NOTE

NATHAN ISAACS'S IDEIA: LEGAL EVOLUTION AND PARENTAL PRO SE REPRESENTATION OF STUDENTS WITH DISABILITIES

SAMUEL FLAKS*

I. INTRODUCTION

Nathan Isaacs (1886–1941), a Professor of Business Law at Harvard Business School, made remarkably creative contributions to legal scholarship and philosophy.[1] His work on a theory of cyclical statutory evolution remains relevant today, both as a tool for understanding the history and evolution of a statute and a way of determining when new legislative action may be necessary. Isaacs dedicated his life to teaching students how the law evolves to serve the needs of society in new and different ways, and though he never used his legal theory to investigate disability law, the subject almost certainly would have been of personal interest to him. Isaacs's daughter Carol became deaf as a child; though she received an excellent education, she and her family overcame the many challenges they faced without public support. It is appropriate that Nathan Isaacs's ideas regarding statutory evolution might come to the aid of many families today that are struggling to educate children with disabilities.

---

* B.S., Cornell University, 2006; J.D. Candidate, Harvard Law School, Class of 2009. I thank Jed Shugerman, John F. Manning, Larry A. DiMatteo, Ariel Strauss, Jed Lewinsohn and the members of the 2007 Harvard Legal History Workshop for providing helpful comments on an earlier version of this Note. The following people (along with many others whose names I was not able to catch) provided me with gracious and invaluable archival assistance: David Warrington and Edwin Moloy of the Harvard Law School Library; Judith Garner of the American Jewish Historical Society; Mimi Mazor of the Hebrew College Library; Melissa Murphy, Laura Peimer, Abby Thompson, Tim Mahoney and Kimberly Tully of the Harvard Business School Baker Library; and Kevin Proffitt and Jennifer Cole of the American Jewish Archives. I am especially grateful that Paul Wotitzky shared with me information about his father-in-law, Nathan Isaacs. Paul never met Professor Isaacs, but his late wife, Carol (Isaacs) Wotitzky, and his late mother-in-law, Ella (Davis) Isaacs, passed on to him many memories of their cherished father and husband. In our last conversation before his tragic passing, Isaac Meyers, a graduate student at Harvard, helped me understand the importance of Nathan Isaacs's work. I, and so many other people, would have benefited enormously if Isaac could have continued to share his insights and friendship.

[1] Carol Weisbrod and Larry A. DiMatteo have made extensive and important studies of Nathan Isaacs's scholarship. *See* Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 786–89 & nn.40–44 (perceptive analysis of the general character of Nathan Isaacs's writings and career); Larry A. DiMatteo, The Forgotten Realist (on file with Langdell Library) (discussing many of Isaacs's most important academic contributions, collecting references to Isaacs, and assessing Isaacs's influence as an early "proto-realist").

This Note will begin by explaining this neglected early twentieth century academic's theory of cyclical statutory evolution.[2] Isaacs argued that the methods of statutory and legal interpretation in a legal system tend to evolve in a recurring cycle. He posited that these cycles begin with codification. After a code is established, it is normally interpreted through close examination of the text. As time passes, the literal meaning of the code's words often no longer directly addresses the problems facing society, forcing lawyers to resort to legal fictions. Next, attorneys and judges formulate and apply the principles underlying the code, developing the law through equity. With time, those principles can become wildly disconnected from the text. The legislation phase of the cycle then begins, as piecemeal amendments align the statutory text with contemporary needs. Finally, a comprehensive re-codification ends the old cycle and begins a new one.

This Note will demonstrate that Isaacs's cycle theory can help us understand how and why a statute has evolved. To that end, Section III shows that Isaacs's cyclical theory of legal evolution can help explain important aspects of the history of the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"),[3] a law that seeks to provide educational services to children with disabilities by mandating how states and public agencies provide special education and related services.[4]

This Note will also demonstrate that Isaacs's cycle theory can lead us to recognize when the judicial interpretation of a statute is wavering between the stage of legal fictions and the more advanced state of interpretation by principles. Specifically, Section IV of this Note will use cycle theory to evaluate a recent Supreme Court decision that addressed parental *pro se* representation of students with disabilities. Cycle theory suggest that the Supreme Court's decision in *Winkelman ex rel. Winkelman v. Parma City School District*,[5] which established that parents can act as *pro se* counsel while prosecuting IDEIA claims in federal court, is internally conflicted between the reasoning of legal fictions and that of equity.

In Section V, the Note considers *Winkelman*'s quarreling lower court progeny, surveying how lower courts interpreting *Winkelman* have been divided by the Court's internal confusion in that decision. Courts have split over whether parents can represent *pro se* their child's IDEIA rights and whether parents can represent their children's claims of discrimination under

---

[2] *See* Nathan Isaacs, *"The Law" and the Law of Change*, 65 U. PA. L. REV. 665, 679 (1917), *cont'd in* 65 U. PA. L. REV. 748 (1917) [hereinafter Isaacs, *Law of Change*] (deriving theory of legal cycles from the history of Jewish law).

[3] Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1482 (2006)).

[4] Prior to amendments in 2004, the IDEIA was known as the Individuals with Disabilities Education Act [IDEA]. Pub. L. No. 101-476, 104 Stat. 1142 (1990). Though many courts continue to refer to the act as the IDEA, the two versions of the statute are essentially identical for the purposes of this Note, and both statutes will be referred to as the "IDEIA."

[5] 127 S. Ct. 1994 (2007).

section 504 of the Rehabilitation Act of 1973 ["Rehabilitation Act"][6] and the Americans with Disabilities Act of 1990 ["ADA"].[7]

Isaacs's cycle theory of legal evolution effectively bypasses sterile debates over the objective worth of textual versus non-textual modes of statutory interpretation by emphasizing that either method may be appropriate, depending on where the code is in its life cycle. Courts may come to the conclusion that non-textual legal interpretations will better serve the needs of society. However, if courts come to believe that the IDEIA, the Rehabilitation Act, and the ADA cannot support these interpretations, Congress should enact statutory amendments to guarantee that parents of disabled children can represent *pro se* their children's interests against educational discrimination in court.

II. Isaacs's Cycle Theory in Legal History

Isaacs's cycle theory was an attempt to discover universal principles of law while allowing for constant change in the content. He acknowledged that legal forms change in response to the changing needs of society.[8] Still, he asserted that those changes occur in a predictable way that correlates with the different but recurring stages of how lawyers approach their legal systems.[9] He explained in an unpublished preface to a planned book on jurisprudence that the shared thesis of his work was "that the external form of the law exerts a subtle but very profound influence not only on the constant problem of law reform, but also on the general theory of law of a particular time or place, and finally on the 'law in action.' "[10] Isaacs contended that the "accident of the external form of a law at any given time" largely determines the "methods of improving law," the "theories as [to] how to teach law and how to enforce law," what is the law, and even what is considered the purpose of law.[11] This meant "it makes a much greater difference than is generally conceded whether the law of a particular time or place is in the

---

[6] 29 U.S.C. § 794(a) (2006).

[7] 42 U.S.C. §§ 12101–12213 (2000).

[8] *See* Nathan Isaacs, *The Aftermath of Codification*, 4 Am. L. Sch. Rev. 548, 555 (1920) [hereinafter Isaacs, *Aftermath of Codification*] (claiming that "[l]aw teaching and writing, and for that matter legal thinking," respond "to the conditions that prevail in the world of practice").

[9] Nathan Isaacs, *The Schools of Jurisprudence: Their Places in History and Their Present Alignments*, 31 Harv. L. Rev. 373, 377–79 (1918) [hereinafter Isaacs, *The Schools of Jurisprudence*].

[10] Nathan Isaacs, *Preface* [of planned book collection of his articles] 1 (1923) [hereinafter Isaacs, *Preface I*] (unpublished manuscript, on file with the Nathan Isaacs Papers, HBS Archives, Baker Library Historical Collections, Harvard Business School).

[11] Nathan Isaacs, History Lecture 7 (Dec. 4, 1922) [hereinafter Isaacs, History Lecture I] (prepared notes available with the Nathan Isaacs Papers, HBS Archives, Baker Library Historical Collections, Harvard Business School).

form of a rigid code or of scattered statutes superimposed on a welter of decisions or of authoritative texts by learned commentators."[12]

Isaacs both drew inspiration from and profoundly challenged the theories of Victorian legal historian Sir Henry Maine.[13] Maine had claimed that legal systems tend to first rely on legal fictions, then equity, and finally legislation as "agencies by which law is brought into harmony with society."[14] Isaacs argued that Maine's three agencies of legal fictions, equity, and legislation did not follow a linear progression but "a constantly recurring cycle."[15] Isaacs clarified—in an unpublished preface of a proposed expanded version of his "*The Law" and the Law of Change*—that his cycles both began and ended in the codification of law, by which he meant "a crystallization of law into hard and fast rules definitely stated."[16] The cycles consisted of "codification, fictions, equity, legislation, codification, fictions, equity, legislation, and so on."[17]

Isaacs suggested that each of the legal agencies which Maine had identified correlated with specific methods of legal study.[18] Directly after the enactment of a code, lawyers and judges study the words of the statute. Isaacs lectured to his students that when a nation receives a legal code that is supposed to be comprehensive, such as France's Napoleonic Code, lawyers study and "cite it. It guides and binds the judges. There is very little room for argument on principle."[19] Accordingly, the preferred method of legal thinking becomes a textualist approach that emphasizes the definition and study of words.[20] Isaacs called the glossing lawyers and judges of such an era "word-students."[21] However, glossing starts to become untenable when people "begin to see that it is necessary to do something to keep the law in harmony with society."[22] Legal fictions are gradually invented when the plain meaning of the words do not appear to satisfy society's needs.[23] Judges rely upon legal fictions, which generally consist of farfetched presumptions, in order to change the law without acknowledging that they are changing the

---

[12] Isaacs, *Preface I*, *supra* note 10, at 1.

[13] *See* Isaacs, *Law of Change*, *supra* note 2, at 665.

