization designated by the governor to promote disability rights initiatives in the state, played a crucial role in fostering support for the

²⁸⁵ See generally ME. PROB. & TR. LAW ADVISORY COMM., REP. L.D. 1322, RESOLVE, DIRECTING THE PROBATE AND TRUST LAW ADVISORY COMM’N TO STUDY AND MAKE RECOMMENDATIONS REGARDING SUPPORTED DECISION MAKING, J. COMM. REP. (Me. 2017).

²⁸⁶ See ALASKA STAT. ANN. §§ 13.56.010–195 (2018).

²⁸⁷ See *Please Join the Council in Supporting HB? The Supported Decision Making Act*, GOVERNOR’S COUNCIL ON DISABILITIES & SPECIAL EDUC., <https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=111074> [<https://perma.cc/T85S-6VTJ>] (last visited May 21, 2022) (“The Council supported the successful WINGS grant application for Alaska, and is a lead stakeholder in that collaboration along with the court system, the Long-Term Care Ombudsman, and the Office of Public Advocacy.”).

²⁸⁸ See generally Anne Applegate, *SDM/SDMA Progress in the Last Frontier; System-Wide Collaboration and Focused Leadership in Alaska*, GOVERNOR’S COUNCIL ON DISABILITIES & SPECIAL EDUC., <http://www.supporteddecisionmaking.org/sites/default/files/docs/events/1-sdm-ak-ppt.pdf> [<https://perma.cc/5395-EEHY>] (last visited May 21, 2022).

²⁸⁹ See *id.* at 11 (explaining that the “sponsor legislator was a council member”).

²⁹⁰ See N.D. CENT. CODE ANN. §§ 30.1-36-01–08 (2019).

policy.²⁹¹ The P&A also appears to have gleaned inspiration from the ABA and the NRC-SDM in wanting to advocate for SDM legislation.²⁹²

Indiana. Governor Eric Holcomb signed the state's SDM law in April 2019.²⁹³ The Arc of Indiana and Indiana Disability Rights, both of which were NRC-SDM grant recipients, played a crucial role in advocating for the statute's enactment.²⁹⁴ The Arc of Indiana's 2015 grant was to support an analysis of the disability law landscape in Indiana, and to propose a path forward for the enactment of an SDM law.²⁹⁵ A few years later, Indiana Disability Rights received another grant from the NRC-SDM "to develop a multi-media advocacy campaign to increase knowledge and use of" SDM across the state.²⁹⁶ On top of these efforts, two other entities received grants to expand WINGS capacity. The Indiana Adult Guardianship State Task Force received funding from the National Guardianship Network ("NGN") in 2015, and the Indiana Supreme Court received further funding from the ABA in 2017 to complement the Task Force's work.²⁹⁷

Missouri. The Missouri legislature was next to pass SDM legislation.²⁹⁸ Although Missouri has continued to allow the use of guardianships, the

²⁹¹ See generally *About P&A*, N.D. PROT. & ADVOC., <https://www.ndpanda.org/about-pa> [<https://perma.cc/BD4T-SCAV>]; see also *Supported Decision-Making Feedback Meetings Scheduled*, JAMESTOWN SUN (Dec. 11, 2018, 6:00 AM), <https://www.jamestownsun.com/lifestyle/health/4541500-supported-decision-making-feedback-meetings-scheduled> [<https://perma.cc/W6NJ-8TU4>] (explaining that the North Dakota Protection and Advocacy Project was in the process of collecting stakeholder input to develop SDM legislation).

²⁹² See SDM FAQ, N.D. PROT. & ADV., <http://www.ndpanda.org/decide/resources.html> [<https://perma.cc/LB5X-X78F>] (last visited May 21, 2022) (citing ABA and SDM-NRC resources, including the pro-CRPD Resolution 113 of the ABA urging states to amend their guardianship statutes to include SDM arrangements).

²⁹³ See IND. CODE §§ 29-3-14-1–13 (2019).

²⁹⁴ See *Press Release, Indiana Disability Rights, Governor Holcomb Signs Landmark Legislation Supporting the Independence of People with Disability*, STATE OF IND. (April 29, 2019), <https://www.in.gov/idr/sdm/sdm-in-the-news/> [<https://perma.cc/LR4D-UU5C>] (writing that Indiana Senator Eric Koch, who authored the bill, thanked Indiana Disability Rights, The Arc of Indiana, and Self-Advocates of Indiana for their help in passing the SDM statute).

²⁹⁵ See generally SUPPORTED DECISION MAKING IN INDIANA: GUARDIANSHIP, CIVIL RIGHTS AND THE CASE FOR A LESS RESTRICTIVE ALTERNATIVE, THE ARC OF IND., <http://www.supporteddecisionmaking.org/sites/default/files/sdm-cop-2016-indiana.pdf> [<https://perma.cc/B8B9-3MK3>] (last visited May 21, 2022).

²⁹⁶ Letter from Melissa Keyes, Legal Director, Indiana Disability Rights, to Morgan Whitlatch & Jonathan Martinis (Aug. 30, 2019), <http://supporteddecisionmaking.org/sites/default/files/1-Indiana-Disability-Rights-Final-Report%20.pdf> [<https://perma.cc/3WPV-FXBP>].

²⁹⁷ See generally ERICA COSTELLO & BECKY PRYOR, 2015 INDIANA STATE GRANT: FINAL REPORT, (2016), <http://naela.informz.net/NAELA/data/images/PDFs/2015%20Indiana%20WINGS%20final%20report%20without%20appendices.pdf> [<https://perma.cc/JF8Z-URGR>].

