The Contractualization of Disability Rights Law

Yaron Covo†

What body of law determines the content and scope of disability rights in the United States? The conventional wisdom is that the rights of disabled individuals are enshrined in and shaped by an array of civil rights statutes. While this answer is correct, it is incomplete. As this Article shows, U.S. disability rights are also built upon contract law concepts and doctrines. For example, in interpreting disability rights statutes, courts have turned to the parol evidence rule, the duty of good faith, and the doctrines of impossibility, materiality, duress, and mistake. Although not explicitly enumerated in disability rights statutes, these contract principles can dramatically affect the way these laws are applied.

By closely examining the role contract law plays in the adjudication of four disability rights statutes, this Article offers the first in-depth analysis of the contractualization of disability rights law. It reveals that there is a mismatch between the goals underlying the contract paradigm courts use to resolve disability rights disputes, on the one hand, and the normative underpinnings of disability rights law, on the other. Specifically, courts tend to use a general, commercial contract paradigm, which focuses on efficient transactions between sophisticated parties, whereas disability rights statutes seek to promote equality and human dignity. This mismatch is problematic, the Article argues, because it operates to the detriment of disabled individuals—the very people disability rights statutes are supposed to protect. For example, courts have invoked a strict form of the parol evidence rule to bar parents of disabled students from introducing oral promises made by school districts that were not incorporated into their children's final written educational plans.

This Article does not, however, propose abandoning the contractualization of disability rights law. Instead, it asserts that contract law, broadly construed, should be part of the disability rights framework as long as contract law is calibrated to match the values underlying disability rights statutes. Thus, this Article proposes to change the contract paradigm upon which courts rely—from a general, commercial approach to a set of rules that recognizes the specific obstacles disabled individuals face, including information asymmetry and bargaining imbalances.

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† Assistant Professor, Case Western Reserve University School of Law. For helpful comments on earlier drafts, I thank Sania Anwar, Ian Ayres, Abbe Gluck, Adi Goldiner, Hanoch Dagan, Doron Dorfman, Klaas Eller, Elizabeth Emens, Jasmine Harris, Avery Katz, Craig Konnoth, Juliet Kostritsky, Shirley Lin, Daniel Markovits, Petros Mavroidis, Jamelia Morgan, Szymon Osmola, David Pozen, Jessica Roberts, Emily Rock, Elle Rothermich, Kate Sapirstein, Ani Satz, Michael Ashley Stein, Karen Tani, and Cristina Tilley, as well as participants in the Junior Scholars Conference at Northeastern School of Law (2024), the Junior Faculty Forum at Richmond School of Law (2024), the 47th Health Law Professors Conference (2024), and the Ninth Annual Health Law Works-in-Progress Retreat at Seton Hall Law School (2025). Lastly, I thank the editors of *The University of Chicago Law Review* for their insightful and helpful edits and suggestions.

INTRODUCTION

What body of law determines the content and scope of disability rights in the United States? According to the conventional wisdom, the answer is straightforward: the rights of disabled individuals are enshrined in and shaped by an array of civil rights statutes.[1] While this answer is correct, it is incomplete. As this Article demonstrates, the exercise and adjudication of disability rights are also built upon contract law concepts and doctrines. Across a variety of social arenas—most notably employment, education, and health care—disabled plaintiffs frequently encounter contract law doctrines that, although not explicitly enumerated in disability rights laws, can dramatically affect the way those laws are applied.

This contractualization of disability rights law has essentially developed along two tracks:[2] one involving negotiations for accommodations and another involving the Spending Clause.[3] The first mechanism typically arises in the context of employment or education, where, under the Americans with Disabilities Act[4] (ADA) and the Individuals with Disabilities Education Act[5] (IDEA), the parties are required to engage in negotiations regarding accommodations and services.[6] Because these statutes are incomplete in a number of important respects,[7] many courts have turned to contract law doctrines to fill those gaps. Thus, for example, courts have invoked the parol evidence rule, the duty of good faith, and the doctrines of impossibility, materiality, mistake, and duress in resolving disputes regarding accommodation requirements under disability rights statutes.[8]

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1 *See* SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW: CASES AND MATERIALS 11–12 (3d ed. 2021) (reviewing a series of disability rights statutes).

2 *See infra* Part III.A.

3 U.S. CONST. art. I, § 8, cl. 1.

4 Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 et seq.).

5 Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified at 20 U.S.C. §§ 1400–1482).

6 *See infra* Part II.A–B. In this Article, I refer to "accommodations" broadly to include services provided to disabled students under individualized education programs (IEPs). For the definition of IEP and its role in the statutory regime governing disability education, see *infra* Part II.A.1. Because each IEP includes a list of the "appropriate learning opportunities, accommodations, adaptations, specialized services and supports" that a disabled student receives in a given year, it can be characterized as a document detailing the sum of accommodations provided to the student. *Individualized Education Program (IEP)*, N.Y. STATE EDUC. DEP'T, https://perma.cc/DEE9-8K54.

7 *See infra* Part II.

8 *See infra* Part II.A–B.

The second track arises out of litigation involving Spending Clause legislation. As stated by the Supreme Court, the theory is that because "legislation enacted pursuant to the spending power is much in the nature of a contract," general contract principles are appropriate when interpreting Spending Clause statutes.[9] The implications of the contract theory of Spending Clause legislation, although perhaps best known in the field of federalism,[10] have also been particularly important for disability rights.[11] Two Supreme Court decisions, *Barnes v. Gorman*[12] and *Cummings v. Premier Rehab Keller, P.L.L.C.*,[13] are illustrative. In those cases, the Court drew upon contract law to deny the plaintiffs punitive and emotional distress damages under § 504 of the Rehabilitation Act of 1973,[14] a Spending Clause provision that prohibits federal-funds recipients from discriminating on the basis of disability.[15] The Court reasoned that because punitive damages and damages for emotional distress are *not* "normally available for contract actions,"[16] recipients could not be treated "as having consented" to liability for such damages.[17]

Despite the important ramifications of incorporating contract law doctrines into disability rights frameworks, the legal literature has, to date, largely overlooked the issue. To be sure, some scholars have analogized the ADA and IDEA negotiation procedures to a contractual negotiation.[18] Their analyses, however, often

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9 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

10 *See infra* Parts II.C.2, III.A.2.

11 Only recently have scholars begun to recognize, mostly through the work of Professor Karen Tani and her coauthors, that (1) disability rights cases have been "key" to the development of the contract theory of Spending Clause legislation and (2) the theory has been particularly detrimental for disabled plaintiffs. *See* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism"*, 110 CAL. L. REV. 1157, 1199–1206 (2022) [hereinafter Tani, *The* Pennhurst *Doctrines*]; Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709, 1725–28 (2023); Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 924–29 (2024).

12 536 U.S. 181 (2002).

13 142 S. Ct. 1562 (2022).

14 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 et seq.).

15 29 U.S.C. § 794. For more on the contractualization of § 504, see *infra* Part II.C.

16 *Barnes*, 536 U.S. at 188; *Cummings*, 142 S. Ct. at 1567, 1572, 1574 (citing *Barnes*, 536 U.S. at 187–88).

17 *Cummings*, 142 S. Ct. at 1572; *see also Barnes*, 536 U.S. at 188 ("Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages liability was a required condition.") (emphasis in original).

18 *See, e.g.*, Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 174–77 (2005) (arguing that the IEP process is characterized by "traits of contractual autonomy," which include "strong elements of bargaining"); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86

stop there and fail to recognize the fundamental role that contract law *itself* plays in the entire disability rights apparatus.[19] Likewise, while recent work has recognized the role contract principles play in the adjudication of Spending Clause cases involving disability rights, that work has centered on federalism and the limitations of Congress's spending power, rather than on contract law.[20]

This Article offers the first in-depth analysis of the contractualization of disability rights law.[21] By exposing the oft hidden contract doctrines that courts employ in adjudicating disability rights disputes and by articulating the two tracks through which this phenomenon occurs, this Article identifies a problematic mismatch between the animating values of disability rights legislation and the use of contract law.

Specifically, the contract paradigm employed by courts is one based on a general discipline used primarily for commercial transactions between sophisticated parties.[22] The issue with that practice, this Article argues, is that it conflicts with the normative underpinnings of disability rights legislation. In other words, while the commercial contract paradigm[23] focuses on efficient

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NOTRE DAME L. REV. 1413, 1419 (2011) (describing the IDEA's institutional design as relying on "private bargaining over a highly individualized right to the provision of social services"); LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381, 425 (2018) (noting that the "IEP is a contract in practice"); Shirley Lin, *Bargaining for Integration*, 96 N.Y.U. L. REV. 1826, 1866 (2021) (referring to the process of choosing workplace accommodations as "bargaining").

19 Two writers have previously discussed the application of the "four corners" rule to IEPs. Their articles, however, have focused on cases in which the parties failed to agree on an IEP, for example, *R.E. v. New York City Department of Education*, 694 F.3d 167 (2d Cir. 2012), which raise different questions than those raised in the contract context (as discussed *infra* note 140). *See generally* Matthew Saleh, *Public Policy, Parol Evidence and Contractual Equity Principles in Individualized Education Programs: Marking the "Four Corners" of the IEP to Mitigate Unequal Bargaining Power Between Parent-Guardians and School Districts*, 43 J.L. & EDUC. 367 (2014); Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195 (2013).

20 *See supra* note 11.

21 Even the few scholarly works that engage with the use of contract law in disability rights statutes have limited their analyses to specific statutes (e.g., the ADA) and doctrines (e.g., good faith). *See, e.g.*, Lin, *supra* note 18, at 1842–48 (discussing the duty of good faith under the ADA's interactive process).

22 *See infra* Part III.B.

23 By referring to the "commercial contract paradigm," I adopt the terminology used by Professors Hanoch Dagan and Michael Heller. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 93 (2017); *see also id.* at 110 (referring to the "classical freedom of contract paradigm" as a model that relies on "one prototypical contract form"—the "commercial transaction"). Dagan and Heller associate the commercial contract paradigm with Professor Samuel Williston, whose work spearheading a movement to shape a general, unified theory of contract law "elevated commercial transactions to the core of contract." *Id.* at 8. To illustrate that "what's left in contract law today is

transactions between parties with comparable bargaining power,[24] disability rights laws (1) are meant to promote equality and human dignity,[25] and (2) usually involve situations characterized by vulnerability and disparities in access to information and resources. Thus, the commercial contract logic used by courts does not fit the disability rights context in which this logic is applied.

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mostly the law of commercial transactions," Dagan and Heller pointed to "distinctive types" of contractual relationships in the contexts of employment and family, which aim to promote noncommercial values like community, and are often not considered to be governed by "general" contract law. *See id.* at 7–11. This Article's adoption of Dagan and Heller's conception of the commercial contract paradigm warrants a number of caveats and clarifications. First, the work this conception does in this Article is descriptive, not normative. Put differently, I do not take sides in the debate on whether contract law (outside the disability context) should promote efficiency or whether it should promote autonomy. *Cf.* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 550–55 (2003) (offering an efficiency-based theory of contracts). *Cf. generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015) (justifying contract law on moral grounds); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004) (same). Rather, my claim is that, in most cases, the answer to the question of "who is the subject of general contract law" is the commercial actor. This statement is supported by some historical evidence. *See infra* notes 287–98 and accompanying text. And variations of it are often recognized by contemporary legal scholars and Supreme Court Justices. *See, e.g.*, Erik Encarnacion, *Contract as Commodified Promise*, 71 VAND. L. REV. 61, 66 (2018) ("A widely held view holds that contract law aims to enforce, and should be designed to facilitate, primarily commercial promises."); Tess Wilkinson-Ryan, David A. Hoffman & Emily Campbell, *Contracts for Everyone* 4–5 (U. Pa. L. Sch. Pub. L. Rsch. Paper No. 24-54) ("The old law, forged to respond to commercial disputes between arms' length negotiators, applies pretty well to the new contracts that make it to court, i.e., commercial disputes between arms' length negotiators."); Aditi Bagchi, *Contract as Exchange*, 113 CAL. L. REV. (forthcoming 2025) (manuscript at 28) ("Taking into account the reality of anonymity allows us to recognize contractual relationships as typically commercial rather than personal and therefore appropriate objects of economic regulation."); *Cummings*, 142 S. Ct. at 1578 (2022) (Breyer, J., dissenting) (noting that "[m]ost contracts are commercial contracts entered for pecuniary gain," which explains one "general" rule in contract law). Second, referring to the "core" of general contract law necessarily entails making generalizations that may obscure existing nuances in the application of contract law. Such generalization does not undermine this Article's argument, given that my goal is to utilize patterns and organizing principles to make a claim about disability rights adjudication, not to analyze each and every aspect of contract law. For further discussion of the commercial contract paradigm and the "Willistonian" approach to contract law, see *infra* Part III.B.