[14] HENRY SUMNER MAINE, ANCIENT LAW 15 (Beard Books 2000) (1861).

[15] *See id.*

[16] Letter from Nathan Isaacs, Pittsburgh Law School, to Adolph S. Oko (Mar. 2, 1923) [hereinafter Oko Letter] (on file with the American Jewish Archives).

[17] *Id.*

[18] *See* Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 41 (1917) [hereinafter Isaacs, *The Standardizing of Contracts*]; Isaacs, *The Schools of Jurisprudence*, *supra* note 9, at 378.

[19] Isaacs, History Lecture I, *supra* note 11, at 7.

[20] Nathan Isaacs, History Lecture 2 (Jan. 8, 1923) [hereinafter Isaacs, History Lecture II] (prepared notes available with the Nathan Isaacs Papers, HBS Archives, Baker Library Historical Collections, Harvard Business School).

[21] Isaacs, History Lecture I, *supra* note 11, at 7.

[22] *Id.* at 8.

[23] Isaacs, *The Standardizing of Contracts*, supra note 18, at 41.

law.[24] Isaacs was influenced by Roscoe Pound, who took a negative view of such fictions.[25]

Borrowing from Sir Henry Maine again, Isaacs described the next part of the cycle as a period of "equity," in which principles are studied, not words.[26] Isaacs thought equity and its handmaiden, the study of legal principles, were results of "a kind of revolt that comes with the realization that life has progressed too far since the last codification to permit us to find in the words of the code an adequate expression of the law of the times."[27] He described ages of "Equity" as periods in which "[c]ommentators supersede the glossators in the schools, and in the courts salvation is sought in the magisterial administration of general principles."[28] Legislation and the conscious amendment of constitutions came about when interpretation reached its limits. The new codification brought with it "another cycle."[29] Isaacs identified these cycles in Jewish, Roman, English, and Islamic law.[30]

Isaacs thought that, with some qualifications, his theory could explain almost all large-scale jurisprudential developments.[31] Isaacs divided jurists into two temperamental casts: expository "scientists" and censorial "reformers."[32] During an age of glossation, scientists exegetically study the text, while reformers criticize the law by reference to foreign systems of law.[33] When "commentary" takes hold during an age of "equity," the legal scientists analyze principles, while reformers attempt to change the law to conform it to a philosophical ideal.[34] During ages of legislation and codification, scientists are conscious of changes in legal history, while reformers

---

[24] *See* PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 94 (1980) (describing Maine's fictions as assumptions "for legal purposes that something is the case which everyone knows is not the case"); MAINE, *supra* note 14, at 16 ("I now employ the expression 'Legal Fiction' to signify any expression which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation modified.").

[25] See Nathan Isaacs, *The Securities Act and the Constitution*, 43 YALE L.J. 218, 220 (1933) (citing Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1907)).

[26] *See* Isaacs, History Lecture II, *supra* note 20, at 2. It is unfortunate that Isaacs, following Maine, used the word "equity" when they both meant to refer to a phenomenon much broader than the "equity" of the British Chancellors. *See* MAINE, *supra* note 14, at 17 (defining "equity" as "any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles . . . . [I]nterference with law is open and avowed").

[27] Isaacs, *The Standardizing of Contracts*, *supra* note 18, at 41.

[28] Isaacs, *The Schools of Jurisprudence*, *supra* note 9, at 378.

[29] Isaacs, *The Standardizing of Contracts*, *supra* note 18, at 41; *see also* Isaacs, *The Schools of Jurisprudence*, *supra* note 9, at 379 (claiming that when "the principles of a given time become exhausted . . . [t]he needs of the time finally force men into the conscious modification of their received law . . . .").

[30] *See* Isaacs, *Law of Change*, *supra* note 2 (discussing legal cycles in Roman, English, and Jewish law); Nathan Isaacs, *Analogies in Islamic and European Law*, 6 A.B.A.J. 158 (1920) (discussing legal cycles in Islamic law).

[31] *See* Isaacs, *The Schools of Jurisprudence*, *supra* note 9, at 380.

[32] *Id.*

[33] *Id.*

[34] *Id.*

constructively attempt to change the course of legal history.[35] In 1918, Isaacs identified himself with the constructive reformers.[36] However, he playfully suggested to a correspondent that "if I live long enough, I hope either to glide to the dogmatic (faith) school," because the reforms he advocated would be adopted as orthodox learning by legal scientists, "or to be part of what I have called one of the cross currents . . . that save us from the tyranny of ideas."[37]

An important aspect of Isaacs's theory of cyclical evolution is its heavy bias in favor of methods of statutory interpretation that look for the supposed purposes of the statute, rather than to the literal meaning of the statute's words. The equitable interpretation ideas embodied in "*The Law" and the Law of Change* was a conscious response to the growing importance of statutory codification at the turn of the twentieth century.[38] In an unpublished manuscript from 1917, Isaacs suggested that he was living through an age of "recodification."[39] A series of uniform laws had recently been adopted, including the Uniform Negotiable Instruments Law (1918), the Uniform Warehouse Receipts Act (1906), the Uniform Sales Act (1906), and the Uniform Bills of Lading Act (1909).[40] Referring to contemporaneous attempts to transform important areas of the common law into statutes, Isaacs suggested that "[w]hat has been done in the law of Partnership, Negotiable Instruments, Sales, Warehouse Receipts, Bills of Lading, Criminal Law, Pleading and various other branches suggests that we may expect more and more of the authority of the digest to be transferred to the code."[41] Isaacs believed that equitable interpretation would be necessary to make sense of these new codifications.[42]

---

[35] *Id.*

[36] Letter from Nathan Isaacs to Alfred Z. Reed, Carnegie Foundation for the Advancement of Teaching (Feb. 25, 1918) [hereinafter Reed Letter] (on file with the Hebrew College Library, Newton Centre, MA and New York, NY).

[37] *Id.*

[38] *See* Isaacs, *Aftermath of Codification*, *supra* note 8, at 551 (discussing the rise of conflicting textualist and non-textualist interpretations in the aftermath of codification of the Uniform Negotiable Instruments Law).

[39] Nathan Isaacs, Cases and Documents Illustrative of Anglo American Legal History 4 (1917) [hereinafter Isaacs, Unpublished Manuscript] (unpublished manuscript, on file with Harvard Law School Library).

[40] JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 2 (5th ed. 2002).

[41] Isaacs, Unpublished Manuscript, *supra* note 39. A few years after first setting out his own view of codification, Isaacs told his students that the debate over the place of statutory law in the law school curriculum had been one of the dominant themes of the 1922 meeting of the Association of American Law Schools. *See* Isaacs, History Lecture II, *supra* note 20 ("How should we take cognizance of statutes? What is the relation between statute law and the rest of the law, and it is a problem that is not fully worked out yet. I was told at this meeting that only twenty-five years ago Langdell, Dean of Harvard, thought it was a waste of money to buy statute books ofr [sic] the Harvard Law Library. Our notions on that sub ect [sic] have changed since then.").

[42] *See id.* (warning that "[w]hether with the code before us we shall turn again to literalism and to fictions, as indeed we have done in Constitutional Law, is a problem for the next generation").

Shortly after Isaacs's death—over twenty years after the cycle theory was publicized—Julius Stone criticized Isaacs's theory. He argued that Isaacs inconsistently claimed that juristic thought varies with different historical contexts, while at the same time assuming that the law has a self determining life cycle of its own "*without decisive reference to the social, economic, and political characteristics of the time and place*."[43] Moreover, Stone wrote, the multitude of historical exceptions to Isaacs's supposed cycles cast the rule into doubt.[44] Stone's criticism was not entirely fair. Isaacs acknowledged that his theory could not adequately describe the vast developments and changes in jurisprudence throughout the ages.[45] Indeed, he trumpeted the "relativity of jurisprudences" because "'every man is a child of his age'—and jurists are men."[46]

Isaacs was aware, as early as the early 1920s, that his cycle theory was vulnerable to the criticism that it was a gross over-generalization and impossible to prove. In 1923, four years after the appearance of the original article, Isaacs began work on revising the "*The Law" and the Law of Change*.[47] Though the revision was never completed, Isaacs sent a new preface to his friend and collaborator, Adolph S. Oko, in which he sought to answer "some implied criticisms that have appeared."[48] Among those critics may have been members of the nascent Legal Realist movement. Those critics doubted whether it was possible to discover universal legal tendencies. Isaacs aimed to show that "one may either believe or refuse to believe in the possibility of a wholesome generalization without becoming wedded either to 'empiricism' or to 'science' or to 'metaphysics.'"[49] He recognized that there are "philosophers and historians who reject any attempt at generalization" in legal history.[50] However, Isaacs argued that "generalizations, honestly discovered, invite explanations, and these explanations will blend from the most obvious instances of similar causes producing similar effects into the most metaphysical notions ever dreamt of by men."[51] Isaacs realized that his analogy of legal history to a cycle was open to mockery. He knew that, implausibly and ridiculously, "cycles, spirals, helixes, ascending lines and now planetary orbits" had been "seized upon by those who would lay down the laws of development."[52] However, Isaacs claimed his theory was less "pretentious,"

---

[43] Julius Stone, *The Province of Jurisprudence Redetermined (Concluded),* 7 MOD. L. REV. 177, 190 (1944) (emphasis in original).

[44] *See id.* at 190 n.130.

[45] *See* Isaacs, *The Schools of Jurisprudence*, *supra* note 9, at 379–80.

[46] *Id.* at 410, 411.

[47] *See* Oko Letter, *supra* note 16.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 2.

[51] *Id.* at 3.