²⁹⁸ See MO. REV. STAT. § 475.075 (2018).

legislature has carved out SDM agreements as “a less restrictive alternative.”²⁹⁹ The Missouri Developmental Disabilities Council (“MDDC”) has played a key role in advocating for these arrangements. How the MDDC used the CRPD as a basis for its advocacy philosophy is unclear. On different occasions, however, it has used scholarship on Article 12 to justify its support for SDM arrangements.³⁰⁰ At a minimum, therefore, Article 12 principles appear to have inspired at least some action on the part of grassroots disability advocates in the state.

Nevada. The SDM statute in Nevada came into effect in May 2019.³⁰¹ Unlike other states that have largely relied on disability rights organizations to promote and raise awareness on SDM, Nevada saw much of its advocacy performed by judges on the state’s Second Judicial District Court, including most notably Judge Frances Doherty.³⁰² In fact, to my knowledge, the Second Judicial District Court was the first judicial entity to receive a grant from the NRC-SDM.³⁰³

This grant paved the way for a statewide outreach event in November 2017, which invited representatives of the NRC-SDM, the ABA, and the Quality Trust for Individuals with Disabilities to share SDM developments with disability rights stakeholders.³⁰⁴ Judge Egan K. Walker of the Second

²⁹⁹ *Id.*

³⁰⁰ *See, e.g.,* DEV. DISABILITIES COUNCIL, THE RIGHT TO MAKE CHOICES, <https://moddcouncil.org/wp-content/uploads/2019/07/MODDC-Supported-Decision-Making-Brochure.pdf> [<https://perma.cc/H7LZ-HK3R>] (last visited May 21, 2022) (citing Dinerstein’s scholarship on Article 12 implementation); *Self-Determination and Guardianship*, MISSOURI DEVELOPMENTAL DISABILITIES COUNCIL, <https://moddcouncil.org/wp-content/uploads/2019/04/SES-Missouri-DD-Council-Guardianship-Paper-FINAL.pdf> [<https://perma.cc/8KPL-RG9U>] (last visited May 21, 2022) (citing scholarship by Peter Blanck and Jonathan Martinis linking SDM developments with the advent of the CRPD).

³⁰¹ *See* NEV. REV. STAT. ANN. §§ 162C.010–330 (2019).

³⁰² *See* Darcy Spears, *Dignity and Choice Sought in Guardianship Alternative in Nevada*, KTNV L.V. (July 17, 2017, 6:00 PM), <https://www.ktnv.com/news/contact-13/dignity-and-choice-sought-in-guardianship-alternative> [<https://perma.cc/8T54-6F25>] (describing the role of the Second Judicial District Court and Judge Doherty in “spearheading the effort to fulfill a fundamental promise: the right to make choices in our own lives with the support of trusted family and friends.”).

³⁰³ *See generally* Media Release, *Washoe County, Second Judicial District Court Leads Statewide Event: Supported Decision-Making as an Alternative to Guardianship—a Nevada Conversation*, WASHOE CNTY. (2017), <https://www.washoecourts.com/OtherDocs/Outreach/SDMALasVegasPressReleaseRevisedFinal.pdf?t=6/6/2020%202:29:07%20PM> [<https://perma.cc/DG2X-CJ5R>].

³⁰⁴ The presentation given during the November 28, 2017, event also makes mention of the CRPD. *See Supported Decision-Making As an Alternative to Guardianship*, SECOND JUD. DIST. CT. STATE NEV. CNTY. WASHOE (Nov. 28, 2017), <https://www.washoecourts.com/OtherDocs/AdultGuardianship/SDMASurveys/November28SDMAPresentationMaterials.pdf> [<https://perma.cc/8MX8-YNFK>] (recognizing, in the PRACTICAL Resource Guide section, the role that Article 12 played in catalyzing SDM policy).

Judicial District Court along with Judge Doherty went on to testify before the Nevada legislature in support of the SDM bill.³⁰⁵ Judge Doherty went so far as to stating on the record that “[s]ince [the Convention’s] passage, jurisdictions throughout the United States and world have advanced formal and informal protocols to expand accessibility of [SDM] for persons with disabilities,” thereby indicating strong support for Article 12 policy.³⁰⁶

Washington. The Washington legislature also enacted a statute enabling SDM arrangements in May 2019.³⁰⁷ The statute appears to originate from advocacy work performed by a WINGS committee that the NGN helped fund through a 2015 grant.³⁰⁸ That said, the NGN—unlike the ABA, which has a record of funding WINGS committees committed to implementing Article 12 principles—has largely stayed away from publicly endorsing the CRPD. As Theodorou has explained, the NGN funded a WINGS initiative in Texas that paved the way for the Lone Star State to enact its own statute. Thus, except for evidence that shows that some members of the Washington WINGS committee have supported the CRPD in the past, such as Disability Rights Washington,³⁰⁹ little appears to show that the SDM law there stems from pro-CRPD advocacy.

Rhode Island. The last SDM statute to pass through a state legislature in 2019 was in Rhode Island.³¹⁰ Public information on the statute is scarce. What is available, however, shows that a coalition of eight disability rights

³⁰⁵ See generally *Hearing on A.B. 480*, 2019 Leg. 80th Sess. (Nev. 2019) (statement of the Honorable Judge Egan Walker, Second Judicial District Court of Washoe County, Nev.); *Hearing on A.B. 480 Before the S. Jud.*, 2019 Leg. 80th Sess. (Nev. 2019) (testimony of Presiding Judge Frances M. Doherty, Presiding Judge, Department Twelve, Family Division).