[24] *See infra* Part III.B.

[25] To be sure, some aspects of the U.S. disability rights framework, particularly in the employment context, have been understood to promote other purposes, including "saving society money by moving people off disability benefits rolls." SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 39 (2009) [hereinafter BAGENSTOS, LAW AND THE CONTRADICTIONS]. Moreover, some courts have injected, to a certain extent, an economic logic into part of the ADA. *See infra* Part I. As explained below, however, it remains the case that, in enacting the ADA, Congress was concerned by research documenting that "people with disabilities, as a group, occupy an inferior status in our society" and sought to "provide a clear and comprehensive national mandate for the elimination of discrimination against" disabled individuals. ADA § 2, 104 Stat. at 329.

This mismatch harms disabled individuals, particularly poor people and those from marginalized communities. Thus, for example, parents of disabled children may face obstacles in the form of the parol evidence rule when oral promises made by a school district are not incorporated into the written educational plan for the child.[26] Similarly, disabled employees seeking accommodations are sometimes assumed to be acting in "bad faith" simply for failing to provide sensitive information pertaining to their health and identities.[27] And, as *Barnes* and *Cummings* demonstrate, disabled plaintiffs may be barred from receiving certain damages for reasons related solely to general, commercial contract law.[28]

By making this mismatch visible, this Article also provides an unexamined perspective on why disability rights statutes have not lived up to their promises.[29] After all, more than three decades after the enactment of the ADA, there is a broad consensus that this law "has not led to dramatic changes" for disabled people.[30] Indeed, empirical studies have shown that (1) employment rates for disabled individuals have not significantly increased,[31] (2) employers and school districts are usually on the winning side of litigation arising under disability rights statutes,[32] and (3) low

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[26] *See infra* Parts II.A, IV.B.

[27] *See infra* Parts II.B, IV.B.

[28] *See infra* Parts II.C, IV.B.

[29] In writing about this perspective, I do not intend to refute existing explanations, such as the idea that there was "judicial backlash against the ADA," Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22 (2000), or the Disability Justice critique of the disability rights framework, which suggests that this framework is insufficient because it "centers people who can achieve status, power and access through a legal or rights-based framework, which . . . is not possible for many disabled people, or appropriate for all situations," SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE, A DISABILITY JUSTICE PRIMER 13 (2d ed. 2019). Nor do I think that the mismatch identified in this Article and existing explanations are mutually exclusive. Rather, my argument is that the mismatch can add important texture to those explanations by pinpointing another reason why disability rights statutes have not yielded the expected results.

[30] Jamelia N. Morgan, *Toward a DisCrit Approach to American Law*, *in* DISCRIT EXPANDED: INQUIRIES, REVERBERATIONS & RUPTURES 13, 14 (Beth A. Ferri, David J. Connor & Subini Ancy Annamma eds., 2022).

[31] *See* Jennifer Bennett Shinall, *Anticipating Accommodation*, 105 IOWA L. REV. 621, 628–34 (2020).

[32] *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 107–09 (1999); Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 392–93 (2019); Perry A. Zirkel & Diane M. Holben, *The Outcomes of Fully Adjudicated Impartial Hearings Under the IDEA: A Nationally Representative Analysis with and Without New York*, 44 J. NAT'L ASS'N ADMIN. L. JUDICIARY 126, 136–37 (2023).

income individuals and people of color are the least likely to benefit from disability rights statutes.[33]

Against this backdrop, this Article argues that any attempt to improve disability rights law must involve addressing the incongruity between the commercial contract paradigm and the animating values of disability rights statutes. To this end, this Article considers two potential avenues of reform. The first is to jettison the "individualized" model of negotiation and accommodation in favor of a set of state-based uniform measures.[34] Notably, this idea has gained some traction among scholars, though for slightly different reasons.[35] I conclude, however, that a uniform model, although promising in many respects, cannot fully address the problem because recognizing disability rights would still require an individualized accommodation model, at least as a residual framework.

This Article, therefore, asserts that the second avenue for reform—namely, changing the contract paradigm through mandatory rules and sticky defaults—is a more appropriate, and perhaps more feasible, solution. Indeed, this Article posits that contract law[36] can and should be part of the disability rights framework, as long as it is calibrated to match the values underlying antidiscrimination laws.

To be clear, this Article does not suggest that negotiations regarding educational plans or employment accommodations

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[33] *See* Heidi H. Liu, *The Proactive Process: An Empirical Study of Disparities in Workplace Accommodations*, 56 ARIZ. ST. L.J. 225, 253–54, 264–66 (2024); *see also infra* note 363 and accompanying text.

[34] *See infra* Part V.A.

[35] *See infra* Part V.A.

[36] This Article defines "contract law" and "private law" broadly, drawing upon the normative conceptualization of these terms in two interrelated theories developed by Professor Hanoch Dagan and his coauthors: "The Choice Theory of Contracts" and "Relational Justice." Based on these theories, this Article's perception of "contract law" assumes the following principles: (1) contract law is the law that governs contractual relationships, broadly defined, extending beyond abstract concepts such as "assent" and "consideration" to include aspects of employment relationships, consumer transactions, and intrafamily contracts, among others; (2) private law is not synonymous with judge-made common law, and it can also be codified in statutes and regulations; (3) different "types" of contracts are aimed at advancing different values—not only utility and autonomy, but also community and dignity; and (4) by "setting the terms of interactions" between private individuals, private law plays (and should play) a role in promoting equality and justice. *See* DAGAN & HELLER, *supra* note 23, at 41–43, 74–78; HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 3–7, 23–27; 45–50 (2024). Importantly, the descriptive and analytical claims advanced in this Article (that is, that contract law plays a significant role in the exercise and adjudication of disability rights and that the contract concepts applied by courts were generally developed for commercial transactions) do not depend on the theories advanced above. Lastly, a caveat is in order. While Dagan's theories have been developed for private actors, this Article uses a contract lens to examine relationships involving public entities, such as school districts.

should constitute contracts or that courts should treat them as such. Rather, this Article develops a set of rules that would govern the ways in which negotiations over accommodations are conducted and the ways in which courts use contract concepts to fill gaps in interpreting disability rights statutes. These rules would help ameliorate informational asymmetries between negotiating parties, empower disabled employees who may avoid requesting accommodations for fear of stigma, and establish a fair system for developing educational plans.[37]

The Article proceeds as follows. Part I describes how disability rights laws are commonly understood by lawmakers and scholars—namely, as civil rights laws. Part II breaks with the conventional wisdom and argues that disability rights are also shaped by contract principles and doctrines. Examining four major disability rights statutes, Part II provides a wide range of examples of how contract doctrines affect the reasoning and outcomes of court decisions in disability rights cases.

Part III turns from description to analysis. It answers two major questions that the contractualization of disability rights law raises: (1) what drives this phenomenon and (2) what contract paradigm courts use in adjudicating disability rights. Part III contends that courts usually use general commercial contract concepts when resolving these disputes. Part IV identifies a mismatch between the animating values of the general, commercial paradigm and the objectives of civil rights statutes. It then demonstrates how the mismatch operates to the detriment of disabled individuals.

Part V advances the Article's prescriptive claim. It argues that while adopting uniform measures that reduce the reliance on negotiated accommodations may help address the mismatch, such measures cannot fully solve the problem. Accordingly, Part V concludes by proposing to change the contract paradigm upon which courts rely from a general, commercial paradigm to one that is sensitive to (1) the problem of information asymmetry, (2) the law's vulnerability to opportunism, and (3) substantial bargaining imbalances.

Before proceeding, two caveats. First, this Article recognizes that applying a broad lens to the contractualization of disability rights law risks minimizing the differences among the contract principles invoked by litigants and courts, as well as the ways in

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[37] *See infra* Part V.B.

which they are applied. While this Article will highlight some of those variations, it leaves a comparative analysis for another day.

Second, this Article was largely completed before the Trump Administration announced its defunding and deregulatory initiatives in January 2025, including those aimed at dismantling the Department of Education.[38] Because this Article focuses on the role courts play in the contractualization of disability rights law, these developments should not affect the descriptive, analytical, and normative claims advanced herein. However, as acknowledged below, these developments may impact the political feasibility of certain reforms discussed in this Article, particularly those involving actions by federal agencies. Thus, while the long-term consequences of these events are as yet unknown, this situation highlights the need to work within the existing statutory and regulatory frameworks to protect disability rights.

I. DISABILITY LAW AS CIVIL RIGHTS LAW

In the United States, disability rights are widely understood as civil rights.[39] Inspired by the measures adopted in the context of race and sex,[40] disability rights advocates in the 1970s and 1980s called on Congress to adopt laws to protect the civil rights of disabled people—particularly the rights of nondiscrimination and integration.[41]

The idea that disability rights are civil rights was clearly reflected in the discussions surrounding the adoption of the ADA,

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[38] *See, e.g.*, Exec. Order. No. 14,242, 90 Fed. Reg. 13,679 (Mar. 20, 2025):

> The Secretary of Education shall, to the maximum extent appropriate and permitted by law, take all necessary steps to facilitate the closure of the Department of Education and return authority over education to the States and local communities while ensuring the effective and uninterrupted delivery of services, programs, and benefits on which Americans rely.

Michael C. Bender & Rachel Nostrant, *Trump Firings Gut Education Department's Civil Rights Division*, N.Y. TIMES (Mar. 13, 2025), https://www.nytimes.com/2025/03/13/us/politics/trump-education-department-civil-rights.html (reporting mass layoffs of staff at the Education Department's Office for Civil Rights).

[39] *See, e.g.*, Robyn M. Powell, *Beyond Disability Rights: A Way Forward After the 2020 Election*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 391, 400–03, 447 (2022) (referring to various disability rights statutes as civil rights laws).

[40] *See, e.g.*, RUTH COLKER, WHEN IS SEPARATE UNEQUAL? A DISABILITY PERSPECTIVE 90 (2009) [hereinafter COLKER, WHEN IS SEPARATE UNEQUAL?] ("The racial civil rights movement also influenced the disability rights movement toward integration."); BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 27–28 (explaining that "to some extent," disability rights leaders drew on "the civil rights frame that had been so successful in supporting the expansion of the rights of racial minorities in the 1960s and of women in the 1970s").

[41] *See* BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 28.

which bars disability discrimination in employment, public services, and public accommodations.[42] The statute's congressional findings demonstrate that Congress was concerned by the longstanding isolation and segregation experienced by disabled Americans and by research documenting that disabled people "are severely disadvantaged socially, vocationally, economically, and educationally."[43] The ADA's goal was to rectify these problems by assuring disabled people "equality of opportunity" and "full participation" in American society.[44]

The ADA brought to the fore the concept of reasonable accommodation, classifying the failure to provide reasonable accommodations as discrimination.[45] Granted, this concept had previously been invoked to protect the rights of religious employees under Title VII of the Civil Rights Act of 1964,[46] but the duty to provide accommodations under the ADA has long been considered much more demanding.[47]

The inclusion of the accommodation mandate in the ADA stirred a debate about whether the duty to accommodate differs from "traditional" antidiscrimination requirements, such as those prohibiting discrimination on the basis of race and sex. Some scholars have argued that while conventional antidiscrimination laws require only that employers and businesses stop discriminating, accommodation mandates impose affirmative duties, which often entail spending money.[48] Other scholars, however, have persuasively argued that the difference between antidiscrimination and accommodation mandates is smaller than it may seem.[49] For example, Professor Christine Jolls and others have

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42 ADA § 2, 104 Stat. at 328.

43 *Id.* § 2, 104 Stat. at 329.

44 42 U.S.C. § 12101(a)(7) (stating that one of Congress's findings in passing the ADA was that it is the United States' goal to pursue these measures).

45 *Id.* § 12112(b)(5)(A).

46 *Id.* § 20000e(j). Congress explicitly recognized the duty to accommodate employees' religious practices in a 1972 amendment. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103.

47 *But see* Groff v. DeJoy, 143 S. Ct. 2279, 2295 (2023) (effectively raising the bar for employers who wish to avoid liability for failing to accommodate the religious practices of their employees by holding that an employer must show that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business" to establish an undue hardship defense).

48 *See, e.g.*, Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 7–12 (1996).