[52] Isaacs, *Preface I*, *supra* note 10, at 2. Isaacs was referring to a discussion in John Henry Wigmore, *Problems of the Law's Evolution*, 4 VA. L. REV. 247, 260 (1917) (advocating a "planetary" version of evolutionary theory).

though he used similar terms.[53] Isaacs also relied upon the authority of Roscoe Pound, who had discerned cycles in legal history similar to those described by Isaacs.[54]

Isaacs also crucially differed with conservative evolutionist theorists, as he did not claim to know the ultimate evolutionary destination of areas of substantive law. Isaacs was only one of many American legal thinkers who suggested a theory of legal historical evolution.[55] Many such theories were inherently conservative and anti-reform because they presumed that the status quo was the epitome of an evolutionary process.[56] Isaacs, however, did not purport to predict the natural path of the evolution of substantive doctrines such as monogamy, polygamy, or polyandry, as earlier legal evolutionists had done.[57] His central interest was in "the sequence of forms," not in "the sequence of substantive ideas."[58]

While it is beyond the scope of this Note to determine whether Isaacs's cycles consistently explained legal developments, his theory attempted to merge a commitment to objective legal principles with a keen knowledge of the historical contingency of law. Eliminating all of his specialized terminology, Isaacs's argument amounted to the generalization that in the "alternation between periods of comparative rigidity and comparative plasticity of law, Maine's instrumentalities crop out as often as they are needed."[59] For Isaacs, the stages of fiction, equity, legislation, and codification reflected

---

[53] Isaacs, *Preface I*, *supra* note 10, at 2.

[54] *See* Oko Letter, *supra* note 16, at 5; *see also* JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970, at 143 n.81 (1990) (describing Pound's version of evolutionary theory in ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 24–40 (1923)).

[55] *See, e.g.*, HERGET, *supra* note 54, at 119–43 (discussing, as examples of legal evolutionary theory, Oliver Wendell Holmes Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 449 (1899) (providing legal doctrinal examples of the "struggle for life among competing ideas, and of the ultimate victory and survival of the strongest"); JAMES COOLIDGE CARTER, LAW: ITS ORIGINS, GROWTH, AND FUNCTIONS (1907) (describing law as the product of evolving custom); Brooks Adams, *The Nature of Law: Methods and Aim of Legal Education*, *in* CENTRALIZATION AND THE LAW 20 (M. Bigelow ed., 1906) (claiming that legal evolution is the product of economic conflict); Wigmore, *supra* note 52 (expounding a planetary theory of evolution that analogized conflicting evolutionary tendencies of the law to the conflicting gravitational fields that determine the paths of planets); POUND, *supra* note 54 (advocating evolutionary theory that envisions law as the product of both custom and conscious change); and Isaacs, *Law of Change*, *supra* note 2).

[56] *See* STEIN, *supra* note 24, at 122 (noting the generally conservative nature of legal evolutionary theories). *But see* Donald Elliot, *The Evolutionary Tradition in Jurisprudence,* 85 COLUM. L. REV. 38, 94 (1985) (praising evolutionary theory for laying the foundations for scholarship that is "both critical and creative"); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence,* 64 TEX. L. REV. 645, 671 (1985) (describing the distinction between conservative Social Darwinists and liberal Reform Darwinists that pushed for conscious legal change).

[57] *See* L.H. MORGAN, SYSTEMS OF CONSANGUINITY AND AFFINITY OF THE HUMAN FAMILY (1871) (arguing that the origins of the family structure lay in matriarchy); STEIN, *supra* note 24, at 110–11 (comparing Morgan and Maine).

[58] Isaacs, *Preface I*, *supra* note 10, at 2.

[59] Oko Letter, *supra* note 16, at 6–7.

"nothing more nor less than the effect of human nature in its relation to Law."[60]

Isaacs's emphasis on equitable interpretation presaged, and perhaps influenced, a powerful school of legal thought that sought to defend the nontextual interpretation of statutes and to undermine the jurisprudence of the pre-1937 conservative Supreme Court majority. By the 1930s, prominent legal scholars such as James Landis and Justice Harlan Fisk Stone were calling for a return to the ancient English doctrine of the "equity of the statute," in which judges treated statutes just as any other precedent which "could be extended to apply to situations analogous to those embraced within their terms."[61] These scholars, like Isaacs, sought to legitimize the purposive interpretation of statutes from the authority of legal history. It is plausible that Isaacs had a direct influence on Landis's thinking; an obituary reported that he had been "associated" with Landis at Harvard, as well as "legal luminaries" like Roscoe Pound and Felix Frankfurter.[62]

John Manning has argued that the "equity of the statute" was the product of a period in which legislative and judicial powers were intermeshed in England, and that the U.S. Constitution's separation of powers made the doctrine inappropriate in an American context.[63] Isaacs's theory of equitable interpretation was even more contestable because it was heavily derived from the example of Jewish Law.[64] After the popularization of academic arguments for the equity of the statute in the 1930s,[65] Isaacs felt the difficulty of the position himself: "[C]haracteristically, we do not in this country argue from the analogy of a statute so as to make its new rule prevail concurrently with the applicability of its reasoning. In other words, each case must be decided on the basis of minute statutory interpretation."[66] Yet, in 1938 he argued that the "professional prejudices" which prevented Anglo-American lawyers from seeking "principles, reasons and trends in the statutory law"

---

[60] Nathan Isaacs, *Preface* [of *"The Law" And The Law of Change*], reprinted from 65 U. PA. L. REV. 659–79 and 748–63 (1917), with miscellaneous annotations and additions by the author [hereinafter Isaacs, *Preface II*] (on file with the Nathan Isaacs Papers, HBS Archives, Baker Library Historical Collections, Harvard Business School).

[61] James McCauley Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213 (1934); Harlan F. Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 13–14 (1936).

[62] *Mourned: Prof. Nathan Isaacs*, CHI. ADVOC., Jan. 16, 1942 (newspaper clipping on file with the American Jewish Historical Society, Newton Centre, MA and New York, NY).

[63] *See* John F. Manning, *Textualism and the Equity of the Statute,* 101 COLUM. L. REV. 1, 22–23 (2001). I thank Professor Manning for suggesting the connection between the equity of the statute and Isaacs's thinking.

[64] *See generally* Isaacs, *Law of Change*, *supra* note 2 (deriving theory of legal cycles from the history of Jewish law).

[65] *See* Samuel E. Thorne, *The Equity of a Statute and Heydon's Case,* 31 ILL. L. REV. 202, 202 (1936) (noting that "the authors of recent articles upon statutory interpretation make haste to buttress their own convictions by the production of historical precedent," which Thorne concluded did not support a modern application of the equity of the statute).

[66] Nathan Isaacs, *Price Control by Law,* 18 HARV. BUS. REV. 504, 506 (1940).

could not "be justified much longer."[67] This Note's examination of aspects of the evolution of IDEIA will underscore the relevance of Isaacs's insights long after his death.

III. Aspects of The Evolution of the IDEIA

Though Isaacs's cyclical theory of legal evolution may not help analyze many aspects of legal history, insights garnered by his theory can help explain the history of federal laws that aim to ensure free and appropriate public education ["FAPE"] for handicapped children, particularly the IDEIA.[68] The IDEIA has evolved in a manner similar to that of the cycles described by Isaacs. As predicted by Isaacs, a codification cycle that has alternated between statutes and case law has had a tremendous effect on both the external form and the substance of special education law.

The IDEIA's evolutionary cycles originated with a Pennsylvania education code that was completely out of touch with the needs of society. Section 1304 of Pennsylvania's Public School Code of 1949 stated that public school boards "may refuse to accept or retain beginners who have not attained a mental age of five years."[69] The statute permitted the complete exclusion of developmentally disabled children from public schools. Congress in 1966 set up a grant program to aid the education of handicapped children by amending the Secondary Education Act of 1965,[70] and passed a separate and superseding law for the same purpose in 1970.[71] However, neither of those laws set out definite guidelines for the use of the grant money by the states.[72]

In 1971, the United States District Court for the Eastern District of Pennsylvania attempted to address the resulting mass exclusion of handicapped children from mainstream public school programs. In *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* ["*PARC*"], it approved a consent agreement which obliged Pennsylvania's public schools to provide developmentally disabled children "access to a free public program of education and training appropriate" to their learning abilities."[73] This decision can be considered a form of legal fiction because, in order to achieve this result, the court ignored the language of section 304 granting a plain right to Pennsylvania's school boards to exclude mentally handicapped children.[74] The court did not squarely face the conflict between the intent of the

---

[67] Nathan Isaacs, Book Review, 51 Harv. L. Rev. 769, 771 (1938) (reviewing Walter J. Derenberg, Trade-mark Protection and Unfair Trading (1936)).

[68] Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400–1482 (2006)).

[69] 24 Pa. Cons. Stat. § 13-1304 (1949).

[70] Pub. L. No. 89-750, § 161, 80 Stat. 1204 (1966).

[71] Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175, 178–81 (1970).

[72] *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 180 (1982); S. Rep. No. 94-168, at 5 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425; H.R. Rep. No. 94-332, at 2–3 (1975).

[73] 334 F. Supp. 1257, 1258 (E.D. Pa. 1971).

[74] *Id.* at 1260.

statute and the needs of society, and the resulting solution could not have been binding beyond the borders of Pennsylvania.

In contrast, in *Mills v. Board of Education,* the United States District Court for the District of Columbia sought to alleviate both the complete denial of public education to disabled children and the exclusion of other handicapped children from regular classrooms on constitutional grounds.[75] The District Court relied on the U.S. Supreme Court's statement that public education must be "available to all on equal terms."[76] The court reasoned that because the District of Columbia was providing public education, it was violating the Equal Protection Clause by denying public education to disabled youth.[77] In order to secure this right, the court determined that due process required a hearing before a disabled child's educational program was changed, along with a periodic review of the child's educational progress.[78] Notably, the D.C. public school system was obligated to bear the expenses involved in providing education for the disabled.[79]

The *PARC* and *Mills* decisions sparked a national discussion about the exclusion of disabled children from public education and the great financial burden that such education would place upon local governments.[80] It would have been cumbersome for courts to develop a comprehensive national program to deal with the dilemma because different district courts might have formulated wildly different solutions. Congress believed that it needed to address the mass denial of education to the majority of American handicapped children who "were either totally excluded from schools" or merely "sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[81] Congress passed an interim bill which greatly increased federal funding for special education in 1974.[82] However, one cycle of special education law closed and another truly began in 1975 when Congress passed the Education for All Handicapped Children Act ["EAHC"],[83] which conditioned a federal grant program to those states who complied

---

[75] 348 F. Supp. 866 (D.D.C. 1972).