³⁰⁶ *Hearing on A.B. 480 Before the S. Jud. Comm.*, 2019 Leg., 80th Sess. (Nev. 2019) (testimony of the Judge Frances M. Doherty), *supra* note 305.

³⁰⁷ See WASH. REV. CODE §§ 11.130.010–915 (2021).

³⁰⁸ In the WINGS report, the committee frames the need for SDM in terms of being able to provide “decisional-support” for people with disabilities. NAT’L GUARDIANSHIP NETWORK, WASHINGTON STATE WINGS REPORT 1 (2016), <http://naela.informz.net/NAELA/data/images/PDFs/2015%20washington%20WINGS%20final%20report%20no%20appendices.pdf> [https://perma.cc/5NJG-W9XN]. In one of the legislative reports on the bill, the WINGS’s work on guardianship reform initiatives was used to spot limitations to the bill. See H.R. Rep. 2SSB 5604, Leg. Reg. Sess., at 8 (Wash. 2019), <http://lawfilesexet.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/House/5604-S2%20HBR%20APH2%2019.pdf?q=20200609100931> [https://perma.cc/77HH-2E75] (“This bill is not what would have come out of the WINGS Project. There are some limitations to the act.”).

³⁰⁹ See S. REP. NO. 113-12, *supra* note 79, at 14 (listing Disability Rights Washington as an organization in favor of ratifying the CRPD).

³¹⁰ See 42 R.I. GEN. LAWS §§ 42-66.13-1–10 (2019).

organizations came into existence to promote SDM across the state.³¹¹ The mobilization effort appears to have been influenced, at least in part, by legislative developments in other states, as well as the pro-SDM initiatives formulated by the ACL and ABA.³¹²

Minnesota. Minnesota passed its SDM statute in May 2020.³¹³ The law appears to stem from a confluence of advocacy efforts. First, the NGN helped fund a WINGS committee in 2015, which helped galvanize “stakeholder engagement” on SDM.³¹⁴ Second, the ACL provided a large grant to Volunteers of America Minnesota and Wisconsin (“VOA”) to open the Center for Excellence in Supported Decision Making, which is dedicated to developing “a replicable statewide model based on supported decision-making to provide alternatives to guardianship and conservatorship in Minnesota.”³¹⁵ Third, VOA received another grant in 2018, but this time from the NRC-SDM to expand its outreach capacities.³¹⁶ Together, these efforts led Minnesota State Representative Kelly Moller to sponsor the bill enabling SDM agreements, which eventually passed the Minnesota legislature in less than six months.³¹⁷

³¹¹ See *Supported Decision-Making*, DISABILITY RTS. R.I., <https://ripin.org/ripin/wp-content/uploads/2020/08/HANDOUT-Supported-Decision-Making.pdf> [<https://perma.cc/85WE-3WDP>] (last visited May 21, 2022) (“[Disability Rights Rhode Island has] formed a coalition, including Advocates in Action, the Alliance for Better Long Term Care, CPN-RI, the Developmental Disabilities Council, the Disability Law Center, RIPIN, and the Sherlock Center, to promote using SDM for RI.”).

³¹² See generally *Fact Sheet, Rhode Island’s Supported Decision-Making Legislation*, DISABILITY RTS. R.I., <http://riddc.org/wp-content/uploads/2019/10/SDM-Fact-Sheet.pdf> [<https://perma.cc/2TBK-T76A>] (last visited May 21, 2022).

³¹³ MINN. STAT. §§ 252A.01–21 (2019).

³¹⁴ REPORT ON ACTIVITIES AND PROGRESS OF MINNESOTA WINGS, MINN. WINGS, <http://naela.informz.net/NAELA/data/images/PDFs/MN-Wings%20Report%20Draft%203.docx> [<https://perma.cc/MW4M-MX6J>] (last visited May 21, 2022); see also *State WINGS Groups in Action*, NAT’L GUARDIANSHIP NETWORK, https://www.naela.org/NGN_PUBLIC/NGN_PUBLIC/Wings_States.aspx [<https://perma.cc/4WRE-7TPG>] (last visited May 21, 2022) (listing Minnesota as an NGN grantee).

³¹⁵ *Center for Excellence in Supporting Decision Making*, VOLUNTEERS FOR AM., <https://www.voamnwi.org/cesdm> [<https://perma.cc/KB7E-PY5X>] (last visited May 21, 2022). The Center for Excellence in Supported Decision Making prepared a report to reflect its work on SDM. See generally CESDM GUIDE TO SUPPORTED DECISION MAKING IN MINNESOTA, VOLUNTEERS FOR AM. (2019), <http://supporteddecisionmaking.org/sites/default/files/Attachment-3.pdf> [<https://perma.cc/VD5P-TPBV>].

³¹⁶ See generally NAT’L RES. CTR. FOR SUPPORTED DECISION MAKING SUBAWARD: FINAL REPORT, VOLUNTEERS FOR AM. (2019), <http://supporteddecisionmaking.org/sites/default/files/Attachment-2.pdf> [<https://perma.cc/J6YZ-NQ96>].