49 *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 651 (2001).

shown that antidiscrimination requirements in the race and gender contexts can also entail economic costs, blurring the lines between antidiscrimination and accommodation.[50]

In addition to the ADA, Congress enacted other civil rights provisions that prohibit discrimination on the basis of disability in housing,[51] air travel,[52] and health programs.[53] Even the IDEA, which is sometimes referred to as a public-benefits statute, includes civil rights components.[54] For example, school districts must take measures to integrate disabled children into general education classrooms—a provision that scholars have attributed to the reasoning of *Brown v. Board of Education*.[55] Tellingly, that provision is often referred to as the "integration presumption."[56]

It is common to think about civil rights statutes as a means to protect individuals from the prejudices of private ordering and the market.[57] Indeed, some proponents of regulatory interventions believe that "contract law has been part of the problem" the ADA and other civil rights statutes were created to solve.[58]

A closer look at disability rights laws and their history, however, reveals a more complicated relationship between such laws and the market economy. For example, Professor Ruth Colker has

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[50] *See, e.g.*, *id.* at 695; Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 622 (2004); BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 56–68; Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 182 (2020) ("Reasonable accommodations are civil rights that are required to level the unequal playing field.").

[51] 42 U.S.C. § 3604. In 1988, Congress added "disability" to the list of protected grounds under the Fair Housing Act. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620.

[52] Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified at 49 U.S.C. § 41705) (prohibiting disability discrimination in air transportation).

[53] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified as amended at 42 U.S.C. § 18116(a)) (prohibiting discrimination on the basis of disability by "any health program or activity" receiving deferral funds).

[54] *See* Claire S. Raj, *Rights to Nowhere: The IDEA's Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 421 (2022) ("The IDEA was born out of the Civil Rights Movement and is essentially a civil rights bill for children who have disabilities that adversely impact their education.").

[55] 347 U.S. 483 (1954). *See also* RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 26 (2013).

[56] *See generally* Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006).

[57] This notion is reflected not only in the civil rights literature but also in the contract literature. *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 649 (1985) ("Some statutory changes are only now beginning to impinge on contract law, such as those which outlaw racial or sex discrimination in employment.").

[58] Matthew T. Bodie, *Taking Employment Contracts Seriously*, 50 SETON HALL L. REV. 1261, 1267 (2020); *see also* Lin, *supra* note 18, at 1847 (referring to the reasonable accommodation framework as a "civil rights mandate correcting for private ordering").

noted that, during the 1960s and 1970s, the movement for integrating disabled children into general schools and classrooms received support from school administrators who attempted to use such measures to save money.[59] More recently, Professor Samuel Bagenstos has shown that, in advocating for the ADA, some disability rights leaders have strategically emphasized the statute's potential contribution to reducing reliance on public benefits.[60] In so doing, those advocates "relied explicitly on a discourse of costs and benefits."[61] According to Bagenstos, early Supreme Court decisions interpreting the definition of "disability" under the ADA are somewhat consistent with that framing.[62] Moreover, some courts injected economic logic into another key component of the ADA: the reasonable accommodation mandate.[63] Specifically, these courts evaluate the "reasonableness" of an accommodation by using a cost-benefit analysis.[64]

Nevertheless, the literature generally does not perceive disability rights statutes solely as a tool to promote market efficiency.[65] One reason may be that, as a matter of law, disability accommodations in the workplace may still be considered "reasonable" even if, from an employer's perspective, their costs exceed the benefits to the employee.[66] Another reason might be the idea, articulated both within[67] and outside[68] the disability rights literature, that a cost-benefit analysis can and should consider noneconomic values such as human dignity and diversity. Moreover, there is evidence that, in practice, employers make decisions

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59 *See* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1428 (2007).

60 *See* BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 27–29.

61 Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 27 (2020) [hereinafter Bagenstos, *Discourse of Justice*]. For a recent exploration of how and why the cost-benefit discourse has been injected into disability rights frameworks, see Karen M. Tani, *Liberalism's Last Rights: Disability Inclusion and the Rise of the Cost-Benefit State*, *in* MASTERY AND DRIFT: PROFESSIONAL-CLASS LIBERALS SINCE THE 1960S 185, 190–98 (2025) [hereinafter Tani, *Liberalism's Last Rights*].

62 *See* BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 39–41.

63 *See* Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 96–102 (2003).

64 *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995); Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995).

65 *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 843 (2008) ("[T]he ADA does not require accommodations to be cost justified, for the employer or for society.").

66 *See Vande Zande*, 44 F.3d at 542; Stein, *supra* note 63, at 118.

67 *See* Stein, *supra* note 63, at 107. *But see* Tani, *Liberalism's Last Rights*, *supra* note 61, at 197–98 (expressing skepticism about the "soft" form of cost-benefit analysis).

68 *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1866–68 (2016).

regarding disability accommodations on the basis of considerations that extend beyond a strict cost-benefit analysis.[69] The final, and perhaps most important, reason is that early Supreme Court ADA jurisprudence can also be read as adopting an egalitarian, antisubordination approach to disability.[70]

Thus, disability rights law is primarily viewed as civil rights law, and its internal normative structure has to do, at least in part, with egalitarianism.[71] Accordingly, much of disability rights scholars' attention has been focused on dilemmas that are familiar in civil rights discourse. For example, common inquiries in the literature include questions about who belongs in the protected group,[72] whether integration is an effective response,[73] and how to address the stigma and stereotypes that drive discriminatory behaviors.[74]

II. DISABILITY LAW AS CONTRACT LAW

In grappling with those questions, scholars have largely overlooked a fundamental fact about disability rights: the content and scope of these rights are often determined not only by statute, but by contract concepts and doctrines. This Part demonstrates this phenomenon by examining the four primary disability rights statutes: the IDEA, ADA, § 504 of the Rehabilitation Act, and § 1557

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69 Lin, *supra* note 18, at 1880.

70 *See* BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 41–44.

71 *See, e.g.*, Samuel R. Bagenstos, *Subordination, Stigma, and "Disability"*, 86 VA. L. REV. 397, 418 (2000) [hereinafter Bagenstos, *Subordination*] (arguing, based on congressional findings and other sources, that disability rights law can be seen as providing disabled people "with the means (antidiscrimination and reasonable-accommodation requirements) to challenge the practices that enact and enforce their subordinated status"); Yaron Covo, *Reversing Reverse Mainstreaming*, 75 STAN. L. REV. 601, 638 & n.224 (2023) (relying on the IDEA's "own normative criteria" to conclude that at least one of the statute's provisions is grounded in egalitarianism).

72 *See, e.g.*, Rabia Belt, *The Fat Prisoners' Dilemma: Slow Violence, Intersectionality, and a Disability Rights Framework for the Future*, 110 GEO. L.J. 785, 811–14 (2022) (discussing courts' approaches to whether obesity is a "disability" under the ADA and § 504).

73 *See* COLKER, WHEN IS SEPARATE UNEQUAL?, *supra* note 40, at 78–80, 115–40 (expressing skepticism as to whether a strong integration presumption is needed under the IDEA); Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 931–50 (2019) (challenging the premise underlying the disability rights framework that interactions between disabled and nondisabled individuals will automatically reduce prejudice against disabled people).

74 *See* Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1410–34 [hereinafter Emens, *Framing Disability*] (advocating for the adoption of "framing rules" that would provide nondisabled people with more accurate insights into the meaning and consequences of disability in disability-relevant decision points); Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 580–87 (2021) (arguing that a situation in which a critical mass of disabled individuals self-identify as disabled could counteract disability stigma).

of the Affordable Care Act[75] (ACA) (the last two provisions will be examined together).

This Part's goal is primarily descriptive. It provides a survey of the myriad contract law doctrines used by courts to resolve disability rights disputes, the vast majority of which have not been identified, let alone examined, by scholars. In describing some of those doctrines, however, I also highlight courts' implicit normative choices in applying them, which in turn lays the groundwork for the analytical and normative claims that appear in Parts III and IV.

A. The IDEA

Enacted in 1975, the IDEA provides disabled children with the right to a "free appropriate public education" (FAPE).[76] The Supreme Court has interpreted FAPE to mean instruction and services that are "individually designed to provide educational benefit,"[77] a standard that has proved to be both elusive and contentious.[78] Indeed, although the Court recently attempted to clarify the FAPE requirement by holding that each educational program must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances,"[79] courts and scholars still struggle to apply the rule.[80]

In addition to the FAPE rule, the IDEA also imposes an obligation to educate disabled students in the "least restrictive environment,"[81] preferably in a general education classroom—a requirement that has been understood by courts and scholars to create an integration presumption.[82]

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75 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

76 20 U.S.C. §§ 1400(d)(1)(A), 1401(9). Although the IDEA is a Spending Clause statute (the federal government provides part of the funding for IDEA services, which in turn allows it to condition funding on compliance with the IDEA), this Article does not examine situations in which courts apply contract doctrines to IDEA cases under the "contract theory" of Spending Clause legislation. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006). When it comes to the contractualization of the IDEA, this Article focuses only on the negotiation-for-accommodation mechanism.

77 Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982).

78 *See* Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 943 n.53 (2021) (explaining that "in the decades after *Rowley* circuit courts had varying interpretations of FAPE").

79 Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 403 (2017).

80 *See* Claire Raj & Emily Suski, Endrew F.*'s Unintended Consequences*, 46 J.L. & EDUC. 499, 513 (2017) (noting that "the Court declined to develop a bright line rule defining 'appropriate progress' in all cases").

81 20 U.S.C. § 1412(a)(5)(A).

82 *See* Oberti v. Bd. of Educ., 995 F.2d 1204, 1213–14 (3d Cir. 1993) ("[T]his provision sets forth a 'strong congressional preference' for integrating children with disabilities in

The FAPE rule and the integration presumption are the primary substantive rights enshrined in the IDEA. The rest of the statute establishes an array of procedural safeguards aimed at ensuring that these rights are fulfilled and structuring the development of educational plans.[83]

The legal tool that embodies both the substantive rights and procedural safeguards is the "individualized education program" (IEP), a "written statement" that must be prepared for each child receiving services under the IDEA.[84] Each IEP must be reviewed at least annually and must include statements about the child's levels of academic achievement, measurable goals, and a list of designated supplementary aids and services.[85] It is this legal document—which courts often refer to as the "centerpiece" of the statute[86]—that serves as the first illustration of the contractualization of disability rights law.

1. The source of contractualization.

By definition, the process of drafting an IEP involves negotiations among several actors, most notably the parents and representatives of the school district.[87] Moreover, according to the IDEA, the parents must give their "informed consent" before the school can begin to provide the child with services.[88]

When the IDEA was adopted, these contract-like requirements prompted concerns among lawmakers.[89] Specifically, some education leaders were wary that framing the IEP in contractual

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regular classrooms."); Daniel R.R. v. Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) (referring to the "presumption in favor of mainstreaming").

83 *See* 20 U.S.C. § 1415.

84 *Id.* § 1414(d)(1)(A)(i).

85 *Id.*

86 *See, e.g.*, Honig v. Doe, 484 U.S. 305, 311 (1988); R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 188 (2d Cir. 2012).

87 20 U.S.C. § 1414(d)(1)(B) (stipulating that an IEP "team" must include the child's parents, teachers, and a representative of the school district, among others).

88 *Id.* § 1414(a)(1)(D)(i)(II).

89 *See* S. REP. NO. 94-168, at 11 (1975), *reprinted in* U.S.C.C.A.N. 1425, 1435 ("It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship."). The idea that a contractual perspective could be used to protect disability rights in the education arena appeared in the literature even before the passage of the statute known today as the IDEA. For example, psychologist James Gallagher proposed using a "special education contract" between parents and educators, which "would commit the special educational personnel to measurable objectives that would be upgraded on a 6 month interval." James J. Gallagher, *The Special Education Contract for Mildly Handicapped Children*, EXCEPTIONAL CHILD. 527, 531–32 (1972).

terms would give parents too much power over educational policies, allowing them to seek "specific performance" or other contractual remedies.[90] Thus, lawmakers intentionally avoided using terminology such as "mutual agreement" in connection with the statute.[91]

Nevertheless, the contract frame has made its way into the IDEA discourse. Various stakeholders, including lawyers[92] and special education professionals,[93] routinely refer to the IEP as a "contract." Similarly, scholars have used bargaining and contract-making framing to describe the IEP process.[94]

2. Is an IEP a contract?

While some federal courts have also invoked the concept of contract as a metaphor or analogy to IEPs,[95] the idea that an IEP should be treated the same as a contract has been rejected almost universally by federal courts.[96] In those courts' view, the IEP exists solely as a statutory creature. Although the courts did not

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90 *See Extension of Education of the Handicapped Act: Hearing Before the Subcomm. on Select Education of the Comm. on Educ. and Labor, House of Representatives*, 94th Cong. 74–76 (1975) (noting that IEPs "should be developed in consultation with parents as distinguished from a contract or agreement" and that "specific performance was an inappropriate enforcement mechanism").

91 *Id.* at 76.

92 *See, e.g.*, *A Brief Guide to Analyzing Your Child's IEP*, FREEMAN L. OFFS., https://perma.cc/8NFT-K7UE.