[76] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[77] *See Mills*, 348 F. Supp. at 874–75 (citing Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (holding that the Equal Protection Clause, as incorporated by the Due Process Clause of the Fifth Amendment, required the District of Columbia to provide equal educational opportunity to poor and affluent students)).

[78] *Id.* at 875.

[79] *Id.* at 876.

[80] Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism,* 121 HARV. L. REV. 4, 75 (2007).

[81] H.R. REP. NO. 94-332, at 2 (1975).

[82] Education for All Handicapped Act, Pub. L. No. 93-380, 88 Stat. 576 (1974); *see also* H.R. REP. NO. 94-332, at 4 (explaining that the 1974 amendments were an interim measure designed to allow study for comprehensive legislative reform).

[83] Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1405–1406, 1415–1419 (2006)).

with the Act's aims and procedures.[84] The legislative history of that Act indicates that Congress sought to codify the principles of *PARC* and *Mills*.[85]

However, the spirit of those two decisions could not be so easily codified once courts were obliged to interpret the words of the EAHC. The first Supreme Court decision that interpreted the EAHC—*Board of Education v. Rowley*—decided in the spirit of glossation that the Act only required that handicapped children receive some educational benefit, rather than the most educational benefit possible.[86] Justice Rehnquist, writing for the Court, acknowledged that the principles of *PARC* and *Mills* had been incorporated into the Act, but reasoned in part that a full educational benefit was not required by the EAHC because the *PARC* decision used the word "adequately" and the *Mills* decision used the word "adequate" to describe the education guaranteed to handicapped children.[87] The Court disregarded the revolutionary role played by those words in a context in which most handicapped children were not receiving any educational benefits at all and instead fixated on the literal meaning of the words. The Court went so far as to dismiss the principle of the *Mills* equal protection analysis, which presumably was incorporated into the EAHC by Congress, as cast into doubt by two decisions before the passage of the EAHC in which the Supreme Court had held that the Constitution did not require equal educational opportunities for rich and poor students.[88]

Nonetheless, *Rowley*'s gloss on congressional intent was apparently correct. Congress did not attempt to supersede *Rowley* to any great extent until the EAHC, which had been renamed the Individuals with Disabilities Education Act in 1991 [IDEA],[89] was reenacted in 1997.[90] The 1997 reenactment embodied "a significant shift in focus from the disability education system" of the prior two decades.[91] Congress believed that the goal of the EAHC of providing access to public education had been mainly accomplished by 1997.[92] However, Congress sought to address the education system's failure to make sufficient progress for disabled students, caused in part by its failure to apply proven research methods of educating children with disabilities and in part by its "low expectations" for these students.[93] Con-

---

[84] *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982).

[85] H.R. REP. NO. 94-332, at 3–4; *see also* S. REP. NO. 94-168, at 8, *as reprinted in* 1975 U.S.C.C.A.N 1432 (describing how the 1974 act "incorporated the major principles of the right to education cases").

[86] 458 U.S. at 198.

[87] *Id.* at 193 n.15 (citing *PARC*, 334 F. Supp. at 1258; *Mills*, 348 F. Supp. at 878).

[88] *See id.* at 199–200 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969)).

[89] Pub. L. No. 102-119, § 1, 105 Stat. 587 (1991).

[90] Pub. L. No. 105-17, 111 Stat. 37 (1997).

[91] J.R. *ex rel.* W.R. v. Sylvan Union Sch. Dist., No. CIV S-06-2136, 2008 WL 682595, at *11 n.13 (E.D. Cal. Mar. 10, 2008).

[92] *See* 20 U.S.C. § 1400(c)(3) (2006).

[93] *Id.* § 1400(c)(4).

gress announced there was a national policy of "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[94] The 1997 reenactment does not recognize the requirement that schools create programs designed to enable disabled children to receive post-secondary educations, to live independently, or to achieve economic self-sufficiency.[95] The United States District Court for the Eastern District of California has observed that *Rowley* has therefore, to some extent, been superseded.[96]

IV. The Competing Fictional and Equitable Grounds for *Winkelman*

Not all of the court decisions and statutory amendments of the past decades that relate to special education can be so neatly mapped upon Isaacs's legal evolutionary cycles. However, Isaacs's insights into the differences between statutory analysis based upon legal fictions and analysis based upon equitable principles can help clarify recent judicial confusion regarding parental *pro se* representation of IDEIA claims.

The Supreme Court's *Winkelman*[97] decision established that parents can represent themselves *pro se* in federal court to vindicate their own individual rights to have their children receive the substantive rights guaranteed by the IDEIA. If the purpose of the IDEIA is taken into account, no other result is possible. The Supreme Court found it implausible that when "Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate."[98] It is hardly possible that Congress intended to bar poor parents, the group most in need of the IDEIA's aid, from defending their children's right to appropriate and free public education in federal court because they could not afford to hire lawyers to represent their interests.

However, an examination of the decision will reveal that the Court's reasoning is internally conflicted between the reasoning of legal fictions and that of equity. Justice Kennedy, who wrote for the seven-justice majority,[99] reached his conclusion in two ways: through legal fictions and a consideration of the purpose of the statute. Consequently, lower courts were given the wiggle room to defeat the Supreme Court's purpose in *Winkelman* by reading the case in the narrowest possible way. *Winkelman* is an example of Justice Marshall's principle that "[e]asy cases at times produce bad law . . . ."[100] *Winkelman* could have been decided on both textual and non-textual

---

[94] *Id.* § 1400(c)(1).
[95] *See J.R.* ex rel. *W.R.*, 2008 WL 682595, at *11 n.13.
[96] *See id.*
[97] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007).
[98] *Id.* at 2005 (quoting 20 U.S.C. § 1401(29) (2000 & Supp. IV 2004)).
[99] *Id.*
[100] Heckler v. Chaney, 470 U.S. 821, 840 (1985) (Marshall, J. concurring).

grounds. By not clearly indicating which was the controlling rationale, the Court sent conflicting signals to lower courts.

The facts and the procedural history of *Winkelman* demonstrate that the IDEIA would have hardly been viable if parents were not granted an individual interest in each child's substantive rights under the Act. In 2003, Mr. and Mrs. Winkelman became concerned that that their six-year-old son Jacob, who suffered from autism spectrum disorder, would not progress well at his public school in Parma, Ohio.[101] Autism spectrum disorder is a disability within the definition of the IDEIA.[102] The Winkelmans and the school district could not agree on an individualized education program ("IEP"), and the Winkelmans were not satisfied with results of the impartial due process hearing that followed.[103] The Winkelmans then sought to represent their own and their son's claims on behalf of themselves and their disabled child. They alleged that the school district failed to comply with the IDEIA.[104] The United States District Court for the Northern District of Ohio dismissed the Winkelman's suit on the pleadings.[105]

On appeal, a Sixth Circuit panel dismissed the case without discussing the substantive grounds of the appeal.[106] The appellate panel was obliged to dismiss the suit because the Sixth Circuit had recently held in *Cavanaugh v. Cardinal Local School District*[107] that parents could not represent *pro se* their child's rights and that parents did not have the substantive rights the IDEIA required to grant them standing in their own capacity.[108] In *Cavanaugh*, the Sixth Circuit acknowledged its disagreement with the First Circuit's position that a parent and child under the IDEA had joint statutory rights.[109] If the Winkelman's suit had then ended, they may not have been able to afford the legal representation necessary to vindicate their son Jacob's rights. However, the Supreme Court granted *certiorari.*[110]

The formal question before the Court was "whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attor-

---

[101] *See Winkelman*, 127 S. Ct. at 1998.

[102] *See id.*

[103] *See id.*

[104] *See id.*

[105] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 411 F. Supp. 2d 722 (N.D. Ohio 2005).

[106] *See* Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 150 F. App'x 406 (6th Cir. 2005).

[107] 409 F.3d 753 (6th Cir. 2005).

[108] *See Winkelman*, 150 F. App'x at 407. Article III of the Constitution grants jurisdiction to the federal judiciary over only "cases" or "controversies." U.S. CONST. art. III, § 2. In order to properly plead Article III standing, the plaintiff must allege an injury that is fairly traceable to the challenged conduct and can be redressed by the relief requested. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

[109] *Cavanaugh,* 409 F.3d at 757 (citing Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247 (1st Cir. 2003)).

[110] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 127 S. Ct. 467 (2006).

neys."[111] However, the implicit question was whether poor parents and their children could defend their right to a free and appropriate public education. The Court could not resolve the question before it by means of studying and glossing the literal meaning of the IDEIA's words because there was no "specific provision in IDE[I]A mandating in direct and explicit terms that parents have the status of real parties in interest"[112] regarding substantive IDEIA rights.