³¹⁷ Representative Moller’s testimony praising the work of the disability rights coalition behind the SDM movement in Minnesota is available on YouTube. MNHouseInfo, *Changes to Guardianship*,

Louisiana. Louisiana Governor John Bel Edwards signed the Dustin Gary Act in June 2020,³¹⁸ the purpose of which “is to recognize a less restrictive decisionmaking process and empowers supported decisionmaking as an option over interdiction for adults with disabilities who need assistance with decisions regarding daily living.”³¹⁹ Accessible information about the statute’s history does not reveal whether individuals or organizations behind the law were supportive of Article 12. Nevertheless, since its enactment, the Dustin Gary Act has been promoted by CRPD-embracing entities, including the NRC-SDM, the ABA, and the Arc.³²⁰

Montana. The first state in 2021 to pass a bill authorizing SDM was Montana. The statute requires courts to consider “less restrictive alternatives” in adult guardianship proceedings, including the possibility of SDM arrangements.³²¹ During legislative hearings,³²² at least two organizations with public support for the CRPD advocated in favor of the measure: the American Association of Retired Persons (“AARP”) and Disability Rights Montana.³²³

Oklahoma. Governor Kevin Stitt signed Oklahoma’s SDM bill into law on April 21, 2021.³²⁴ The statute makes guardianship a matter of last resort,

Conservatorship Laws Discussed 3/3/20, YOUTUBE (Mar. 3, 2020), https://www.youtube.com/watch?time_continue=140&v=aGXobf9ka-0&feature=emb_title [https://perma.cc/6UJE-JARS]. The reader will notice that the original bill sponsored by Representative Moller—that is, H.F. 3391—was later folded in the S.F. 3357 omnibus bill. See *Sen. Melisa Franzen (SD49) Update: May 22, 2020*, 3RD CONG. DISTRICT, MINN. DEMOCRATIC-FARMER-LAB. PARTY (May 22, 2020), <https://www.dfl3cd.org/sen-melisa-franzen-sd49-update-may-22-2020> [https://perma.cc/2HNS-4SEP] (stating that S.F. 3357 includes “four policy provisions related to civil law,” including the Representative Moller-sponsored bill modernizing the Minnesota Guardianship Law “to create a more person-centered approach in statute”).

³¹⁸ LA. STAT. ANN. § 13:4261.101 (2020).

³¹⁹ LA. STAT. ANN. § 13:4261.103 (2020). See *What Is Interdiction?*, GOVERNOR’S OFFICE OF ELDERLY AFFS., <http://goea.louisiana.gov/assets/legalservicesfiles/interdiction.pdf> (last visited May 21, 2022) (explaining that interdiction is synonymous with guardianship under Louisiana law).

³²⁰ See ALTERNATIVES TO LEGAL STATUS CHANGES, DISABILITY RTS. LA., <https://disabilityrightsla.org/wp-content/uploads/2021/05/Alternatives-to-Interdiction-and-Continuing-Tutorships.pdf> [https://perma.cc/5U2J-AQAE] (last visited May 21, 2022).

³²¹ MONT. CODE ANN. § 72-5-305 (2021).

³²² See “Require Consideration of Less Restrictive Options in Guardianship Proceedings,” MONT. LEG. BRANCH, [https://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P_BILL_NO1=31&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20211](https://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=31&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20211) [https://perma.cc/ZMD3-WFNT] (last visited May 21, 2022) (providing access to hearings on the bill before the Montana legislature).

³²³ See A. James Forbes, Jr., Am. Ass’n of Retired Pers. Bd. of Dir., Remarks at the International Day of Persons with Disabilities—Panel on Aging and Disability (Dec. 3, 2009), https://www.un.org/disabilities/documents/events/idpd09_aarp.pdf [https://perma.cc/PF8W-ZSRV]; S. REP. NO. 112-6, *supra* note 71, at 10.

³²⁴ OKLA. STAT. tit. 30 § 1-111 (2021).

requiring consideration for least-restrictive alternatives like SDM. Although the law's legislative history is difficult to parse because of the lack of publicly available information, two organizations with documented support for the CRPD, Oklahoma AARP and the Oklahoma Disability Law Center, appear to have supported the state's legislative reform efforts.³²⁵

Colorado. The next state to pass a law authorizing SDM arrangements was Colorado.³²⁶ Strong evidence suggests that CRPD-embracing organizations favored the measure. Records from the General Assembly show that five organizations testified in support of the measure, including the Arc of Colorado, the Colorado Developmental Disabilities Council ("CDDC"), and Disability Law Colorado. The Arc of Colorado and Disability Law Colorado have previously affirmed their support for the CRPD's ratification.³²⁷ The CDDC, for its part, not only has a history of working with NRC-SDM proponents, but the ACL also funds it entirely. These facts reveal that Colorado's SDM law was in no small measure a product of federal-state coordination efforts.³²⁸

New Hampshire. Governor Christopher Sununu signed New Hampshire's SDM statute into law on August 10, 2021.³²⁹ Disability Rights Center-New Hampshire ("DRC-NH") was among several organizations that offered

³²⁵ *Oklahoma Legislative Sessions End—Many AARP Priorities Passed Into Law*, OKLA. AM. ASS'N OF RETIRED PERS., <https://states.aarp.org/oklahoma/oklahoma-legislative-sessions-ends-many-aarp-priorities-passed-into-law> [<https://perma.cc/87A8-ZTC3>] (last visited May 21, 2022); see S. REP. NO. 112-6, *supra* note 71, at 11. For Disability Law Center, see UNIV. OF OKLA. HEALTH SCI. CTR., CTR. FOR LEARNING & LEADERSHIP, GUIDE TO COMMUNITY SERVICES IN OKLAHOMA 3 (3d ed. 2020), https://libraries.ok.gov/wp-content/uploads/Guide-to-Community-Services_2020.pdf [<https://perma.cc/4USX-YHYC>] and S. Rep. No. 112-6, *supra* note 71.