93 *See, e.g.*, *Individual Education Plans (IEP)*, P.53K, https://perma.cc/SBW9-DKRY. ("An IEP is a contract between parents and the local Department of Education which states what services the Department commits to provide to your child."); Lori Bass, *An IEP Is a Contract – Read It*, MEDIUM (Nov. 21, 2023), https://perma.cc/MCB7-L6HF ("[T]he IEP is a contract. It's not just a packet of papers that comes with the child from one classroom to another. It's a legal, binding contract between the school district and the family.").

94 *See, e.g.*, *supra* note 18; David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 L. & CONTEMP. PROBS. 63, 72–73 (1985); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 451 (2011) (noting that after the parties have reached an agreement regarding the provisions of an IEP, "the resulting document is, in effect, a contract").

95 *See, e.g.*, Bd. of Educ. v. Bd. of Educ., 1993 WL 1318610, at *22 (S.D. Ohio Aug. 24, 1993) (using contract as a metaphor for an IEP).

96 *See, e.g.*, Doe v. Dennis-Yarmouth Reg'l Sch. Dist., 578 F. Supp. 3d 164, 182 (D. Mass. 2022); L.J. *ex rel.* N.N.J. v. Sch. Bd., 927 F.3d 1203, 1212 (11th Cir. 2019); SH v. Campbell Cnty. Sch. Dist., 409 P.3d 1231, 1236 (Wyo. 2018); Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 820 (9th Cir. 2007); Ms. K v. City of S. Portland, 407 F. Supp. 2d 290, 301 (D. Me. 2006). *But see* J.E. v. Jackson Pub. Sch. Dist., 264 So. 3d 786, 794 (Miss. Ct. App. 2018) (assuming arguendo that the IEP is a contract); Bishop v. Oakstone Acad., 477 F. Supp. 2d 876, 886 (S.D. Ohio 2007) (treating the IEP as a contract between the school district and a private school paid to provide education to a disabled child and the child as a third-party beneficiary of that contract).

examine this in detail, it appears that there are two primary contractual elements that an IEP fails to satisfy: voluntariness and consideration.

Let us begin with voluntariness (or lack thereof). Because the IEP is a statutory requirement, the school district has no right to refuse to negotiate an IEP. Thus, IEPs fail to satisfy a fundamental principle of contracting—the idea that "[c]ontractual obligations are chosen obligations."[97]

The second missing element is consideration. In the context of an IEP, consideration is lacking because (1) the school district is acting under a legal duty[98] and (2) the parents arguably do not give anything in exchange for the district's promises vis-à-vis their child.[99]

Courts' reluctance to treat an IEP as a contract typically arises in the face of a school district's failure to implement the IEP. In such cases, circuit courts have generally ruled that only a *material* failure to implement an IEP may give rise to school district liability.[100] In formulating the materiality standard, for example, the Ninth Circuit held that finding a school district liable for breach of an IEP requires "more than a minor discrepancy between the services provided to a disabled child and those required by the IEP."[101] This approach contrasts with traditional contract law, in which even a nonmaterial breach is considered a breach. In other words, in contract law, a party can sue for damages for any breach of contract, however "trivial."[102]

3. The contract law of IEPs.

Ironically, although circuit courts are unwilling to treat a failure to implement an IEP as a breach of contract, their reasoning is often grounded in contract law concepts, namely the "material breach" doctrine. Specifically, in justifying the adoption of the

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97 Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. 457, 457 (2019).

98 RESTATEMENT (SECOND) OF CONTS. § 75 cmt. c (AM. L. INST. 1981) ("A promise to perform a legal duty is not consideration for a return promise unless performance would be.").

99 Caruso, *supra* note 18, at 178–79.

100 *See, e.g.*, *L.J. ex rel. N.N.J.*, 927 F.3d at 1211; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Sumter Cnty. Sch. Dist. 17 v. Heffernan *ex rel.* TH, 642 F.3d 478, 484 (4th Cir. 2011); A.P. v. Woodstock Bd. of Educ., 370 F. App'x 202, 205 (2d Cir. 2010); Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003).

101 *Van Duyn*, 502 F.3d at 815.

102 *See* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 76 (2012). If the breach is only "trivial" (as opposed to "material"), however, the nonbreaching party can only sue for that specific failure to perform. *Id.*

materiality standard, the Ninth Circuit explained that "determining 'materiality' has been a part of judging for centuries—for example, deciding whether a *contractual breach* is material."[103]

But the adoption of a materiality standard is not the only way in which courts have invoked contract principles in IDEA disputes. Courts have also applied the parol evidence rule and the duty of good faith, as well as the doctrines of mutual assent, duress, mutual mistake, modification, and excuse, each of which will be examined in turn.

a) Formation. Similar to cases involving contract disputes, legal decision-makers in IDEA cases sometimes have to decide whether IEP negotiations have resulted in an agreed-upon IEP and, if so, what the agreed terms are. Such determinations may be necessary for a number of reasons: (1) to ensure that the school district provided the parents with the opportunity to "meaningfully participate" in the IEP formation,[104] (2) to ensure the school's compliance with an agreed-upon IEP,[105] (3) to ensure the school's compliance with the "stay put" requirement,[106] or (4) to evaluate a parent's retroactive claim that the IEP was flawed.[107]

In deciding whether the parties agreed on the IEP's terms, courts often apply an "objective" approach, similar to prevailing

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[103] *Van Duyn*, 502 F.3d at 822 n.4 (emphasis added).

[104] Because the IDEA requires schools to (1) involve the parents in the development of the IEP, 20 U.S.C. § 1414(d)(1)(B)(i), and (2) consider the "concerns of the parents" as part of the IEP development, *id.* § 1414(d)(3)(A)(ii), courts often treat "the opportunity for meaningful participation in the formulation of IEPs" as one of the Act's procedural safeguards, K.S. *ex rel.* P.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995, 1007 (N.D. Cal. 2008). Against this backdrop, school districts sometimes ask the parents to sign a form recognizing their participation alongside their IEP consent form. *See, e.g.*, M.M. v. Lafayette Sch. Dist., 2012 WL 398773, at *23 (N.D. Cal. Feb. 7, 2012), *aff'd in part, rev'd in part, and remanded*, 767 F.3d 842 (9th Cir. 2014).

[105] *See, e.g.*, Fremont Unified Sch. Dist. v. Parents *ex rel.* Student, Nos. 2008090878, 2008100774, at 31–33 (Cal. Off. of Admin. Hearings Feb. 20, 2009), https://perma.cc/2HA3-5YEE (analyzing the communication between the parties to determine whether the district's delivery of services "comported with Student's IEP").

[106] The IDEA's stay-put provision stipulates that, "during the pendency of any proceedings . . . the child shall remain in the then-current educational placement" unless the parties "otherwise agree." 20 U.S.C. § 1415(j). Because the term "*then-current* educational placement" in the stay-put provision typically refers to the child's last agreed-upon educational program, Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d 519, 532 (2d Cir. 2020) (emphasis in original), courts sometimes need to determine what exactly the parties agreed on in the last IEP.

[107] *See* Carlisle Area Sch. v. Scott P. *ex rel.* Bess P., 62 F.3d 520, 536 n.8 (3d Cir. 1995) (finding that "the parents' failure to press their objections to the IEP when it was offered . . . casts significant doubt on their contention that the IEP was legally inappropriate").

contract law doctrine.[108] In other words, courts generally do not focus on "the actual perceptions" of the parties;[109] rather, they examine the situation "from the perspective of an external (and unbiased) observer."[110]

For example, in *Birmingham v. Omaha School District*,[111] the parents of a disabled child objected to the district's plan for their daughter's education, arguing that they "never reach[ed] an agreement" with the school district and "'did not at any time assent' to an IEP" for their daughter.[112] The Court of Appeals for the Eighth Circuit, however, relied on external manifestations and statements to conclude that the parents had previously agreed to the relevant disputed terms.[113]

Similarly, in *Pass v. Rollinsford School District*,[114] a federal district court in New Hampshire rejected a claim that the IEP was inappropriate. In doing so, the court took into consideration the fact that the student's sister initially signed the IEP "without identifying any exceptions,"[115] which indicated "her written consent" to the IEP's implementation.[116] The court favored this external manifestation over the sister's testimony that she did not fully understand the meaning of her signature and that she had believed, at the time of signing, that the IEP did not "address[ ] all of [the student's] needs."[117]

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[108] Lucy v. Zehmer, 84 S.E.2d 516, 522 (1954) ("If [a person's] words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind."); BIX, *supra* note 102, at 24–25 ("An objective approach focuses on the reasonable understanding of public acts or the words spoken and written rather than on the parties' (sometimes idiosyncratic) understanding of those acts and words.").

[109] BIX, *supra* note 102, at 24.

[110] *Id.*

[111] 298 F.3d 731 (8th Cir. 2002).

[112] *Id.* at 735 (alteration in original).

[113] *Id.*; *cf.* Student v. Fontana Unified Sch. Dist., No. 2005070696, at 6 (Cal. Off. of Admin. Hearings Mar. 1, 2006), https://perma.cc/NF82-L4DQ (noting that the student's grandparents did not sign the document, "thereby indicating their assent").

[114] 928 F. Supp. 2d 349 (D.N.H. 2013).

[115] *Id.* at 355.

[116] *Id.*

[117] *Id.* at 357. In her testimony, the sister said the following with respect to another IEP, similar to the one that was in dispute:

> When I signed the IEPs I didn't realize . . . that I was signing off on everything that was here as well as everything that wasn't here. So I assumed that I was agreeing or consenting to the things that were here to allow those to happen . . . I definitely was very concerned that we lost the services from the transition from Maine to North Carolina to here and *felt that [the student] needed more*.

Id. at 364 (emphasis in original).

In contract law, the objective theory is often articulated as "viewing assent from the vantage point of the 'reasonable person.'"[118] Interestingly, the "reasonable person" test has also made its way to disputes over IEP formation. For example, the dispute in *In re Nathan F.*,[119] an administrative case from Massachusetts, centered around whether the parents and the school district agreed to amend an IEP with respect to speech and language services. Analyzing the evidence presented by the parties, the administrative law judge ruled that "a reasonable person viewing the correspondence" between the school district and the parents "could not conclude that 'a meeting of the minds' occurred" on the pertinent component of the IEP.[120]

Legal decision-makers adjudicating IEP disputes have also effectively applied a range of other contract formation doctrines,

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[118] Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1125 (2008) (defining the objective theory and citing sources). For a famous articulation of the "reasonable person" standard, see Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

[119] 2 MSER 79 (Mass. Bureau of Special Educ. Appeals 1996).

[120] *Id.* at 81. For another case in which an administrative law judge used the "reasonable person" standard to determine mutual assent between a parent and a school district—this time ruling in favor of the parent, see generally *Fremont Unified School District*, Nos. 2008090878, 2008100774.

including "duty to read,"[121] acceptance by silence,[122] qualified acceptance,[123] and duress.[124]

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[121] By "duty to read," I mean that "contracting parties are presumed to have read the contract before agreeing to its terms" and that "a party is normally bound by the terms of the contract notwithstanding its failure to read them." Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2260 (2019); *see also* FARNSWORTH ON CONTRACTS § 3.07 (4th ed. 2020) ("[O]ne who signs a writing may be bound by it, even though one neither reads it nor considers the legal consequence of signing it."). In *Parent ex rel. Student v. Lafayette Elementary School District*, No. 2009040640, 2009081105 (Cal. Off. of Admin. Hearings June 21, 2010), https://perma.cc/9UY6-ZXGT, the California administrative law judge held that the school district could rely on the IEP signature of the parent of an eleven-year-old child with learning impairments even though the parent testified "that she 'did not read the goals and objectives at the meeting'" and "attempted to distance herself from the consequences of her signing the IEP." *Id.* at 25–26; *see also id.* at 66 ("Mother signed IEP documents attesting either to her assent and/or participation."). In *Student v. Bellflower Unified School District*, No. 2005080006 (Cal. Off. of Admin. Hearings June 26, 2006), https://perma.cc/98CK-5HXX, another California administrative decision, the administrative law judge rejected the parents' claim that they "did not understand what was occurring" at the IEP meetings, holding that, by signing the IEPs, the parents affirmed that "they consented to the IEPs." *Id.* at 15, 23; *see also id.* at 12 ("Mother signed the IEP in multiple locations, indicating her understanding of and assent to the goals and objectives.").

[122] RESTATEMENT (SECOND) OF CONTS. § 69 (AM. L. INST. 1981) (identifying certain situations in which a party's silence and inaction can operate as an acceptance, including "[w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation" and "[w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept"). In *Shawsheen Valley Regional Vocational Technical School District Schol Committee v. Massachusetts Bureau of Special Education Appeals*, 367 F. Supp. 2d 44, 50 (D. Mass. 2005), the court faced a "difficult situation": it had to review the last agreed-upon IEP, but, "for the most part, Parents did not formally accept or reject IEPs that were issued" by the school. *Id.* Against this backdrop, the court effectively applied a variation of the acceptance by silence doctrine and determined that the parents accepted the IEPs, reasoning that (1) the parents had accepted the pertinent services and that (2) in past interactions between the parties, the parents would "regularly call[ ]" the Director of Special Education "if they had any problems with" IEPs—something they did not do with respect to the IEPs in question. *Id.* at 51.