However, there remained two other ways to resolve the case. Justice Kennedy claimed that both "the text of the IDE[I]A" and quite separately, the "entire statutory scheme" of the IDEIA resolved the question presented.[113] The Court's emphatic answer to the question presented was that the "IDE[I]A does not differentiate . . . between the rights accorded to children and the rights accorded to parents."[114] Martha Nussbaum has asserted that *Winkelman* broke "no new legal ground" because the IDEIA if "carefully read" unambiguously grants parents an independent right for their children to receive a free and appropriate public education.[115]

However, if the purpose of the IDEIA is ignored, the text of the statute is ambiguous regarding whether it grants to parents independent, substantive, rights—indeed, Justice Kennedy's textual arguments seem more like unconvincing legal fictions than sound textual analyses. The Court described many provisions of the IDEIA statute in which parents play a role, in an attempt to show that parents have an independent substantive right for their children to receive IDEIA rights. Still, only a strained reading of those provisions can establish that parents have more than procedural rights under the IDEIA. The distinction is important, because many cases may involve only a substantive claim by parents that their child is not receiving FAPE. The Court noted that a parent must be a member of the team that develops an IEP.[116] The Court also noted that the parents' "concerns" regarding "enhancing the education of their child" must be considered by an IEP team.[117] Furthermore, the Court listed the "general procedural safeguards" and rights enjoyed by parents throughout the process of developing an educational pro-

---

[111] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 1998 (2007). Though *Winkelman* arose under the IDEA, the Supreme Court examined the 2004 IDEIA act text to reach its decision. *Winkelman*, 127 S. Ct. at 2000; *see also* J.R. *ex rel.* W.R. v. Sylvan Union Sch. Dist., No. CIV S-06-2136, 2008 WL 682595, at *1 n.2 (E.D. Cal. Mar. 10, 2008) (recognizing *Winkelman*'s authority over IDEIA though the case construed the IDEA).

[112] *Winkelman*, 127 S. Ct. at 1999.

[113] *Id.*

[114] *Id.* at 2004.

[115] Nussbaum, *supra* note 80, at 76.

[116] *Winkelman*, 127 S. Ct. at 2000 (citing 20 U.S.C. § 1414(d)(1)(B) (2000 & Supp. IV 2004)). An unwary reader may not realize that the parent need not be the parent of the child who is the subject of the IEP. *Id.* ("IDE[I]A requires school districts to develop an IEP for each child with a disability, . . . with parents playing 'a significant role' in this process . . . . Parents serve as members of the team that develops the IEP.") (internal citations omitted).

[117] *Id.* (quoting 20 U.S.C. § 1414(d)(3)(A)(ii) (2000 & Supp. IV 2004)).

gram for their child.[118] The Court might seem to be on strong ground here, because the text of § 1415(a) requires states to create and implement procedures that "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education."[119] Furthermore, the Court also emphasized that § 1415(b)(1) mandates that parents have access to all records relating to their child.[120] If § 1415(b)(2)(a) did not exist, the Court's argument that § 1415(a) and § 1415(b)(1) conclusively create for parents an independent right of FAPE for their child may have had firmer textual foundations. However, § 1415(b)(2)(a) states that if the parents of the child are unavailable, an individual is assigned "to act as a surrogate for the parents."[121] It is plausible that all of these statutory sections are really discussing the procedural rights that are granted to a parent because the child does not have the ability to exercise them herself. These sections surely do not necessarily mean that a parent has an independent right to a FAPE for his child.

The Court majority also pointed to a series of provisions that refer to the "parent's complaint" in an attempt to show that parents have an independent right to a FAPE for their child.[122] Section 1415(i)(3)(B)(i)(I) allows the award of attorney's fees to "a prevailing party [of an administrative hearing] who is the parent of a child with a disability."[123] In turn, that language could be interpreted to grant the parent standing in federal court because the IDEIA permits "[a]ny party aggrieved by the findings and decision made [by the hearing officer] . . . the right to bring a civil action with respect to the complaint."[124] However, Justice Scalia convincingly pointed out that the listed provisions merely demonstrate that those parents have procedural rights under the IDEIA, and does not bestow upon them substantive rights.[125] The Court also asserted that the grammar of one of the IDEIA's statements of purpose, ensuring "that the rights of children with disabilities and parents of such children are protected,"[126] presupposes that parents possess independent substantive rights under the IDEIA.[127] But surely grammar does not

---

[118] *Id.* (citing 20 U.S.C. §§ 1414(d)(4)(A) (2000 & Supp. IV 2004) (requiring the IEP Team to revise an IEP when parents supply certain information); 1414(e) (2000 & Supp. IV 2004) (requiring that States to "ensure that the parents of [a child with a disability] are members of any group that makes decisions on the educational placement of their child")).

[119] 20 U.S.C. § 1415(a) (2006).

[120] *Winkelman*, 127 S. Ct. at 2000 (citing 20 U.S.C. § 1415(b)(1) (2000 & Supp. IV 2004) (requiring procedures that provide "[a]n opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child")).

[121] 20 U.S.C. § 1415(b)(2)(A) (2006).

[122] *Winkelman*, 127 S. Ct. at 2002.

[123] *Id.* (citing 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2000 & Supp. IV 2004)).

[124] *Id.* at 2001 (citing 20 U.S.C. § 1415(i)(2)(A) (2000 & Supp. IV 2004)).

[125] *Id.* at 2009.

[126] 20 U.S.C. § 1400(d)(1)(B) (2006).

[127] *Winkelman*, 127 S. Ct. at 2002.

preclude the possibility that the rights granted to children and to parents are not identical. Nonetheless, the Court construed these various provisions to grant parents an independent and enforceable right to a FAPE.[128]

Overall, Justice Scalia's jibe that the Court had attempted to create a substantive parental right to education for their child by "spraying statutory sections about like buckshot" hit the mark.[129] All of the provisions cited by the Court majority can be more plausibly read as safeguards for ensuring that a child receives a FAPE rather than, as claimed by the Court, a grant to parents of a substantive right of a FAPE for their child.[130] The statute does provide for an award "to a prevailing party who is the parent of a child with a disability."[131] A literal reading of the sentence does seem to indicate that the "parent" is the "prevailing party." Since the parents pay for their child's education, it does make some sense to consider the parents the prevailing party when money is awarded to them. However, that provision may just reflect the practical reality that such a payment is most conveniently given to a parent and not a separate trustee for the child. The provision hardly demonstrates that parents have an independent right for their child to receive FAPE. The Court's strained reading of those statutory provisions was probably motivated by the substantive policy goal of enabling poor parents to protect their children's IDEIA rights. Because the Court did not openly acknowledge that it was carrying out a strained reading of the statute that presumed congressional intentions that are not plausibly there, its reading can appropriately be described as an exercise in legal fiction.

The Court may have sensed the weakness of its arguments, as Justice Kennedy went on to offer an alternative argument that parents have an independent right to a FAPE for a child based upon the "statutory structure" of the IDEIA.[132] Justice Kennedy's alternative arguments, based upon the IDEIA's "interlocking" statutory scheme, can be viewed as an equitable interpretation based upon the purpose of the statute.[133]

The Court essentially argued that although no particular word or phrase in the IDEIA creates substantive rights for the parents, the entire Act is based upon the unwritten premise that parents have a right to have their child receive a FAPE and allowing parents to pursue that right would further the goals of the IDEIA. It noted that the "goals of IDE[I]A include 'ensur[ing] that all children with disabilities have available to them a free appropriate public education' and 'ensur[ing] that the rights of children with disabilities

---

[128] *Id.*

[129] *Id.* at 2009.

[130] *See id.* at 2001–02. For example, 20 U.S.C. § 1415(g)(1) (2006)—"any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency,"—is much more easily read as a procedural safeguard than as a substantive right.

[131] 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2006).

[132] *See Winkelman*, 127 S. Ct. at 2004.

[133] *See id.* at 1999 (presenting the possibility that the IDEIA as a whole granted parents independent rights).

and parents of such children are protected.'"[134] The Court also observed that an essential element of the statute is its establishment of "general procedural safeguards that protect the informed involvement of parents in the development of an education for their child."[135] It linked these procedural safeguards to the IDEIA's goal of a free, appropriate public education.[136] The Court commented that the IDEIA goes to great lengths "to ensure that the rights of children with disabilities and parents of such children are protected."[137] Justice Kennedy described how the parents of a child play a key role in the substantive formulation of the cornerstone of the act, the IEP.[138]

The IDEIA empowers parents to challenge a broad array of substantive issues affecting their child's education.[139] Within that statutory context it is implausible that the Act grants procedural rights to parents but not substantive rights. These rights under the IDEIA are thus inextricably linked because the "adequacy of the educational program is, after all, the central issue in the litigation."[140] Therefore, Justice Kennedy argued, the IDEIA grants parents "independent, enforceable rights . . . which are not limited to certain procedural and reimbursement-related matters, [but] encompass the entitlement to a free appropriate public education for the parents' child."[141]

Therein lies a sturdy foundation for the Court's decision. Congress had made its intent to grant substantive rights to parents sufficiently clear when it stated in the IDEIA's introduction that "the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."[142] The purpose of the Act would have been defeated if parents who could not afford legal counsel could not argue substantive IDEIA claims *pro se* in federal court because they personally lacked standing. As the Court wrote, "[t]he potential for injustice in this result is apparent."[143]

However, the Court did not make clear whether its holding was based upon its strained reading of the IDEIA's statutory provisions or on the alternative ground of the IDEIA's goal of providing education to disabled children. The seven-justice majority might have been internally divided over whether to base its analysis upon the purpose of the statute, or upon the

---

[134] *Id.* at 2000 (quoting 20 U.S.C. § 1400(d)(1)(A)-(B) (2000 & Supp. IV 2004)).

[135] *Id.*

[136] *Id.* (citations omitted) ("A central purpose of the parental protections is to facilitate the provision of a [FAPE], which must be made available to the child . . . .").

[137] *Id.* at 2005 (citation omitted).

[138] *Winkelman*, 127 S. Ct. at 2004 (citing 20 U.S.C. § 1414(d)(3)(A)(ii) (2000 & Supp. IV 2004)).

[139] *Id.* (citing 20 U.S.C. § 1415(b)(6)(A) (2000 & Supp. IV 2004)).

[140] *Id.* at 2005.

[141] *Id*.

[142] *Id.* at 2006–07 (citing 20 U.S.C. § 1400(c)(5) (2000 & Supp. IV 2004)).

[143] *Id.* at 2005.

superficially sound but ultimately flimsy foundation of an array of statutory provisions, none of which directly establish that parents have independent rights under the IDEIA.[144] The Court seemed unwilling to fully transition from what Isaacs described as a technique of legal fictions to an embrace of a method that attempts to discover principles underlying the statute. This hesitancy may have been motivated by a modest conception of the judicial role in a democracy. That caution, however, has resulted in a great deal of uncertainty among the lower courts.