³²⁶ COLO. REV. STAT. ANN. § 15-14-801–806 (2021).

³²⁷ ARC COLO., 2015 CHAPTER ACTIVITY REPORT, <https://thearcofco.org/wp-content/uploads/2019/02/2015-annual-report.pdf> [<https://perma.cc/W7LD-9TPQ>]; S. REP. NO. 112-6, *supra* note 71, at 11 (listing "The Legal Center (Colorado)," which is the former name of Disability Rights Colorado).

³²⁸ *CO DD Council Hosts Supported Decision-Making Event*, COLO. DEVELOPMENTAL DISABILITIES COUNCIL (Feb. 9, 2016), <http://coddc.org/blog/2016/02/09/co-dd-council-hosts-supported-decision-making-event/> [<https://perma.cc/RV5G-EQXD>] (showing a collaboration between CDDC and Quality Trust, one of the main stakeholders behind the creation of the NRC-SDM); COLO. DEVELOPMENTAL DISABILITIES COUNCIL, *The Colorado Developmental Disabilities Council and the Five-Year Plan: Frequently Asked Questions*, http://www.coddc.org/Documents/Plan_FAQs_%282%29.pdf [<https://perma.cc/M95Q-MQF3>] (last visited May 21, 2022) (detailing CDDC's relationship with the ACL).

³²⁹ N.H. REV. STAT. ANN. §§ 464-D:1–16 (2021).

support for the bill during deliberations.³³⁰ Not only has DRC-NH expressed support for the CRPD, but it is also one of fifty-seven Protection and Advocacy agencies governed by the ACL, which are scattered across the country to offer legal and policy assistance to people with disabilities.³³¹ What is more, the legislature noted in its statement of findings that supported decision-making “has been promoted as an alternative to guardianship by . . . the [ABA].”³³² These findings show that stakeholders with documented support for the CRPD in general and Article 12 in particular were influential forces behind SDM advocacy in New Hampshire.

Illinois. The last state to pass an SDM statute as of this writing is Illinois, where Governor J.B. Pritzker signed the Supported Decision-Making Agreement Act into law on August 27, 2021.³³³ Public information reveals that the Illinois Guardianship and Advocacy Commission, an organization with no obvious record of support for the CRPD, helped drive advocacy for the law.³³⁴ Still, several CRPD-embracing organizations also appear to have supported the measure during legislative hearings, including the Illinois Council on Developmental Disabilities, Equip for Equality, and The Arc of Illinois.³³⁵

Beyond the eighteen states listed above and the District of Columbia, many other SDM bills remain in the legislative process. States where bills are pending appear to include Connecticut, Kentucky, Massachusetts, New

³³⁰ *HB-540, Relative to Supported Decision-Making As an Alternative to Guardianship: Hearing Before the S. Jud. Comm.*, 2021 Leg. Sess. 2 (N.H. 2021), https://www.gencourt.state.nh.us/bill_status/pdf.aspx?id=4017&q=HearingRpt [<https://perma.cc/RF8X-7E9B>] (statement of Michael Skibbie, Disability Rights Center-New Hampshire).

³³¹ S. REP. NO. 112-6, *supra* note 71; *see also* ADMIN. FOR CMTY. LIVING, *State Protection & Advocacy Systems* (June 28, 2021), <https://acl.gov/programs/aging-and-disability-networks/state-protection-advocacy-systems> [<https://perma.cc/PP34-UFQ2>] (featuring DRC-NH on the drop-down list under “Find your P&A Agency”).

³³² H.B. 540, 2021 Reg. Sess. (N.H. 2021).

³³³ 2021 Ill. Legis. Serv. P.A. 102-614 (H.B. 3849)

³³⁴ Several representatives from the Illinois Guardianship and Advocacy Commission offered oral testimony in favor of the law during hearings on the measure. *See Illinois 102nd General Assembly Witness Slip Information for HB3849*, ILL. GEN. ASSEM. (May 18, 2021), <https://my.ilga.gov/Hearing/WitnessSlipInfo/132930?hearingId=18556&legislationdocumentid=166477&printerfriendly=True> [<https://perma.cc/C2V8-WGCN>]. Plus, a close alliance appears to have formed between the bill's main sponsor, Representative Lindsey LaPointe, and the commission. *See generally* Ill. State Rep. Lindsey LaPointe, *A Conversation on the Supported Decision Making Act*, FACEBOOK (Aug. 27, 2020) https://www.facebook.com/watch/live/?ref=watch_permalink&v=3000072983455245 [<https://perma.cc/E8JU-6D7Z>].

³³⁵ *See* S. Rep. No. 112-6, *supra* note 71, at 10 (mentioning Equip for Equality as a CRPD supporter); S. Rep. No. 113-12, *supra* note 79 (listing the Illinois Council on Development Disabilities and The Arc of Illinois as CRPD supporters).