[123] RESTATEMENT (SECOND) OF CONTS. § 59 (AM. L. INST. 1981) ("A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."). In *Parent ex rel. Student v. Kern County Superintendent of Schools*, No. 2017110316 (Cal. Off. of Admin. Hearings Apr. 4, 2018), https://perma.cc/EJK9-YK8U, an administrative law judge in California held that a school district and a disabled child's father did not reach an agreement over an IEP because, even though the father consented to the school district's offer of placement and services, he placed "a new material condition to his acceptance" by adding two typed sentences to the IEP notes—a condition to which the school district did not agree. *Id.* at 6, 13–14. Effectively applying contract law's doctrine of "qualified acceptance," the administrative law judge concluded: "The evidence unequivocally established a lack of meeting of the minds on an essential term of the original IEP offer." *Id.* at 14.

[124] Under the duress doctrine, "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim." RESTATEMENT (SECOND) OF CONTS. § 175(1) (AM. L. INST. 1981). Legal decision-makers adjudicating IEP disputes have addressed parents' claims that they had signed IEPs under "duress." In *Banks ex rel. Banks v. Modesto City School District*, 2005 WL 2233213 (E.D. Cal. Sept. 9, 2005), the court noted that "Plaintiff's

Importantly, none of the above standards and doctrines—including the reasonable person test, acceptance by silence, and objectivism more generally—are enumerated in the IDEA. And yet, courts do not discuss the normative assumptions underlying their decisions to adopt these standards, nor do they invoke any theories justifying the use of general contract concepts. One might wonder, for example, if the fact that the school district is always the drafter of the IEP should matter when considering whether to apply formation concepts that prioritize objectivism over the parties' actual intentions during IEP negotiations.

b) Good faith. Courts often require the parties to negotiate over an IEP in good faith.[125] In this respect, the good-faith duty under the IDEA differs from U.S. contract law doctrine, in which the duty generally applies only to performance and enforcement of contracts—as opposed to the negotiation (precontractual) stage.[126]

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parents signed the IEP under duress, having been told that if they did not, no services would be provided to Plaintiff." *Id.* at *2. Nevertheless, the court did not make any determinations regarding the duress issue because that claim had been resolved in a settlement before the court ruled on the matter. *Id.*; *see also* M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 255 (2d Cir. 2012) (determining that the parents offered "no evidence of duress other than their own testimony," which had been found "unpersuasive"); Parent *ex rel.* Student v. Twin Rivers Unified Sch. Dist., No. 2008110275, at 12 (Cal. Off. of Admin. Hearings Oct. 12, 2009), https://perma.cc/6QZU-VXSC (determining that "there was no credible evidence establishing any duress or coercion of Parent" regarding the signing of an IEP); [Redacted] Parent *ex rel.* Student v. [Redacted] School, No. SHE 1989-012A, at 10–12 (Mich. State Bd. of Educ. Nov. 10, 1989), https://perma.cc/2JJB-WQFW (holding that an educational plan was valid after noting that the consent of a student's parent to it was not coerced), *aff'd In re* [Redacted] Public Schools, No. SHE 1989-012B, at 6–9 (Mich. State Bd. of Educ. Dec. 27, 1989), https://perma.cc/J2BT-T4QX; Parent *ex rel.* Student v. Dep't of Educ., No. DOE-SY2021-015, at 6 (Off. of Disp. Resol., Haw. Dep't of the Att'y Gen. Jan. 8, 2021), https://perma.cc/265D-LRYR (noting that the parents' claims did not "describe the circumstances" causing duress).

[125] *See, e.g.*, Kitchelt v. Weast, 341 F. Supp. 2d 553, 557 n.1 (D. Md. 2004) (noting that "the key consideration is that the parents pursue in good faith the development of the IEP" in the context of tuition reimbursement).

[126] RESTATEMENT (SECOND) OF CONTS. § 205 cmt. c (AM. L. INST. 1981) (noting that the Restatement's section that pertains to the duty of good faith "does not deal with good faith in the formation of a contract"); U.C.C. § 1-304 (AM. L. INST. & UNIF. L. COMM'N 1951) (imposing a duty of good faith in "performance and enforcement" of contracts). In this respect, the IDEA's good-faith doctrine bears some similarity to a different contract law doctrine: the obligation to negotiate in good faith that arises from "preliminary agreements," whereby the parties agree upon some terms, but leave some other terms open to further negotiation. *See* Brown v. Cara, 420 F.3d 148, 157 (2d Cir. 2005) ("The essence of a Type II preliminary agreement is that it creates an 'obligation to negotiate the open issues in good faith in an attempt to reach the [ultimate contractual objective] within the agreed framework.'") (alterations in original) (citing Tchrs. Ins. & Annuity Ass'n v. Trib. Co., 670 F. Supp. 491, 498 (S.D.N.Y. 1987)); Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 664–65 (2007) ("[T]he emerging legal rule requires parties to such preliminary agreements to bargain in good faith over open terms.").

Still, there is some evidence that the IEP doctrine may have been influenced by its contract law counterpart.[127] For example, similar to the Second Restatement,[128] courts in IEP disputes do not attempt to provide a concrete definition of "good faith." Rather, they adopt an "excluder" approach,[129] identifying a nonexhaustive list of behaviors constituting bad faith,[130] which partially overlap with the bad-faith behaviors identified by the Second Restatement, especially those involving a failure to cooperate.[131]

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[127] One example is the role the duty of good faith plays in the judicial analysis. In IDEA disputes, similar to contract law disputes, a violation of the duty of good faith often serves as an element in deciding whether a breach was "material," as opposed to an independent cause of action. *See, e.g.*, Myles S. *ex rel.* SS v. Montgomery Cnty. Bd. of Educ., 824 F. Supp. 1549, 1560 (M.D. Ala. 1993) (noting that "although the school system technically violated the IEP's requirement . . . the violation was not done in bad faith and was de minimis").

[128] RESTATEMENT (SECOND) OF CONTS. § 205 cmt. d (AM. L. INST. 1981). The Second Restatement concedes that a "complete catalogue of types of bad faith is impossible." *Id.* Instead, it identifies a nonexhaustive list of behaviors constituting bad faith. *Id.*

[129] Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 5–8 (describing "the contractual obligation of good faith as an 'excluder;' that is, as a concept 'without general meaning (or meanings) of its own, and serv[ing] to exclude a wide range of heterogeneous forms of bad faith'" (alterations in original)).

[130] In invoking the duty of good faith under the IDEA, courts often refer to an "obstruction" of the IEP process as a paradigmatic bad-faith behavior. Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 26 (1st Cir. 2008); *see also* Roland M. v. Concord Sch. Comm., 910 F.2d 983, 995 (1st Cir. 1990) (using the same terminology while implying that such "obstructionism" constitutes a "procedural bad faith"); Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1182 (9th Cir. 2016) (using the same terminology without an explicit reference to "bad faith"). Such obstruction may be caused (1) by an "unreasonable delay in acting upon a completed IEP," *Lessard*, 518 F.3d at 26–27 (noting that parents who "prolong[ ] IEP negotiations indefinitely" are not entitled to remedy for the district's late implementation of an IEP); (2) by a failure "to respond to the School District's requests for insight," *id.*; *see also* A.R. v. Hawaii, 2011 WL 1230403, at *5 (D. Haw. Mar. 31, 2011) (noting that a parent's "failure to return telephone messages" constitutes obstruction of an IEP); (3) by a predetermination of placement with no intention to negotiate, *see* K.G. v. Sheehan, 2010 WL 5644782, at *8 (D.R.I. Dec. 30, 2010), *R. & R. adopted sub nom.*, K.G. *ex rel.* CG v. Sheehan 2011 WL 285872 (D.R.I. Jan. 25, 2011); *see also* R.D. *ex rel.* Kareem v. D.C., 374 F. Supp. 2d 84, 90 (D.D.C. 2005) (referring to such behavior as "bad faith" and an attempt to "game the system"); *Lessard*, 518 F.3d at 27 (referring to a parent's "intransigence" as a justification for the district's late implementation of an IEP process); *A.R.*, 2011 WL 1230403, at *5 (referring to "pre-determination of private placement" as an example of the parent's "obstructions" of the IEP process); or (4) by a general "lack of cooperation," *id.* at *5. Interestingly, when the school district predetermines a placement, it is usually considered to be "a procedural violation of the IDEA." Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004). On the other hand, when the parent "predetermines" a placement, a court may consider this to be "bad faith." *A.R.*, 2011 WL 123043, at *13 (explaining that "[a]cceptance of [the plaintiff's] argument might actually encourage bad faith conduct by parents").

[131] The Second Restatement identifies a number of "bad faith" behaviors, including "lack of diligence and slacking off" and "failure to cooperate in the other party's performance." RESTATEMENT (SECOND) OF CONTS. § 205 cmt. d (AM. L. INST. 1981); *see also* IAN AYRES, GREGORY KLASS & REBECCA STONE, STUDIES IN CONTRACT LAW 691 (10th ed. 2024)

c) Mistake and modification. In identifying and treating mistranscriptions and typographical errors in IEPs, legal decision-makers sometimes apply—albeit implicitly—the contract doctrine of mutual mistake.[132] Specifically, they apply the doctrine pertaining to situations in which a writing "fails to express the agreement" because of a mutual mistake regarding the content of the document.[133] Consistent with that doctrine,[134] legal decision-makers sometimes retroactively "reform" the IEP to express the original agreement.[135]

However, in situations in which (1) it is not entirely clear whether the alleged error in the IEP is the result of mutual mistake; (2) an alleged typographical mistake has meaningful consequences for the parents; or (3) the school district does not take adequate measures to correct the mistake once discovered, courts and administrative law judges sometimes refuse to retroactively reform the IEP, requiring the parties to reconvene and draft a new IEP.[136] In one case, for example, the Ninth Circuit effectively

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(referring to "[p]revention, hindrance, or failure to cooperate" as among the settings "where claims of bad faith are frequently made").

132 *Cf.* Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573, 1610–11, 1620 (2003) (referring to a mistranscription as a mistake shared by both parties, albeit opting not to use the term "mutual mistake" for functional purposes).

133 RESTATEMENT (SECOND) OF CONTS. § 155 (AM. L. INST. 1981); FARNSWORTH, *supra* note 121, § 7.05. For IDEA examples, see *Parent ex rel. Student v. Mount Diablo Unified School District*, No. 2015100931, 6–7 (Cal. Off. of Admin. Hearings May 2, 2016), https://perma.cc/W45Q-Q5EV (concluding, on the basis of "evidence presented at hearing," that there was a "scriveners error" in an agreed-upon IEP whereby the word "daily" was mistakenly used instead of "weekly"); and *Student v. D.C. Public Schools*, No 2017-0148, 10 (D.C. Off. of Disp. Resol. Aug. 9, 2017), https://perma.cc/NG26-7H37 (identifying a "scrivener's error" in an agreed-upon IEP but not regarding this error as a violation of the law or breach of the IEP itself).

134 For the reformation remedy in contract law, see Eisenberg, *supra* note 132, at 1610 ("In the case of mistranscriptions [ ] the appropriate relief is to amend the writing so that it correctly embodies the real bargain."); FARNSWORTH, *supra* note 121, §§ 7.05, 9.04; RESTATEMENT (SECOND) OF CONTS. § 155 (AM. L. INST. 1981); *Dahua Technologies USA Inc. v. Feng Zhang*, 988 F.3d 531, 539 (1st Cir. 2021); and *Thomas v. Del Biaggio*, 527 B.R. 33, 45–50 (N.D. Cal. 2014).

135 *See, e.g.*, Parents *ex rel.* Student v. Glendale Unified Sch. Dist., No. 2015100106, at 29 n.6, 60 (Cal. Off. of Admin. Hearings Apr. 1, 2016), https://perma.cc/WZ9D-26QK (refusing to hold the school district liable for a "clerical error" in an IEP signed by the parents).