V. *Winkelman*'s Confused and Bickering Progeny

The lower courts that have interpreted *Winkelman* have been divided over whether parents can represent *pro se* their child's IDEA rights and whether parents can represent their child's claims under two federal laws, the Rehabilitation Act[145] and the ADA,[146] which prohibit discrimination upon the basis of disability. The Supreme Court in *Winkelman* sowed the seeds of this confusion by holding that parents could represent their personal substantive IDEIA claims *pro se*, but declining to address the more contentious issue of whether parents could represent their child's IDEIA claims *pro se*.[147] Though such a discussion might have been unnecessary to resolve the particular case before the Court, the Court's rectitude laid a trap for unwary lower courts. With the benefit of Isaacs's cycle theory, it becomes clear that some courts have relied upon fictions to answer the questions provoked by *Winkelman*, while others courts have emphasized the equitable principles undergirding the IDEIA.

If the true basis for the Court's holding that parents possess independent substantive IDEIA rights was its imaginative reading of the IDEIA's text, that legal fiction could not be easily extended to grant parents the right to represent *pro se* their child's own IDEIA, Rehabilitation Act, or ADA claims. The statutory language relevant to those issues is quite different from the text examined by the Supreme Court in *Winkelman.*[148] The issue is of great significance because the ADA and Rehabilitation Act may cover a child, while the IDEIA may not, depending on her individual disability and circumstances. The ADA provides that "[n]o otherwise qualified individual with a disability" will be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

---

[144] *Winkelman*, 127 S. Ct. at 2009 (Scalia, J., dissenting) (arguing that the Court's many textual citations did not establish an independent parental right).

[145] 29 U.S.C. §§ 706, 794–794(a) (2006).

[146] 42 U.S.C. §§ 12101–12213 (2000).

[147] *Winkelman*, 127 S. Ct. at 2007.

[148] *See infra* nn. 177–185 and accompanying text.

receiving Federal financial assistance."[149] The Rehabilitation Act only protects disabled people "qualified" under its particular requirements.[150]

However, if the Court's holding was based on a judgment that the IDEIA's purpose of providing education to disabled children would be frustrated if poor families could not prosecute those claims *pro se* in federal court, then the same logic should apply to allow parents to represent *pro se* their child's IDEIA, Rehabilitation Act, and ADA claims. Lower courts have been free to choose between these two options, and they have been far from unanimous in their choices. This result is perfectly understandable because it is "difficult to know which of the factual and legal props were essential to support" Justice Kennedy's *Winkelman* decision.[151]

There is little dispute that the general rule that a party cannot represent *pro se* another person's claim[152] was not abrogated by *Winkelman.* For example, the Ninth Circuit in *Stoner v. Santa Clara County Office of Education* held that a realtor bringing a *qui tam* suit on behalf of the government could not bring the claim *pro se* because the claim was derivative.[153] The court distinguished the claim before it from *Winkelman*, where the parents made an independent and individual claim for FAPE.[154]

Winkelman also did not seriously call into question the prevailing rule[155] that a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney. The Supreme Court of Ohio argued that *Winkelman* did not affect the common law prohibition of a parent representing a child *pro se* because *Winkelman* was based upon a "unique, comprehensive statutory scheme."[156] Likewise, *Winkelman* will probably not be held to have altered the general rule outside the context of

---

[149] 29 U.S.C. § 794(a) (2006).

[150] 42 U.S.C. § 12112(a) (2000).

[151] *Cf.* ANDREW L. KAUFMAN, CARDOZO 560 (1998) (describing many of Justice Cardozo's opinions as "like chairs with six legs").

[152] *See, e.g.*, Martin v. City of Alexandria, 198 F. App'x 344, 346 (5th Cir. 2006); Shepherd v. Wellman, 313 F.3d 963, 970 (6th Cir. 2003); Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998) ("Because *pro se* means to appear for one's self, a person may not appear on another person's behalf in the other's cause. A person must be litigating an interest personal to him."); Russell v. United States, 308 F.2d 78, 79 (9th Cir. 1962); Collins v. O'Brien, 208 F.2d 44, 45 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 944 (1954). *See also* Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 232 (3d Cir. 1998) ("The rule that a non-lawyer may not represent another person in court is a venerable common law rule.").

[153] 502 F.3d 1116, 1127 (9th Cir. 2007).

[154] *Id.*

[155] *See, e.g.*, Devine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997), *cert. denied,* 522 U.S. 1110 (1998); Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997); Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876 (3d Cir. 1991); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) (holding that under FED. R. CIV. P. 17(c) and 28 U.S.C. § 1654 a non-attorney parent cannot represent a child in litigation without the aid of counsel). *But see* Harris v. Apfel, 209 F.3d 413 (5th Cir. 2000) (finding the general rule inapplicable in the context of appeals from administrative denials of Social Security benefits).

[156] *In re* C.S., 84 N.E.2d 1177, 1190 n.1 (Ohio 2007) (holding that a parent could not represent *pro se* a juvenile delinquency suspect); *see also* Chambers v. Tibbs, 980 So. 2d 1010, 1015 (Ala. Civ. App. 2007) (holding that parents could not represent their child in non-IDEIA claims against a school principal and that although the "style of the action" indicated it as-

disability law. The Judiciary Act section which permits plaintiffs to represent themselves in federal court[157] and the Federal Rules of Civil Procedure, which do not list parents as representatives who may sue or defend on behalf of a minor or an incompetent person,[158] have been interpreted by the courts to not allow parents to represent their children *pro se*.[159] The policy justification for this interpretation is the fear that "unskilled, if caring" parents would mishandle their children's claims.[160]

There is general agreement among the federal district courts that *Winkelman* established that a parent can represent herself *pro se* to vindicate her own individual, substantive right for her child to receive FAPE.[161] Yet the Supreme Court's refusal to decide whether parents could represent their child's substantive IDEIA claims without an attorney drew immediate attention.[162] The analysis of that question ultimately depends upon whether lower

---

serted the parents' legal rights as *pro se* litigants, the parents failed to specifically assert any claims on their own behalf).

[157] 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

[158] *See* Fed. R. Civ. P. 17(c).

[159] *See, e.g.*, Johns v. County of San Diego, 114 F.3d 874, 877 (9th Cir. 1997) (holding that a parent or guardian cannot bring an action on behalf of minor child without retaining lawyer); Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 883 (3d Cir. 1991) (holding that it is "well-established" that a non-attorney parent cannot represent her child in place of an attorney); Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990) (holding that a "non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child"); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) (holding that "under Fed. R. Civ. P. 17(C) and 28 U.S.C. § 1654 a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney"); Lawson v. Edwardsburg Pub. Sch., 751 F. Supp. 1257 (W.D. Mich. 1990) (holding that a handicapped child and her father who brought action under the EAHC were not permitted to represent interests of his or her minor child); *see also* Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998) (collecting cases and studying relevant policy).

[160] Devine v. Indian River County Sch. Bd., 121 F.3d 576, 582 (11th Cir. 1997).

[161] *See, e.g.*, Blunt v. Lower Merion Sch. Dist., 559 F. Supp. 2d 548, 556 n.2 (E.D. Pa. June 6, 2008) (stating that parents have substantive rights under the IDEIA); Tereance D. *ex rel.* Wanda D. v. Sch. Dist. of Phila., 548 F. Supp. 2d 162, 170 (E.D. Pa. 2008) (holding that a parent's claim for a FAPE on behalf of her son was sufficient for her to be a party in her own right); N.N.J. v. Broward County Sch. Bd., No. 06-61282-CIV, 2007 WL 3120299, at *2 (S.D. Fla. Oct. 23, 2007) (holding that a parent has right to her child receiving a "meaningful education"); M.W. *ex rel.* Wang v. Clarke County Sch. Dist., No. 3:06-CV-49CDL, 2007 WL 2765572, at *1 (M.D. Ga. Sept. 20, 2007); Taylor v. Altoona Area Sch. Dist., 513 F. Supp. 2d 540, 554 (W.D. Pa. 2007) (stating that there is "no question that the IDEIA provides both disabled students and their parents with private means of redress"); Montclair Bd. of Educ. v. M.W.D., No. 05-3516 DMC, 2007 WL 1852342, at *2 (D.N.J. June 26, 2007) (holding that a parent was a real party of interest in IDEIA suit in addition to her son and that she was allowed to petition for *pro bono* counsel for both herself and her son); *see also* K.D. v. Oakley Union Elementary Sch. Dist., No. C 07-00920 MHP, 2008 WL 360460, at *12 (N.D. Cal. Feb. 8, 2008) (holding that a parent had standing due to his rights under the IDEIA, but claim was time barred); DeMerchant v. Springfield Sch. Dist., No. 1:05-CV-316, 2007 WL 2572357, at *1 n.2 (D. Vt. Sept. 4, 2007) (observing that the *Winkelman* decision held that parental rights under the IDEIA included both procedural rights and the entitlement to FAPE, but dismissing both procedural and substantive claims on other grounds).

[162] *See* M.W. *ex rel* Wang, 2007 WL 2765572, at *1 (encouraging parties to study *Winkelman* when formulating pleadings).

courts understand *Winkelman* to be based on the IDEIA's goal of providing education to handicapped children who cannot afford counsel, or on a much more limited statutory interpretation of the Act.