Mexico, New York, Oregon, Virginia, and West Virginia.³³⁶ Another notable mention is Tennessee, another NRC-SDM grant recipient, which makes no specific mention of SDM in its guardianship reform law but included “techniques and processes that preserve as many decision-making rights as practical under the particular circumstances for the person with a disability” as least restrictive alternatives to guardianship.³³⁷

* * *

I now turn to a brief account of case law that has integrated CRPD jurisprudence in their reasoning.³³⁸ I seek to open a field of discussion about the implications of invoking the CRPD and Article 12 as persuasive authority in guardianship cases, an issue that could gain in importance as states continue to legislate SDM.

3. Article 12 in Case Law

Judges on New York Surrogate’s Court have incorporated Article 12 principles in guardianship cases on at least five occasions.³³⁹ To be clear, these cases are drops in the ocean. In New York City alone, there were more than 2,000 dispositions in guardianship cases in just 2018.³⁴⁰ These cases are also unique because New York, as of this writing, has not enacted an SDM statute. Rather, they rely on Article 12 as persuasive authority to make certain legal determinations, such as avoiding imposing guardianships, requiring the appointment of counsel, or demanding periodic reporting and review of a guardianship appointment. Still, these cases remain notable for two reasons. First, they illustrate how the CRPD has seeped into guardianship jurisprudence at the state court level. Second, they may become the seeds from which a more robust jurisprudence starts flourishing across the country, especially as states continue to codify SDM and by

³³⁶ The interested reader can follow the progression of these bills on the SDM-NRC website, which has an updated database of SDM bills. *See generally In Your State*, NAT’L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://supporteddecisionmaking.org/states> [https://perma.cc/2ZY7-QCXJ] (last visited May 21, 2022).

³³⁷ TENN. CODE ANN. § 34-1-101(11) (2019).

³³⁸ Based on the discussion above, evidence shows that those states that received at least some form of influence from the ACL, the NRC-SDM, or the ABA include Delaware, Wisconsin, the District of Columbia, Maine, Alaska, Indiana, Nevada, and Minnesota.

³³⁹ *See In re Mark C.H.*, 906 N.Y.S.2d 419, 433 (Sur. 2010); *In re Dameris L.*, 956 N.Y.S.2d 848, 855 (Sur. 2012); *In re Michelle M.*, 41 N.Y.S.3d 719, at *4, 2016 WL 3981204 (N.Y. Sur. July 22, 2016); *In re Zhuo*, 42 N.Y.S.3d 530, 532-33 (N.Y. Sur. 2016); *Proceeding for the Appointment of a Guardian for Leon Pursuant to SCPA Article 17-A*, 43 N.Y.S.3d 769, at *1 (N.Y. Sur. 2016).

³⁴⁰ N.Y. STATE UNIFIED CT. SYS., 2018 ANNUAL REPORT 44 (2018) (listing the number of dispositions in New York City at 2,204 for guardianship cases).

consequence task judges to decide when such arrangements are preferable to guardianship.

One important and often-cited case decided by Judge Glen in 2012 concerned a petition to revoke guardianship of an individual with “mild to moderate mental retardation.”³⁴¹ Leaning on the fact that the individual had developed a “system of supported decision making”—including neighbors, family members, an active social worker, and a loving partner—Judge Glen terminated the guardianship arrangement that was in place.³⁴² The “persuasive weight” commanded by the CRPD made clear that the individual no longer needed guardianship.³⁴³ In Judge Glen’s words, “[t]erminating the guardianship recognize[d] and affirm[ed] [the individual’s] constitutional rights and human rights”³⁴⁴

This case, along with the four others decided by New York Surrogate’s Court, are congruous insofar as they interpret the CRPD as persuasive but non-binding authority.³⁴⁵ This use of human rights treaties as persuasive authority appears to be consistent across other state courts that have used different non-ratified international human rights treaties to inform decisions on controversial issues, such as same-sex marriage, juvenile death penalty, and the treatment of incarcerated individuals.³⁴⁶ Johanna Kalb has even noted that the use of non-ratified human rights treaties has gained more traction among state courts than their ratified treaties, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.³⁴⁷ This counterintuitive finding has led Kalb to argue that “advocates should continue to raise alternative soft law uses for international human rights treaties in state courts.”³⁴⁸

³⁴¹ *In re Dameris L.*, 956 N.Y.S.2d 848, 849 (2012).

³⁴² *Id.* at 853.

³⁴³ *Id.* at 855–56.

³⁴⁴ *Id.* at 856.

³⁴⁵ *See id.* at 855. (“While the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons, a guarantee that includes and embraces supported decision making, is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections”).

³⁴⁶ *See* Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051, 1059 (2011) (discussing when state courts have applied international human rights cases to controversial cases).

³⁴⁷ *See id.* at 1072 (“Despite the fact that many of the norms embodied in the UDHR are found in the ICCPR and in CERD, two treaties that the United States has ratified, arguments based on their persuasive value (as well as the persuasive value of the UDHR) seem to have gained more traction with state courts.”).

³⁴⁸ *Id.*

SDM proponents should consider Kalb's observations as states continue to legislate SDM. In cases like the ones outlined above, judges face a difficult choice. They could choose to disregard the CRPD as a source of law and focus instead on the technical requirements sufficient to find SDM as a least-restrictive alternative to guardianship. Or they may orient their decisions with the human rights-informed "premise that 'persons with disabilities have a right to recognition everywhere as persons before the law' and 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'"³⁴⁹ My hope is that lawyers will analyze the SDM laws of their states and determine whether the Convention has played an influential role. If evidence exists—such as would be the case in the states I have listed above—lawyers have better reason to craft their arguments in accordance with the demands of Article 12.