136 *See* M.C. *ex rel.* M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1197 & n. 4 (9th Cir. 2017) (holding that the school district was prohibited from changing unilaterally the IEP in a situation in which (1) the district did not provide evidence supporting the existence of the typographical error and (2) the school district failed to notify the parents about the mistake once it was discovered); Parents *ex rel.* Student v. Larchmont Charter Sch., No. 2021030156, at 18, 31–32 (Cal. Off. of Admin. Hearings Sept. 21, 2021), https://perma.cc/BS8K-FZWF (holding that (1) there was no evidence for the existence of mutual mistake and (2) under those circumstances, the school was required to renegotiate the terms of the IEP with the parents to correct a "clerical error" found by the school);

adopted the rule that altering a contract requires the agreement of both parties, reasoning that "[a]n IEP, like a contract, may not be changed unilaterally."[137]

d) Parol evidence rule. Although there are variations among jurisdictions,[138] generally speaking, the parol evidence rule provides that parties to a written, "integrated" contract may not introduce extrinsic evidence to change the terms.[139]

In the context of IEP disputes, courts sometimes invoke this language when parties seek to introduce extrinsic evidence.[140] For example, a federal district court in Arizona barred the parent of an autistic child from introducing a digital recording of a meeting that preceded the signing of the IEP.[141] The parent had wanted to show that the school had made a staffing promise that it was now allegedly breaching, but the court held that "extrinsic evidence is not admissible to change the IEP's meaning," explicitly invoking the "general rule against parol evidence."[142]

Similarly, the Seventh Circuit held that courts should not go "beyond the four corners" of an IEP,[143] although it recognized that extrinsic evidence might be introduced in the event of vagueness.[144]

In re Hampshire Reg'l Sch. Dist., 2021 MSE LEXIS 40, at *2, *9–10 (Mass. Bureau of Special Educ. Appeals May 28, 2021) (finding credible testimonies noting that a mistake in the IEP was a mutual, "typographical error," but adding that "although the District had 'merely corrected' Ms. White's 'error' in the November Amendment, it could not—and should not—have done so 'unilaterally'").

137 *M.C.*, 858 F.3d at 1197; *see also Van Duyn*, 502 F.3d at 822 (finding that "the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team").

138 *See* FARNSWORTH, *supra* note 121, § 7.14; Klass, *supra* note 97, at 464.

139 RESTATEMENT (SECOND) OF CONTS. § 213 (AM. L. INST. 1981).

140 *See infra* notes 141–46. Although the oft-cited case *R.E. v. N.Y.C. Department of Education*, 694 F.3d 167 (2d Cir. 2012), referred to a "four corners" rule, *id.* at 185, it did not apply a parol evidence rule, because it dealt with a situation in which, following a *failed* negotiation involving an IEP, the school district had tried to introduce extrinsic evidence about the program that the child would have been enrolled in had the negotiation succeeded, *id.* at 188. This kind of case differs from typical contract law disputes, in which the parol evidence rule is applied only when the parties *reach* an agreement.

141 Oskowis v. Ariz. Dep't of Educ., 2020 WL 3396776, at *5 (D. Ariz. June 19, 2020). The court also explained that the motion to admit the digital recording of the IEP meeting was untimely. *Id.* For the purpose of this Article, however, the court's substantive reasoning is more important, since it has broader implications.

142 *Id.* at *5–6. Interestingly, the court also used terminology associated with the application of the rule in contract law cases, noting that the language of the contested IEP is not "reasonably susceptible to plaintiff's proffered interpretation." *Id.* at *6; *cf.* RESTATEMENT (SECOND) OF CONTS. § 215 cmt. b (AM. L. INST. 1981) (noting that in order to introduce extrinsic evidence for the purpose of offering a differing interpretation, "the asserted meaning must be one to which the language of the writing, read in context, is reasonably susceptible").

143 John M. v. Bd. of Educ., 502 F.3d 708, 715 (7th Cir. 2007).

144 *Id.* at 715–16.

In a similar vein, the First Circuit held that resorting to extrinsic evidence may only be allowed when it is necessary to "determine the meaning of an IEP term that is actually ambiguous."[145]

Although anecdotal, a close examination of these cases reveals that courts seem to be applying a "strict" version of the parol evidence rule, whereby extrinsic evidence is highly suspect.[146] But in actual contract disputes, using such a strict approach to parol evidence is typically reserved for commercial contracts involving sophisticated parties on both sides.[147] It is well recognized, however, that in IEP disputes, parents are often at a severe disadvantage in terms of legal knowledge, resources, and access to information.[148] Moreover, IEPs are typically drafted by school districts, which are in a better position to choose the exact language and terms. Given these facts, one would think that, as in contract

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[145] M. v. Falmouth Sch. Dep't, 847 F.3d 19, 27–29 (1st Cir. 2017).

[146] To begin with, as a matter of outcome, in all three cases cited *supra* notes 141–45, the courts either denied the introduction of extrinsic evidence or remanded the case to a lower court with guidance to avoid admitting such evidence as long as there is no vagueness. Moreover, in the *Falmouth* case, the court refused to consider extrinsic evidence when interpreting the content of the IEP and deciding whether a certain term was ambiguous, *Falmouth*, 847 F.3d at 28–29, effectively adopting a "Willistonian" approach, *see* SELECTIONS FROM WILLISTON'S TREATISE ON THE L. OF CONTS. § 607 (1926) (delineating a standard of interpretation for contracts in which "a writing has been adopted"). In another case, *J.E.*, the court applied the parol evidence rule while assuming arguendo that the IEP is a contract. 264 So. 3d at 794–95. The *J.E.* case did not revolve around an IDEA dispute but rather a civil action alleging that the school district failed to supervise a student with Down Syndrome who was sexually assaulted during the school day. *Id.* at 789. Thus, the analysis in that case is different from the cases discussed in notes 141–45, in which the parol evidence rule was used to fill gaps in the IDEA. However, the way in which the parol evidence rule was applied in the *J.E.* case is similar to the way in which the rule was applied in the IDEA cases discussed above. *See J.E.*, 264 So. 3d at 794–95 (noting that while "[e]xtrinsic evidence may be considered if a provision in a contract is ambiguous," there was "no allegation that the IEP was ambiguous").

[147] *See* Robert Childres & Stephen Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 7–14 (1972) (finding, on the basis of an empirical study, that courts tend to apply the parol evidence rule "strictly" in cases involving "contracts between sophisticated equals"); Klass, *supra* note 97, at 472 & n.43 (citing studies showing that "courts already apply the parol evidence rule differentially depending on who the parties are or the type of transaction they are engaged in"); Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1285–87 (2019) (citing evidence that shows that New York's adoption of the strict version of the rule was driven by an attempt to accommodate commercial transactions between sophisticated parties).

[148] *See* Pasachoff, *supra* note 18, at 1437–39 (noting informational disparities between school districts and parents); Karen Syma Czapanskiy, *Special Kids, Special Parents, Special Education*, 47 U. MICH. J.L. REFORM 733, 761–62 (2014) [hereinafter Czapanskiy, *Special Kids*] (same).

disputes in which one of the parties is unsophisticated,[149] courts would be more amenable to applying a more liberal standard.[150]

e) Excuse (impossibility). U.S. contract law recognizes that, when an unexpected change in circumstances occurs and performance becomes impractical or impossible, the promisor can be excused from performance.[151]

In the context of an IDEA dispute, the question of excuse typically arises when a school district argues that it is "impossible" to provide one of the services listed in the IEP. Thus, for example, school districts have claimed excuse due to (1) a student's incarceration,[152] (2) an unexpected resignation of a nurse,[153] and (3) the expulsion of the student for "aggressive and volatile" behavior.[154]

Until recently, courts have been generally reluctant to read the impossibility doctrine into IDEA disputes, although such hesitancy has been expressed primarily in dicta.[155] As one district court recently stated, "an impossibility of performance defense is

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[149] *See* Childres & Spitz, *supra* note 147, at 17–30 (finding that courts tend to apply a more liberal version of the parol evidence rule or ignore the rule altogether in cases in which at least one of the parties is not sophisticated); Kastner & Leib, *supra* note 147, at 1285–87 (citing evidence showing courts' tendency to apply a more liberal version of the rule in situations involving unsophisticated parties).

[150] What is striking is not only that the courts do not seem to apply a more liberal version of the parol evidence rule when it comes to IEP disputes but also that they do not engage in any meaningful discussion as to whether the circumstances surrounding the IEP formation and the values that the IEP is aimed at promoting may warrant a specialized version of the rule. In comparison, in discussing the "soft" version of the parol evidence rule, Professors Tal Kastner and Ethan Leib have referred to the now-adopted draft of the Restatement of Consumer Contracts, which creates a "specialized" version of the rule for consumer transactions, taking into account the specific circumstances surrounding such transactions. *See* Kastner & Leib, *supra* note 137, at 1286–87. For further discussion, see *infra* Parts III.B, IV.B, and V.B.3.

[151] *See* Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 225 (2009).

[152] *See, e.g.*, Brown v. District of Columbia, 2019 WL 3423208, at *2 (D.D.C. July 8, 2019).

[153] *See, e.g.*, *In re* Elmira City Sch. Dist. v. N.Y. State Educ. Dep't, 166 N.Y.S.3d 710, 716–18 (N.Y. App. Div. 2022).

[154] *See, e.g.*, Schiff v. District of Columbia, 2019 WL 5683903, at *2 (D.D.C. Nov. 1, 2019).

[155] *Elmira City Sch. Dist.*, 166 N.Y.S.3d at 716–18 ("[E]ven if an impossibility of performance defense did apply in this circumstance, petitioner has not made the requisite showing, as it has not demonstrated that the inability to hire a one-to-one RN was 'objectively impossible.'"); *Brown*, 2019 WL 3423208, at *17 ("In any case, the District has not met the requirements for application of the impossibility doctrine."); *Schiff*, 2019 WL 5683903, at *8 ("Even if an impossibility defense could apply here, the District has still not shown that it has made a requisite showing."); *cf.* Parents *ex rel.* Student v. Ventura Unified Sch. Dist., No. 2021030296, at 12 (Cal. Off. of Admin. Hearings June 18, 2021), https://perma.cc/4SAF-LYJK ("Even assuming, without deciding, that the impossibility defense in contract law could be applied, it is an affirmative defense.").

generally at odds with the purpose of the IDEA."[156] The same court, however, left open the possibility that the doctrine would be considered in exceptional cases.[157] Other courts and administrative law judges were similarly willing to recognize that, under unique circumstances, the performance of an IEP may be excused.[158]

Recently, variations of the impossibility doctrine have been applied by legal decision-makers who have held that the public health restrictions imposed during the COVID-19 pandemic excused school districts from providing certain services—even if such services were specifically listed in students' IEPs. For example, a Maryland federal district court refused to recognize a violation of the IDEA in a case where the school district had indisputably failed to provide the set of services enumerated in a student's IEP.[159] In so ruling, the court noted that the student's mother "did not show that Defendants had the *ability* to deliver all the modifications, accommodations, services, and related services" listed in the IEP.[160]

In a similar case from California, an administrative law judge ruled that COVID-19 policies requiring school closures excused a school district from its duty to provide services promised in the student's IEP, citing the "impracticality and deadly risks" associated with in-person instruction.[161] Other cases were decided on the same grounds.[162]

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[156] *Elmira City Sch. Dist.*, 166 N.Y.S.3d at 716–18; *see also Brown*, 2019 WL 3423208, at *16–18 (noting that the court is "unconvinced that the doctrine of impossibility can function to negate the District's obligation to provide Plaintiff a FAPE").

[157] *See Elmira City Sch. Dist.*, 166 N.Y.S.3d at 716–18.

[158] *See Schiff*, 2019 WL 5683903, at *7. In recognizing that the excuse doctrine may be applied in IDEA disputes, courts often refer to a case that revolved around the implementation of a settlement agreement, *Hester v. D.C.*, 505 F.3d 1283 (D.C. Cir. 2007), but as this Part demonstrates, the doctrine has been applied in practice in situations that do not involve settlement agreements.

[159] Lee v. Bd. of Educ., 2024 WL 361330, at *13–14 (D. Md. Jan. 31, 2024).

[160] *Id.* at *18 (emphasis added).

[161] Parents *ex rel.* Student v. Stanislaus Union Sch. Dist., No 2022040227, at 64–65 (Cal. Off. of Admin. Hearings July 29, 2022), https://perma.cc/NQ7C-B3VC.

[162] *See, e.g.*, E.M.C. v. Ventura Unified Sch. Dist., 2020 WL 7094071, at *6 (C.D. Cal. Oct. 14, 2020) ("Even if the May 7 IEP does require in-person IIS, Plaintiff's educational program has been modified by statewide public health restrictions prohibiting in-person education in Ventura County while it remains on the statewide monitoring list."); Parent *ex rel.* Student v. Dep't of Educ., No. DOE-SY2021-011, at 43 (Off. of Disp. Resol., Haw. Dep't of the Att'y Gen. Apr. 5, 2021), https://perma.cc/E8JN-JQ23 (noting that delivering IEP services virtually instead of in-person "was reasonable" given that "the shutdown of the entire State of Hawaii was an unforeseen, unprecedented move"); *Parent*, No. DOE-SY2021-015, at 44–45 ("When the 8/28/2019 IEP was developed. . . . No one, including the 8/28/2019 IEP team, expected that there would be lockdowns, quarantines and social-distancing that would make 'in-person' implementation of IEPs an issue.").