Interpreting *Winkelman* in accord with the Supreme Court's attempt to provide meaningful education to disabled youth requires recognizing that the Court only declined to address whether parents could represent their child *pro se* because it had already found that parents and children had identical procedural and substantive rights to a FAPE.[163] A Ninth Circuit panel similarly recognized the IDEIA's goal of helping disabled youth, holding that though a parent may not represent a minor child's claims *pro se*, it was not necessary to decide whether the minor son was a party to the action because the parent's asserted basis for recovery was identical to the child's.[164] The United States District Court for the District of New Hampshire and a magistrate judge of that district adopted a similar analysis of the equitable import of *Winkelman* in two cases. Thus, without an attorney, parents were allowed to prosecute claims that were identical to their children's IDEIA claims.[165] The district court argued that the Supreme Court had not found it necessary to decide whether parents could represent their child in an IDEIA suit without an attorney in federal court because the Court had already ruled that "the rights and interests of parents and their children under the IDE[I]A are co-extensive."[166] It was therefore "fair and equitable" to allow parents who had sued on behalf of their child to pursue "their own co-extensive rights under the IDE[I]A."[167] Likewise, the magistrate judge held that though a parent could not, "strictly speaking," represent her son's IDEIA rights, she was allowed to "pursue her own identical claims in her own right."[168] Indeed, several courts have refused to let parents pursue their child's IDEIA claims without an attorney, while allowing them to prosecute their own, substantively identical claims.[169] Other courts have gone further and recognized that

---

[163] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2007 (2007) ("In light of our holding we need not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se*.").

[164] *See* Blanchard v. Morton Sch. Dist., 260 F. App'x 992, 993 (9th Cir. 2007).

[165] *See* J.P.E.H. v. Hooksett Sch. Dist., No. 07-CV-276-SM, 2007 WL 4553936, at n.1 (D.N.H. Dec. 18, 2007); Alexandra R. *ex rel.* Burke v. Brookline Sch. Dist., No. 06-CV-215-SM, 2007 WL 2669717, at *1 (D.N.H. Sept. 6, 2007).

[166] *Alexandra R.*, 2007 WL 2669717, at *1.

[167] *Id.*

[168] *J.P.E.H.*, 2007 WL 4553936, at n.1 (holding that a parent was "pursuing her own co-extensive rights" under the IDEIA).

[169] *See, e.g.*, R.Y. v. Visalia Unified Sch. Dist., No. CV-F-06-1407 OWW/DLB, 2008 WL 117981, at *1 (E.D. Cal. Jan. 10, 2008) (allowing parents to represent their own claims under the IDEIA, but not allowing them to represent their child by themselves); N.N.J. v. Broward County Sch. Bd., No. 06-61282-CIV, 2007 WL 3120299, at *2 (S.D. Fla. Oct. 23, 2007) (holding that a parent had a right to her child receiving a "meaningful education" and that she could litigate her own claims *pro se*, but not her child's claim); Bell v. Anderson Cmty. Sch., No. 1:07-cv-00936-JDT-WTL, 2007 WL 2265067, at *8 n.13 (S.D. Ind. Aug. 6, 2007) (holding that parent could not litigate on behalf of child *pro se*, but could litigate personal IDEIA claim *pro se*); L.J. v. Broward County Sch. Bd., No. 06-61282-CIV, 2007 WL 1695333, at *2 (S.D. Fla. June 8, 2007); *see also* Strock v. Indep. Sch. Dist. No. 281, No. 06-CV-3314(JMR/

Winkelman's acceptance of the independent IDEIA rights possessed by parents grants them standing to bring an IDEIA claim on behalf of their children.[170]

However, some courts have viewed the Supreme Court's failure to decide whether parents can represent their children's claims without a lawyer as a signal that the traditional rule forbidding such actions remain in effect, despite the harm caused to indigent families. Courts that have recognized that *Winkelman* established that parents may prosecute IDEIA actions on their own behalf have insisted that still binding precedent bars parents from representing the legal claims of their minor children without an attorney.[171] One court went so far as to refuse to reconsider a decision issued before *Winkelman* that dismissed a *pro se* suit made by parents on behalf of their children, even though the parents had no way to know at the initiation of the suit that they would have had standing had they sued on their own behalf.[172] Other courts have also refused to allow IDEIA suits to proceed merely because a parent styled a complaint on behalf of his child rather than on his own behalf.[173] Some of these courts may be motivated by an animus against *pro se* petitioners,[174] but the majority of courts were probably motivated by the sensible concern that *pro se* parents will not be able to adequately represent their children's interests. However, under the IDEIA the more press-

---

FLN), 2008 WL 782346 (D. Minn. Mar. 21, 2008) (holding that a parent had standing because of his substantive interest in his child's FAPE but did not allege sufficient facts regarding alleged discrimination against his child).

[170] *See, e.g.*, Russell v. Dep't of Educ., No. 03-00654 HG-BMK, 2007 WL 2915616, at *3 (D. Haw. 2007) (holding "that in light of the *Winkelman* decision," the parents that had brought an IDEIA claim on behalf of their son had standing to bring an IDEIA claim on his behalf); *see also* J.L. v. Ambridge Area Sch. Dist., No. 06-cv-1652, 2008 WL 2798306, at *8-10 (W.D. Pa. July 18, 2008) (holding that in light of *Winkelman* there was sufficient justification to permit the proffered testimony of parents that the school board interfered with and denied their rights to participate in their son's education).

[171] *See, e.g.*, Jones v. Child Protective Serv., No. 3:08CV-73-S, 2008 WL 2559247, at *1 n.1, *2 (W.D. Ky. June 24, 2008)) (dismissing case without prejudice due to binding circuit precedent and insisting that minor children must obtain counsel to proceed with their claims); Peake *ex rel.* K.R.D. v. Comm'r of Soc. Sec., No. 6:06-cv-1863-Orl-KRS, 2008 WL 495377, at *1 (M.D. Fla. Feb. 20, 2008) (holding that a parent could not litigate *pro se* her child's rights under the IDEIA because of controlling Circuit precedent); Muse' B. *ex rel.* Hanna B. v. Upper Darby Sch. Dist., No. 06-CV-00343, 2007 WL 2973634, at *1 n.1 (E.D. Pa. Oct. 9, 2007) (stating that precedent holding that parents cannot represent *pro se* the legal interests of their minor child in federal court was still good law); Crawford v. Child Protective Serv., No. 3:07CV-21-H, 2007 WL 2772740, at *3 n.2 (W.D. Ky. Sept. 20, 2007) (*Winkelman* did not address whether the IDEIA entitles parents to litigate their child's claims *pro se* and controlling case law prohibits *pro se* parental representation of minor child's claim).

[172] *See* Chase v. Mesa County Valley Sch. Dist. No. 51, No. 07-CV-00205-REB-BNB, 2007 WL 2889446, at *2 (D. Colo. Sept. 27, 2007) ("Nothing in *Winkelman* suggests that parents may act *pro se* to assert the rights of their children, and long standing law is directly to the contrary.")

[173] *See, e.g.*, *Muse'*, 2007 WL 2973634, at *1 n.1 (holding in part that a parent could not represent her child *pro se* in an IDEIA suit); *Crawford*, 2007 WL 2772740, at *3, n.3 (holding that controlling case law prohibits *pro se* parent's representation of minor child's claim).

[174] *See, e.g.*, Muse' v. Upper Darby Sch. Dist., No. 07-1739, 2008 WL 2553022, at *1 (3d Cir. June 27, 2008) (affirming a consent decree negotiated by *pro bono* counsel and noting the "irrational and inconsistent" conduct of the child's mother).

ing concern should be guaranteeing that all disabled children have the opportunity to be represented in federal court.

Winkelman created even greater uncertainty over whether parents can represent their own and their children's ADA and Rehabilitation Act claims without the assistance of counsel.[175] This dispute is important because the ADA and the Rehabilitation Act may protect certain groups of children that are not covered by the IDEIA. The ADA and the Rehabilitation Act have been found to provide procedural and substantive protections similar to the IDEIA,[176] and the ADA and Rehabilitation Act each contain different definitions of disability that are broader than the IDEIA's definition.[177]

Several courts have sought to extend *Winkelman*'s holding to the ADA and the Rehabilitation Act. Some have resorted to legal fictions to attain this result, while others have based their analyses upon the purposes of the respective statutes. Courts have recognized that *Winkelman* stands for the proposition that "'a proper interpretation of the [IDEIA] requires a consideration of the entire statutory scheme.'"[178] But what does considering the entire statutory scheme mean? Examining statutory structure could mean attempting to distill and to discover the purpose of the statute, and exploring how that purpose should be applied to issues that arise with changing conditions. Such an examination could be termed as an equitable interpretation of the statute, in Isaacs's parlance. But considering the entire statutory scheme could also mean an exercise in implausible presumed meanings, linguistic gymnastics, and the ingenious cobbling together of disparate statutory provisions; in Isaacs's parlance, a legal fiction. The Court's opinion in *Winkelman* contains both styles of reasoning. The District Court for the District of New Jersey, in *Montclair Board of Education v. M.W.D,* chose to read *Winkelman* as being primarily based upon the principles of the IDEIA and American "'social and legal traditions'" which recognize the interests of parents in their children's educations.[179] Congress' chosen method of guaranteeing these goals was "'strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.'"[180]

---

[175] *See* D.A. *ex rel.* K.A. v. Pleasantville Sch. Dist., No. 07-4341 (RBK), 2008 WL 2684239, at *6 (D.N.J. June 30, 2008) ("Since *Winkelman*, courts have disagreed as to whether its reasoning applies beyond the IDE[I]A to the ADA and Rehabilitation Act.").

[176] *See id.* at *7.

[177] *Compare* 42 U.S.C. § 12131(2) (2000) *and* 29 U.S.C. § 705(9) (2006) *with* 20 U.S.C. § 1401(3)(A) (2006).

[178] Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 1998 (2007); Paul K. *ex rel.* Joshua K. v. Hawaii, No. 07-00322 SOM/KSC, 2008 WL 2605214, at *4 (D. Haw. July 1, 2008) (citing *Winkelman* and recognizing that it required consideration of the entire statutory scheme of the IDEIA, and that the divestment of a plaintiff's "jurisdiction at the end of the Decision Deadline flies in the face of the very spirit of the IDE[I]A").

[179] *See* No. 05-3516 DMC, 2007 WL 1852342, at *1 (D.N.J. June 26, 2007) (quoting *Winkelman,* 127 S.Ct. at 2006).