B. SDM and Cooperative Foreign Affairs Federalism

The flourishing of SDM laws and case law invoking Article 12 serve as evidence that subnational entities have proven receptive to implementing the CRPD. Out of the nineteen subnational governments that have enacted SDM, at least ten—Delaware, Wisconsin, the District of Columbia, Maine, Alaska, Indiana, Nevada, Minnesota, Colorado, and New Hampshire—have been influenced by the ACL and the ABA.³⁵⁰ Helped by grants provided by the NRC-SDM, entities like the Delaware Developmental Disabilities Council, Alaska's Governor's Council on Disabilities and Special Education, Nevada's Second Judicial District Court, and the Colorado Developmental Disabilities Council were able to strengthen their grassroots advocacy infrastructures and impact SDM legislative efforts.³⁵¹

These findings illustrate how cooperative foreign affairs federalism operates in practice. The principles enunciated in Article 12 of the CRPD—

³⁴⁹ *In re Michelle M.*, 41 N.Y.S.3d 719, at *4 (quoting CRPD Art. 12(a)–(b)). Judge Glen recognized a similar principle *In re Dameris L.*, 956 N.Y.S.2d, at 855. She explained that “[w]hile the CRPD does not directly affect New York’s guardianship laws, international adoption of a guarantee of legal capacity for all persons . . . is entitled to ‘persuasive weight’ in interpreting our own laws and constitutional protections.” *Id.* (citations omitted).

³⁵⁰ *See generally* Part III.B.1.

³⁵¹ *See generally* Part III.B.2. This form of federal–state coordination is consonant with what Beth Simmons describes as “resource mobilization theory,” which “emphasizes that movement success is influenced by tangible resources (money, facilities, and means of communication) as well as intangible resources (legitimacy, experience, various forms of human capital or skills, etc.)” SIMMONS, *supra* note 1, at 137 (citing Jo Freeman, *Resource Mobilization and Strategy*, in *THE DYNAMICS OF SOCIAL MOVEMENTS: RESOURCE MOBILIZATION, SOCIAL CONTROL, AND TACTICS* (Mayer N. Zald & John D. McCarthy eds., 1978)).

most notably those of autonomy, self-determination, and equal capacity under the law—have found support in state legislatures across the nation. And advocates who have invoked them were compelled not by politics or reflexive ideological affinities, but by the liberating impact that SDM would have on people with disabilities.³⁵² From a conceptual standpoint, therefore, this still-developing SDM movement buttresses Beth Simmons's view that human rights standards can provide "useful alternative frameworks by which the oppressed gain a sense of political identity, legitimacy, and efficacy."³⁵³

Furthermore, the success that SDM proponents have had advocating for themselves and on behalf of the disability community is illustrative of a constitutional system that can accommodate the work and involvement of non-federal entities on human rights issues.³⁵⁴ I consider this to be a positive development. After all, guardianship reform exists squarely within state authority, flowing from the state's fundamental interest "in providing care to its citizens who are unable . . . to care for themselves . . ."³⁵⁵ Waiting on federal involvement, while guardianships across the country continue to run the risk of curtailing people with disabilities' ability to participate in society to their fullest extent, would be an exercise in vain. So, insofar as guardianship reform efforts have not lived up to their ambitions—leaving behind threats of stigma, ableism, and discrimination, as Leslie Salzman has argued³⁵⁶—SDM advocacy at the state level has helped address, in the words of Chief Justice John Marshall, one of those "crises of human affairs"³⁵⁷ to which the Constitution must adapt.

³⁵² I think here of Theodorou's caution not to ascribe SDM policymaking to some reflexive admiration of human rights law. See Theodorou, *supra* note 238, at 1012 ("Though supported decision-making has been enshrined in human rights law, . . . the experience in Texas shows that at least some forms of supported decision-making can have broad appeal in conservative legislatures where lawmakers may be skeptical of the UN and international human rights.") Point taken. In state legislatures, I would certainly agree that little evidence shows that politicians used the CRPD as rhetorical tools, even in Democrat-dominated states. But nobody should dismiss the importance that the CRPD—through the ACL and the ABA's involvement—has played in catalyzing the SDM movement in the first place. In other words, although the CRPD is seldom featured in legislative records *per se*, it nonetheless has shaped their direction.

³⁵³ SIMMONS, *supra* note 1, at 141.

³⁵⁴ See generally Part III.B.

³⁵⁵ *Addington v. Texas*, 441 U.S. 418, 426 (1979).

³⁵⁶ See Salzman, *supra* note 253, at 298 (finding that in addition to persistent problems of overbreadth, length, and lack of oversight mechanisms, "[p]ersons with psychosocial disabilities must overcome the significant stigma attached to psychosocial disability, the assumptions that they are inherently different and predisposed to violence, and notions that their 'mental defect' precludes their ability to reason and make a whole range of personal decisions.").