It is not a coincidence that courts applied the excuse doctrine to IEP disputes at the onset of the pandemic. During that period, contracts of all kinds were "breached, re-negotiated, reformed, or abandoned"[163] and the doctrine had become "ubiquitous."[164] Against this backdrop, one can understand courts' traditional reluctance to apply the doctrine to IEP disputes not as a categorical opposition to the incorporation of the doctrine but rather as a recognition that it should only be invoked in exceptional and unexpected circumstances, similar to the way the impossibility doctrine has been applied under general contract law.[165]

Note, however, that when it comes to IEP disputes, there is no set of circumstances where the excuse doctrine can work to the advantage of students. Unlike contract law, where the identity of the party benefitting from the doctrine is generally not predetermined, in the IDEA context it is only school districts who can be excused from performance. Moreover, the application of the excuse doctrine to IEP disputes during the COVID-19 pandemic seems incompatible with statements made by former Education Secretary Betsy DeVos, who noted early in the pandemic that there was "no reason for Congress to waive any provision designed to keep [special education] students learning."[166]

In sum, even though there is almost a consensus among federal courts that an IEP is not a contract, in adjudicating IEP disputes, courts have employed several contract doctrines and concepts that are not explicitly enumerated in the IDEA. In applying these doctrines, courts have made certain normative choices and assumptions regarding the goals of the "agreement" and the power dynamics between the parties, although they rarely discuss—let alone justify—these choices and assumptions.

B. The ADA

The ADA was enacted in 1990 to rectify the "stark, purposeful, state-mandated segregation and exclusion" of disabled people

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[163] Rachel Rebouché, *Bargaining About Birth: Surrogacy Contracts During a Pandemic*, 100 WASH. U. L. REV. 1265, 1267 (2023).

[164] Yehonatan Givati, Yotam Kaplan & Yair Listokin, *Excuse 2.0*, 109 CORNELL L. REV. 629, 632 (2024). For an argument that public health crises sometimes give rise to a "special defense to obligation" that is based on increased social costs of performance, see David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 985 (2021).

[165] Givati et al., *supra* note 164, at 638.

[166] Erica L. Green, *DeVos Decides Against Special Education Waivers During the Pandemic*, N.Y. TIMES (Apr. 28, 2020), https://www.nytimes.com/2020/04/28/us/politics/coronavirus-devos-special-education.html.

in the United States.[167] The ADA's Title I (employment), the title most relevant to this Article, treats an employer's failure to provide a reasonable accommodation to a "qualified individual" with a disability as discrimination.[168] A reasonable accommodation may involve, for instance, allowing a person to work remotely despite a general in-person work policy, hiring a sign language interpreter, or introducing changes to an employee's work schedule.[169]

The ADA's accommodation mandate is not unlimited, however. First, employers are only required to provide "reasonable" accommodations to qualified employees who can fulfill the "essential functions" of the job with or without accommodation.[170] Second, the employer need not provide the requested accommodation if it imposes "undue hardship."[171]

1. The source of contractualization.

The ADA does not contain a specific description of the ways in which an employer should determine the accommodation for a disabled employee.[172] According to the regulations promulgated by the Equal Employment Opportunity Commission (EEOC), however, an employee's request should trigger an "informal" exchange between the employee and the employer for the purpose of determining "the appropriate reasonable accommodation."[173] That exchange has come to be known as the "interactive process."[174] Courts across the country have considered the interactive process to be mandatory, meaning that a failure to negotiate by either party may constitute a violation of the ADA.[175]

Thus, similar to the IDEA, it is a statutory negotiation procedure—here, the interactive process—that constitutes a contract-like

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167 Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 407 (1991).

168 42 U.S.C. § 12112(b)(5)(A).

169 *Id.* § 12111(9) (providing examples of reasonable accommodations).

170 *Id.* § 12111(8) (defining a "qualified individual" for the purpose of the ADA).

171 *Id.* § 12111(10) (defining "undue hardship" as "an action requiring significant difficulty or expense," determined by a number of statutory factors).

172 The only suggestion of the interactive process that can be found in a statute is a provision that shields an employer from being liable in compensatory damages for denial of reasonable accommodation as long as the employer has negotiated the accommodation request in "good faith." *Id.* § 1981a(a)(3). That provision was not part of the original ADA; it was included in the Civil Rights Act of 1991 § 102, Pub L. No. 102-166, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 2000e-2(k)).

173 Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(o)(3) (2025).

174 *Id.*

175 *See* Lin, *supra* note 18, at 1843 n.71 (collecting cases).

instrument under the ADA. The interactive process grew out of a pre-ADA report issued by the Senate Committee on Labor and Human Resources,[176] an approach that was later incorporated into an interpretive guidance issued by the EEOC. According to these guidelines, the parties are expected to (1) identify potential accommodations, (2) "assess the[ir] effectiveness," and, eventually, (3) "select and implement the accommodation that is most appropriate for both the employee and the employer."[177]

Various stakeholders have used contractual terminology in discussing this negotiation requirement. For example, courts have described the interactive process in terms of "offer" and "counter offer."[178] Scholars, too, have referred to the interactive process as involving "bargaining" over accommodations.[179]

Notably, the two other main titles of the ADA, Title II (public entities) and Title III (public accommodations) also include a reasonable accommodations requirement (or, in the language used by those titles, "reasonable modifications").[180] There is evidence that disabled individuals who seek to enforce their rights in those other contexts also engage in negotiations with the pertinent entities—either government entities or places of public accommodation.[181] Such negotiations, however, are more similar to the classic type of negotiations "in the shadow of the law,"[182] as opposed to the interactive process, which is embedded in the reasonable accommodation doctrine. Thus, the doctrinal distinctiveness of the interactive process makes it more likely to give rise to the contractualization of disability rights in employment, as the remainder of this Part demonstrates.

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176 S. REP. NO. 101-116, at 31 (1989).

177 *See* 29 C.F.R. pt. 1630 app. § 1630.9 (2025).

178 *See, e.g.*, EEOC v. Ford Motor Co., 782 F.3d 753, 766 (6th Cir. 2015); Collier v. City of New Albany, 2023 WL 373825, at *6 (S.D. Ind. Jan. 24, 2023); Valentine v. Am. Home Shield Corp., 939 F. Supp. 1376, 1399 (N.D. Iowa 1996); EEOC v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 137 (1st Cir. 2014) (Kayatte, J., dissenting).

179 *See, e.g.*, Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1219, 1220 (2002).

180 General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(7) (2025); 42 U.S.C. § 12182(b)(2)(A)(ii).

181 *See, e.g.*, HABEN GIRMA, HABEN: THE DEAFBLIND WOMAN WHO CONQUERED HARVARD LAW 151–64 (2019) (describing negotiations with the staff at the Lewis & Clark College cafeteria); Kristen L. Popham, Elizabeth F. Emens & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1, 31–32 (2023) (quoting an interviewee describing her negotiations with the staff of a hotel in Richmond, Virginia).

182 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

2. Does the interactive process constitute a contract?

Courts adjudicating accommodation disputes do not treat the interactive process, or any agreements about accommodations that grow out of the process, as a contract per se. For example, if an employer stops providing the employee with an accommodation that had been previously agreed upon, courts do not refer to such instances—what Professor Nicole Porter calls "withdrawn accommodations"[183]—as a breach of contract.[184] At most, courts might draw an "inference of reasonableness" from the fact the accommodation had already been provided for some time.[185]

Similarly, even when an employee signs a document or otherwise affirmatively accepts the employer's proposed accommodation, courts usually refrain from treating such agreements as contracts.[186] Here again, the employee's consent may be taken into consideration in the assessment of the accommodation's "reasonableness,"[187] but courts do not consider this as an independent element of a binding contract.

Nor should they. After all, the employer is *required* by statute to provide a reasonable accommodation to an eligible employee, which means that the employer's agreement to provide an accommodation is not entirely voluntary. Conversely, if there is more than one accommodation that could be deemed "reasonable," it is the employer who gets to choose the specific accommodation that would be provided,[188] which means that an employee's choice regarding the accommodation is also not fully voluntary.[189]

3. The contract law of the interactive process.

Although the interactive process does not constitute a negotiation toward a contract, courts interpret the process itself to be governed, at least in part, by contract concepts. Specifically, two

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183 *See generally* Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885 (2015).

184 *See, e.g.*, Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999).

185 *See* Porter, *supra* note 183, at 905–12.

186 *See infra* notes 199–205 and accompanying text (discussing the application of the "duress" doctrine in ADA cases).

187 *See id.*

188 Hoppe v. Lewis Univ., 692 F.3d 833, 840 (7th Cir. 2012); 29 C.F.R. pt. 1630 app. § 1630.9.

189 An employee can choose not to accept an accommodation, but in doing so they "may lose the status of a qualified individual if unable to perform the essential functions of the job without the accommodation." Mark C. Weber, *Unreasonable Accommodations and Due Hardship*, 62 FLA. L. REV. 1119, 1140 n.86 (2010).

contract doctrines have made their way into interactive process jurisprudence: (1) the implied duty of good faith and (2) duress.

a) Good faith. As part of the interactive process, employers and employees are effectively required to negotiate in good faith over accommodations. The analysis of the good-faith duty under the ADA is similar to its IDEA counterpart,[190] including the fact that, unlike contract law, the duty applies to the negotiation stage (and is not limited to performance).[191]

Similar to contract law, the duty of good faith under the ADA is implied and nonwaivable.[192] The doctrines have a number of other common features, suggesting that at least some aspects of the good-faith duty in the ADA context may have been imported from or inspired by contract law. For example, courts have identified a nonexhaustive list of behaviors that constitute "bad faith" by pinpointing the party "responsible for the breakdown in the interactive process" in various scenarios.[193] This identification of bad-faith behaviors, in turn, is consistent with the "excluder theory" adopted in the Second Restatement.[194] Moreover, there is

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[190] *See supra* notes 125–31 and accompanying text. In fact, some courts have even used the term "interactive process" in discussing the duty of good faith under the IDEA. *See, e.g.*, Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 27 (1st Cir. 2008).

[191] One could argue that, given that most accommodation requests come as part of preexisting employment relationships, the duty of good faith pertains to the enforcement stage. But the nature of the good-faith duty under the ADA differs significantly from one focused on performance, concerning instead communication and exchange of information toward reaching an agreement on accommodation.

[192] *See, e.g.*, Kleiber v. Honda of Am. Mfg., Inc., 485 F.3d 862, 871 (6th Cir. 2007) ("Even though the interactive process is not described in the statute's text, the interactive process is mandatory, and both parties have a duty to participate in good faith."). There is an explicit statutory reference to "good faith" in a provision that shields an employer from damages liability as long as the employer "demonstrates good faith efforts" to identify and provide a reasonable accommodation in consultation with the employee. 42 U.S.C. § 1981a(a)(3). That provision, however, does not impose a duty of good faith but rather constitutes a "safe harbor" against damages in cases involving refusal to provide accommodations. Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 UTAH L. REV. 429, 443.

[193] Jackson v. City of Chicago, 414 F.3d 806, 814 (7th Cir. 2005). Thus, for example, a number of circuit courts point to two general behaviors that are likely to violate the good-faith duty: (1) obstruction or delay of the interactive process and (2) failure to communicate, "by way of initiation or response." *See, e.g.*, Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (establishing the test); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3d Cir. 1999) (adopting the test); *Kleiber*, 485 F.3d at 871 (same).

[194] *See supra* note 129 and accompanying text.

similarity in the rhetoric used by courts[195] and in some of the behaviors constituting bad faith between these bodies of law, especially with respect to lack of cooperation.[196]

In adjudicating interactive-process disputes, courts impose a duty of good faith not only on employers,[197] but also on employees.[198] This symmetrical approach seems to ignore the fact that, when it comes to disability accommodations in the workplace, an employer and a disabled employee have significantly different interests, resources, and access to information. Thus, holding them to similar (contractual) standards may fail to reflect the power dynamics surrounding the interaction, as Part IV discusses in greater detail.

b) Duress. In evaluating the reasonableness of an agreed-upon accommodation, a number of courts have examined whether the employee was pressured into accepting the proposed accommodation.[199] In doing so, these courts seem to be influenced by the

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[195] In ADA disputes, courts use metaphors such as "sweep[ing] the problem under the rug," "sit[ting] behind a closed door," "negotiat[ing] with a brick wall," or sitting "back" and continuing "to document [the employee's] failures." *Beck*, 75 F.3d at 1136; EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 806 (7th Cir. 2005); Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 737 (5th Cir. 1999); *Taylor*, 184 F.3d at 315. This rhetoric is consistent with the terminology used by judges to identify bad-faith behaviors in contract disputes. For example, in invoking the duty of good faith, Judge Richard Posner explained that "[t]he seller cannot sit idly by while the buyer flails about trying to cope with the failure of the seller's product." AMPAT/Midwest, Inc. v. Ill. Tool Works Inc., 896 F.2d 1035, 1041 (7th Cir. 1990).