[180] *Winkelman*, 127 S.Ct. at 2006–07 (quoting 20 U.S.C. § 1400(c)(5) (2000 & Supp. IV 2004)).

Some courts have been willing to recognize and adopt the convincing policy rationale allowing parents to have standing under the Rehabilitation Act and the ADA. Those laws' goals of ending discrimination would be foiled if poor parents could not press their claims in federal court, much as the IDEIA's purposes would have been foiled if *Winkelman* had not granted substantive individual IDEIA rights to parents. The Ninth Circuit has decided that parents may represent their ADA and Rehabilitation Act claims of discrimination against their child without the assistance of an attorney, based upon *Winkelman*'s principle that a parent of a child with a disability has a personal and specific interest in preventing discrimination against the child.[181] Likewise, the district court in *Tereance D. ex. rel. Wanda D. v. School District of Philadelphia* denied a motion to dismiss the ADA and Rehabilitation Act claims of a parent of a disabled student because "[u]nder IDE[I]A, a parent may be an aggrieved party with standing to assert both substantive and procedural rights."[182] The discussion in these two decisions has been criticized as being too brief to have much weight.[183] Yet they can be defended as reflecting an intuitive but sound feeling that, because the IDEIA, the ADA and the Rehabilitation Act all aim to protect the educational rights of disabled children, poor children should not be disenfranchised from their protection. Respect for the enlightened self-interest of parents and the authority of the Supreme Court's decision in *Winkelman* support a finding that "a parent of a child with a disability has a particular and personal interest"[184] in preventing discrimination against the child and independent substantive rights under the IDEIA, the ADA and the Rehabilitation Act. A parent should certainly have standing "at least insofar as she is asserting and enforcing the rights of her [child] and incurring expenses for his [or her] benefit."[185]

In contrast, other courts have sought to enable parents to represent ADA and Rehabilitation Act claims *pro se* in federal court by means of statutory sleight of hand. These cases employ strained legal fictions in attempts to demonstrate that parents should be able to represent themselves

---

[181] *See* Blanchard v. Morton Sch. Dist. (*Blanchard I*), 509 F.3d 934, 938 (9th Cir. 2007) (citing *Winkelman*, 127 S. Ct. at 2003).

[182] 548 F. Supp. 2d 162, 170 (E.D. Pa. 2008).

[183] D.A. *ex rel.* K.A. v. Pleasantville Sch. Dist., No. 07-4341 (RBK), 2008 WL 2684239, at *6 (D.N.J. June 30, 2008).

[184] *Winkelman*, 127 S. Ct. at 2003.

[185] *Blanchard I*, 509 F.3d at 938; *see also* Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1115 (9th Cir. 1987) (holding that a disabled rights organization had standing under Rehabilitation Act for expenses reasonably and foreseeably expended to secure for a handicapped juror an interpreter that the defendants were legally obligated to provide); Blanchard v. Morton Sch. Dist. (*Blanchard II*), 260 F. App'x 992, 994 (9th Cir. 2007) (ruling that mother had standing to bring claims under ADA and Rehabilitation Act because she was enforcing the rights of her son).

pro se in court for the ADA, the Rehabilitation Act and the IDEIA.[186] The IDEIA states: "Any party aggrieved by the findings and decision made [at the administrative level] shall have the right to bring a civil action with respect to the complaint."[187] The Rehabilitation Act also permits recovery for "a party aggrieved" by violations of that Act.[188] *C.J.G. v. Scranton School District* argued that since a parent could be a party aggrieved under the IDEIA and bring suit, a parent could also be a party aggrieved under the Rehabilitation Act and bring suit.[189]

C.J.G. also made the similar statutory argument that parents have an independent right to sue for wrongs done to their children under the ADA.[190] The ADA guarantees "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."[191] This guarantee is enforced by § 12133, which provides that "[t]he remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title."[192] In turn, § 794a permits a claim to be brought by "any person aggrieved by any act or failure to act . . . ."[193] If these textual arguments carry the day, parents would have to be granted independent substantive rights by the ADA and the Rehabilitation Act.[194]

This wordplay is an unconvincing legal fiction. It is far from clear that a party under the IDEIA must also necessarily be a party under a completely separate statute that happens to be aimed at the same problem and uses similar tools to deal with those problems. As argued by a court that opposed extending *Winkelman* to the ADA and the Rehabilitation Act, *Winkelman* is "too closely tied to the specific language and structure of the IDEIA to apply

---

[186] *See, e.g.*, C.J.G. v. Scranton Sch. Dist., No. 3:07-CV-1314, 2007 WL 4269816, at *5 (M.D. Pa. Dec. 3, 2007) (holding that parents had "standing to bring claims for their own injuries in their own right pursuant to Section 504").

[187] 20 U.S.C. § 1415(i)(2)(A) (2006).

[188] 29 U.S.C. § 794a(2) (2006) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.").

[189] *See* 2007 WL 4269816, at *5. *See also* Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000) (holding that a mother had standing to pursue claim under the Rehabilitation Act that defendants had retaliated against her for her complaints relating to child's education).

[190] *See C.J.G.*, 2007 WL 4269816, at *6 (affording parents standing pursuant to the ADA).

[191] 42 U.S.C. § 12132 (2000).

[192] 42 U.S.C. § 12133 (2000).

[193] 29 U.S.C. § 794(a)(2) (2006) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.").

[194] *See* K.F. *ex rel.* Felix v. Francis Howell R-III Sch. Dist., No. 4:07CV01691 ERW, 2008 WL 723751, at *7 (E.D. Mo. Mar. 17, 2008) (finding that *Winkelman*'s reasoning indicates that "parents do have standing under Section 504 and the ADA as an aggrieved party in their own right").

equally to the ADA or Rehabilitation Act, even though those laws afford similar protections."[195]

Indeed, several federal district courts have decided that *Winkelman*'s holding that IDEIA rights of parents are coterminous with those of their children was based upon the IDEIA's general text and structure, rather than any specific provision in the IDEIA or fanciful interpretation of a provision. Nor are these courts willing to take up Isaacs's suggestion of interpreting similar and related statutes by analogy.[196] For example, the United States District Court for the District of New Jersey held that *Winkelman*'s reasoning did not apply to the ADA or Rehabilitation Act even though the court acknowledged that the statutes were similar and had the same aims.[197]

Courts might also have decided to read *Winkelman* on the narrowest possible grounds because they disagree with the statute's and the court's policy objective of expanding access to the courts for the parents of disabled children. Another district court case, *Woodruff ex rel. v. Hamilton Township Public School*[198] may have read both *Winkelman* and the text of the IDEIA in a strict and literal manner. The parents in *Woodruff* asserted that their school board violated both their own and their child's ADA and Rehabilitation Act rights.[199] The court acknowledged that *Winkelman* established that parents have a legal right in their child's education, but insisted that there was an important distinction between "a parent appearing *pro se* to prosecute her own claims and a parent serving as legal counsel for her child."[200] The court also argued that there was an important distinction between the IDEIA interpreted by *Winkelman,* with its interrelated statutory provisions, and the quite separate ADA and Rehabilitation Act.[201] Of course, those distinctions may have loomed less large if the court's interpretation had taken greater account of the purpose of the statutes in question. However, the *Woodruff* court explicitly decided to construe the Supreme Court's *Winkelman* decision "narrowly" and not allow the parents to bring ADA and the Rehabilitation Act suits on their own behalf.[202] The court went on to dismiss the parents' IDEIA claim because their pleadings were so "amorphous" that it could not determine if the claim was "theirs or their son's."[203] The court's hyper-critical reading ignored *Winkelman*'s recognition that parents' and children's rights to FAPE are coterminous. The *Woodruff* court was apparently motivated by a

---

[195] D.A. *ex rel.* K.A. v. Pleasantville Sch. Dist., No. 07-4341 (RBK), 2008 WL 2684239, at *7 (D.N.J. June 30, 2008).

[196] Isaacs, *supra* note 66, at 506.

[197] *D.A.* ex rel. *K.A.*, 2008 WL 2684239, at *7; *see also* J.R. *ex rel.* W.R. v. Sylvan Union Sch. Dist., No. CIV S-06-2136, 2008 WL 682595, at *12–13 (E.D. Cal. Mar. 10, 2008) (holding that parents could only represent their child's claims under the IDEIA and dismissing claims under the ADA and the Rehabilitation Act).

[198] No. 06-3815 NLH, 2007 WL 4556968, at *4 (D.N.J. Dec. 20, 2007).

[199] *See id.*

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *Woodruff*, 2007 WL 4556968, at *5.

belief that parental *pro se* actions clog and burden the court.[204] Ultimately, the district court was able to undermine *Winkelman* without having to explicitly buck the Supreme Court because the *Winkelman* opinion's divided discourse on the grounds of the decision gave the option to evade the Court's and the IDEIA's purpose.

VI. Conclusion

This Note has tried to show how Isaacs's theory of statutory evolution can help reach a better understanding of the recent history of modern federal special education law and one of its current debates. Of course, Isaacs's theory cannot be reliably used to make conjectures about the future of judicial interpretation of the IDEIA, ADA and the Rehabilitation Acts. As Isaacs recognized, "[i]t is beyond the scope of history to prophesy."[205] However, this Note's attempt to apply his analysis suggests that the judges who are shaping the course of the statutes are internally divided over the merits of adapting statues by way of legal fictions or by explicitly searching for the underlying principles of a statute. The resulting confusion and opportunism is terribly damaging and is not likely to end soon. New statutory amendments might soon be necessary to guarantee that parents can prosecute their disabled children's claims under the IDEIA, ADA and the Rehabilitation Act, without requiring them to hire counsel.

---

[204] *See id.* at *3 n.2 ("[P]rior to the involvement of their hired counsel, the Woodruffs' emergent relief motion was not directed to the proper party, precluding a resolution on the merits. After counsel was retained, and the proper parties were brought into the case, the Woodruffs' emergent motion was then heard.").

[205] Isaacs, Unpublished Manuscript, *supra* note 39.