³⁵⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

Finally, the role that the ACL has played in catalyzing state-based advocacy aligns with Galbraith's insights on cooperative foreign affairs federalism, where "one or both political branches of the federal government provid[e] support for the state or local action through expressions of approval, *the provision of funds*, or regulatory delegations."³⁵⁸ The ACL was a key player in the creation of the NRC-SDM, which continues to this day to advocate fervently for broad implementation of Article 12 principles.³⁵⁹ It also, with help from the ABA, provided funds to expand WINGS committees in several states, including Alabama, Alaska, Florida, Idaho, Indiana, Oregon, and Utah.³⁶⁰

One insight emerges from these findings, namely that the ACL has successfully engaged with state-based advocates to implement SDM policy through a host of mediating entities, notably the NRC-SDM and the ABA. This kind of federal-state engagement is standard under a contemporary understanding of foreign affairs federalism. As Davis has explained, state adoption of international standards endorsed by the executive branch is one way that subnational entities have historically engaged in foreign affairs.³⁶¹ Thus understood, SDM stems from "a more cooperative model that seeks to locate areas in which federal and state governments can, as they already do in many areas, work together on issues of mutual concern."³⁶²

The ACL's role in pushing broad implementation of SDM also reveals another, more perplexing structural facet of foreign affairs federalism. If the executive branch, through its grantmaking powers, can unilaterally pursue certain treaty mandates eschewed by Congress, then the President gains the privilege of avoiding the constitutionally mandated advice and consent process while concurrently pushing forward partisan foreign affairs policy objectives.³⁶³ Sure, SDM is one among a broad swath of policy prescriptions governed by the CRPD. But the implication remains that the executive branch is in effect free to cherry-pick desirable treaty provisions, as the ACL

³⁵⁸ Galbraith, *supra* note 20, at 2141 (emphasis added).

³⁵⁹ See generally Part III.B.1.

³⁶⁰ See *State Wings*, AM. BAR ASS'N (Nov. 30, 2021), [https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/state-wings/\[https://perma.cc/manage/create?folder=7380\]](https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/state-wings/[https://perma.cc/manage/create?folder=7380]) (listing ACL-funded WINGS).

³⁶¹ See Davis, *supra* note 186, at 259 (explaining that "local adoption and implementation of international standards . . . that may or may not have been endorsed by the federal government" is one way that subnational entities have engaged in foreign affairs).

³⁶² GLENNON & SLOANE, *supra* note 15, at 305.

³⁶³ President Obama was unequivocal about his support for the CRPD. See generally Part II.B.

has done with Article 12, and implement them through traditional administrative processes.

From the standpoint of domestic federalism, this result poses no novel problem. According to Bulman-Pozen, “from healthcare to marijuana to climate change, federal and state executives negotiate without Congress” on a continuous basis.³⁶⁴ By contrast, from the standpoint of foreign affairs federalism, this same phenomenon raises tougher questions about the necessity and scope of the advice and consent process itself. At a minimum, the SDM case study shows that the Senate’s decision not to ratify a treaty has not prevented the federal government from carrying out at least a key component of that same treaty without structural impediments blocking its path.

This kind of backdoor treaty implementation complexifies the binary formulation of cooperative and uncooperative federalism.³⁶⁵ On one hand, state-based organizations have freely engaged with the federal government to advocate and push for SDM legislation.³⁶⁶ On the other, the federal government has done so without clear congressional approval.³⁶⁷ This arrangement, however, might neither be a bug nor a feature. It might simply reflect the “spontaneous ordering” that federal–state relations have taken in the realm of foreign affairs since the founding, nudging it back to “federalism’s early days—an era in which the states played a much larger role internationally.”³⁶⁸

IV. CONCLUSION

Despite the Senate’s refusal to ratify the CRPD, subnational entities across the United States have helped champion and implement CRPD policy here at home. How they have done so is emblematic of foreign affairs federalism—this dynamic regime in which local and state governments exploit constitutional openings to participate on issues of international importance.

One way in which cities, counties, and states alike have affirmed their support for the CRPD is through expressive means—namely, resolutions. These policies have enabled local and state governments to take an

³⁶⁴ Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 955 (2016).

³⁶⁵ See generally Galbraith, *supra* note 20, at 215260.

³⁶⁶ See generally Part III.B.2.

³⁶⁷ See generally Part II.B.

³⁶⁸ GLENNON & SLOANE, *supra* note 15, at 76, 354.

oppositional stance toward the federal government, empowering them to signal support for the causes of international disability justice and human rights, and to reaffirm their role in the U.S. system of federalism. Another way in which subnational entities have come to implement the CRPD is through SDM legislation. Enshrined in Article 12 of the Convention, SDM was meant to provide an alternative to guardianship by putting people with disabilities “at the center of the discourse,”³⁶⁹ empowering them to decide who cares for them and how they should be cared for.³⁷⁰ I have shown that SDM laws represent, in important and often-overlooked ways, a product of federal–state collaboration. The ACL, for example, was a catalyst for grassroots SDM advocacy. Among those subnational governments that passed SDM laws, at least ten—Delaware, Wisconsin, the District of Columbia, Maine, Alaska, Indiana, Nevada, Minnesota, Colorado, and New Hampshire—received some form of help from the ACL.

These findings show that cooperative and uncooperative foreign affairs federalism serve as a compelling model for understanding how local and state governments have come to integrate the CRPD within their respective policy agendas. But, more importantly, they also make clear that even without the CRPD’s ratification, many of the treaty’s central tenets can continue to resonate—and become an example of how human rights can influence law and policy, sometimes in surprising ways.

³⁶⁹ *Daily Summary of Discussion at the Seventh Session 18 January 2006*, U.N. ENABLE (Jan. 18, 2006), <https://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm> [https://perma.cc/99GD-JXDL].

³⁷⁰ Series & Nilsson, *supra* note 26, at 366.