[196] *Compare supra* note 131 (providing examples in the contracts context), *with infra* notes 197–98 (providing examples in the ADA context).

[197] For example, bad-faith behaviors may include a delay in the response to an accommodation request or a "cursory" medical examination. *See* Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1117 (9th Cir. 2000) (noting that a five-month period to respond to an accommodation request does not "reflect good faith engagement in the interactive process"), *vacated on other grounds*, 535 U.S. 391 (2002); Rorrer v. City of Stow, 743 F.3d 1025, 1041 (6th Cir. 2014).

[198] For example, courts have held that a violation of the good-faith standard may occur when a worker fails to provide medical documentation to support their accommodation request or "does not answer the employer's request for more detailed proposals." Mynatt v. Morrison Mgt. Specialist, Inc., 2014 WL 619601, at *14 (E.D. Tenn. Feb. 18, 2014); *Taylor*, 184 F.3d at 312, 317; *see also* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 69 (2021) [hereinafter Macfarlane, *Disability Without Documentation*] ("When disabled employees do not provide medical documentation of the disability, courts hold that they have not participated in good faith in the interactive process.").

[199] In *Nighswander v. Henderson*, 172 F. Supp. 2d 951 (N.D. Ohio 2001), the court found that an employee's reassignment to a part-time position was not a reasonable accommodation, even though the employee "signed the job offer." *Id.* at 954. In reaching this conclusion, the court noted that the signing was "under protest." *Id.* In *Boyte v. Shulkin*, 2018 WL 898680 (M.D. Tenn. Feb. 14, 2018), the court denied an employer's (the defendant's) motion to dismiss with respect to the employee's (the plaintiff's) failure-to-accommodate claim, even though the employee had previously accepted an accommodation offer from the employer. *Id.* at *1–3. In doing so, the court noted that the employee wrote on the acceptance form that her acceptance was "under protest." *Id.* at *1.

logic of the duress doctrine in contract law, which allows a party to avoid a contract if it can prove that it would not have entered into the agreement absent the coercive conduct of the other side.[200]

Interestingly, at least one court has acknowledged a plaintiff's claim of "duress" even in a situation in which the accommodation was proposed by the employee.[201] In that case, the plaintiff, who had panic and anxiety disorder, sued his former employer for failing to provide him with a reasonable accommodation even though the parties had previously agreed that a job transfer, which the plaintiff had suggested, would be acceptable.[202] While the district court granted summary judgment for the employer, concluding that it reasonably accommodated the plaintiff by reassigning him to a warehouse position,[203] the Third Circuit reversed. It held that there was a genuine issue of material fact on the reasonableness question, relying in part on the plaintiff's testimony that "he had requested the warehouse transfer 'only under duress' because he was afraid he was going to lose his job."[204] This case, as well as others, illustrate that an employer cannot discharge its reasonable accommodation duty by pressuring an employee to agree.[205]

Nevertheless, there are differences in the way the duress doctrine works in those cases compared to the way it operates in contract law. For example, the threshold for invoking the duress concept in ADA cases appears to be lower than that in ordinary contract cases, even those involving "economic duress."[206] Specifically, while ADA cases may turn on an employee's general allegation that they were afraid of losing their job, a standard contract duress claim typically requires proof of "improper" threat.[207]

In sum, in adjudicating ADA disputes, courts have employed certain contract law doctrines. Here again, similar to IDEA cases,

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200 FARNSWORTH, *supra* note 121, § 4.16.

201 *See* Skerski v. Time Warner Cable Co., 257 F.3d 273, 284 (3d Cir. 2001).

202 *Id.*

203 *Id.*

204 *Id.*

205 *See, e.g.*, Montoya v. Napolitano, 2015 WL 11117307, at *5 (D.N.M. May 5, 2015).

206 *Cf.* Parker v. Chrysler Corp., 929 F. Supp. 162, 167 (S.D.N.Y. 1996) ("The fact that the choice offered is between inherently unpleasant alternatives—resignation or job insecurity—does not by itself establish that a resignation was induced by duress or coercion."); Reiver v. Murdoch, 625 F. Supp. 998, 1014 (D. Del. 1985) (predicting that a Delaware court "would hold that threats of termination of an at-will employee to obtain a release of already accrued benefits could form the basis of an action predicated on economic duress").

207 FARNSWORTH, *supra* note 121, § 4.16.

the courts' decisions to resort to contract law have not been accompanied by a meaningful discussion explaining or justifying such decisions and their implications.

C. Section 504 of the Rehabilitation Act and § 1557 of the ACA

Enacted as the first major disability rights provision in the United States, § 504 of the Rehabilitation Act prohibits recipients of federal funding from discriminating on the basis of disability.[208] The Third Circuit has explained that "[t]hrough the Rehabilitation Act, Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies."[209]

Although the Rehabilitation Act was enacted in 1973, § 504 had not been implemented before 1977, when then–Secretary of Health, Education, and Welfare Joseph Califano signed the regulations for the statute.[210] That signing was the culmination of protests and sit-ins organized by disability rights activists, which one disability rights scholar referred to as "a touchstone of the disability rights movement."[211]

Section 504's scope of coverage extends to "K-12 public schools, almost all colleges and universities, many health care providers, and many state and local agencies, ranging from libraries to transit operations."[212] Similar to the ADA, there is a reasonable accommodation requirement under § 504.[213] Since the adoption of the ADA, § 504 is no longer as significant as it used to be. In some instances, however, disabled plaintiffs may prefer to seek redress under § 504 for a number of reasons. For example, § 504 generally provides an avenue for compensatory damages[214]—unlike the public accommodations provisions of the ADA, which only provide for injunctive relief.[215]

While § 504 is considered the earliest major attempt to use civil rights legislation in the disability context, § 1557 of the ACA

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208 29 U.S.C. § 794.

209 Koslow v. Pennsylvania, 302 F.3d 161, 175 (3d Cir. 2002).

210 Karen M. Tani, *After 504: Training the Citizen-Enforcers of Disability Rights*, 42 DISABILITY STUD. Q., June 12, 2023 [hereinafter Tani, *After 504*].

211 *Id.* at 9.

212 *Id.* at 6.

213 Reasonable Accomodation, 29 C.F.R. § 32.13(a) (2025).

214 29 U.S.C. § 794a; Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992) (holding that "a damages remedy is available for an action brought to enforce" Title IX of the Education Amendments Act of 1972, Title VI of the Civil Rights Act of 1964, and § 504 of the Rehabilitation Act).

215 42 U.S.C. § 12188(a)(2).

is the most recent such endeavor. That provision prohibits discrimination on the basis of disability (as well as other protected grounds) by health programs that receive federal funding or are administered by the U.S. Department of Health and Human Services (HHS).[216]

Although some healthcare programs were covered under preexisting antidiscrimination statutes, "section 1557 extended its protection to individuals participating in any health program or activity that receives funding from HHS, in full or in part, any health program or activity that HHS itself administers, any health insurance marketplaces, and all plans offered by insurers that participate in the marketplace."[217] Section 1557 "amended existing antidiscrimination laws to provide additional protections to patients in certain health care programs, activities, and settings."[218] When it comes to health care providers, § 1557 "extends the reach of the Rehabilitation Act . . . by defining 'federal financial assistance' to include grants, loans, credits, subsidies, and insurance contracts."[219]

1. The source of contractualization.

Unlike the IDEA and ADA, which require the parties to negotiate over accommodations, the contract angles of § 504 and § 1557 have to do with the fact that the Rehabilitation Act and the ACA were enacted under Congress's spending power.[220]

The underlying theory, which the Supreme Court has developed in a line of cases beginning in the 1980s,[221] is that the relationship between the federal government and recipients of federal funding constitutes an implied agreement, pursuant to which, in return for the funds, the recipients agree to comply with "federally imposed conditions."[222] In the context of antidiscrimination provisions such as § 504 and § 1557, the promise of recipients of

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[216] *Id.* § 18116.

[217] Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1505 (2020).

[218] Elizabeth Pendo & Jennifer D. Oliva, *Disability Discrimination by Clinical Algorithm*, 103 N.C. L. REV. 187, 212 (2024).

[219] *Id.* at 220.

[220] Note, *Without Remedies: The Effect of Cummings and the Contract Law Analogy on Antidiscrimination Spending Clause Plaintiffs*, 138 HARV. L. REV. 1407, 1407 (2025).

[221] The origin of this contract analogy is a 1981 case, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), which concerned a disability rights statute, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 (repealed 2000). For a historical analysis, see Tani, *The* Pennhurst *Doctrines*, *supra* note 11, at 1157.

[222] *Pennhurst*, 451 U.S. at 17.

federal funding can be described as a promise not to discriminate. Based on this theory, courts have used contract concepts to adjudicate disputes involving Spending Clause legislation.

2. Does the relationship between the federal government and recipients of federal funding constitute a contract?

Despite the large volume of case law dealing with the "contractual nature"[223] of conditional spending, the Supreme Court generally does not treat the relationship between the federal government and recipients of federal funds as purely contractual. As Chief Justice John Roberts recently emphasized, "our cases do not treat suits under Spending Clause legislation as literal 'suits in contract.'"[224] The Court's rhetoric, however, has not always been consistent.[225] As Professor Abbe Gluck put it, "courts have vacillated between whether the 'contract' metaphor is a metaphor, or is intended to describe the actual status of the state-federal agreement, or is only intended to describe the context of the states' choice to participate."[226]

Part of what makes the contract analogy tricky is that taking it literally leads to the conclusion that Spending Clause statutes are in and of themselves contract offers. In a recent article, Professor Jeff Gordon argued exactly that, explaining that what he calls "statutory contracts" constitute "a unilateral contract offer, the kind where only one party is bound and the second party accepts by rendering performance."[227] Other scholars have expressed skepticism as to whether Spending Clause legislation should be treated as contracts, at least from a normative perspective.[228]

In a 2008 article, Professor Samuel Bagenstos argued that the Supreme Court had adopted a "weak contract theory," which focuses on the "notice requirement" that stems from the contract analogy.[229] Bagenstos distinguished this weak theory from what

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223 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

224 *Cummings*, 142 S. Ct. at 1573.

225 Abbe R. Gluck, *Our (National) Federalism*, 123 YALE L.J. 1996, 2011 (2014).

226 *Id.* at 2031.

227 Jeff Gordon, *Statutory Contracts*, 42 YALE J. REG. 660, 664–65 (2025). At the same time, Gordon has recognized that "all spending statutes are only enacted pursuant to the Article I legislative power." *Id.*

228 *See, e.g.*, Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 385 (2008) [hereinafter Bagenstos, *Spending Clause Litigation*] (arguing that "the Court should not adopt either the strong or the weak contract theory"); Gluck, *supra* note 225, at 2031 (arguing that Spending Clause statutes should not be described as actual contracts between states and the federal government).

229 Bagenstos, *Spending Clause Litigation*, *supra* note 228, at 384–408.

he called "Strong Contract Theory"[230]—the idea, advanced by Professor David Engdahl, that spending statutes "have no force at all as 'law,' but rather are binding, if at all, only by virtue of contract."[231] Bagenstos predicted that the Roberts Court would "continue to implement the weak contract theory,"[232] limiting "the enforceability of conditional spending statutes" by using "doctrines that skew the interpretation" of such statutes.[233] As the next Section shows, that prediction turned out to be prescient.

3. The contract law of § 504 and § 1557: remedies.

In a series of decisions, the Supreme Court has relied on substantive contract law to limit the scope of damages that may be awarded in antidiscrimination claims under § 504 of the Rehabilitation Act and § 1557 of the ACA.

In *Barnes*, for example, the Court held that punitive damages are not available under § 504 and Title II of the ADA.[234] In that case, the plaintiff, a wheelchair user, suffered "serious medical problems" after he had been mistreated by the police following his arrest for trespass.[235] The plaintiff brought suit against the Kansas City Board of Police Commissioners, claiming that he was discriminated against by the police's failure "to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries."[236]

Although *Barnes* originated from a lawsuit alleging disability discrimination, the Court's reasoning had little to do with either disability or discrimination. Instead, the Court relied on contract doctrine. Invoking the contract analogy, the Court denied the plaintiff punitive damages because such damages "are generally not available for breach of contract."[237]

Exactly two decades after *Barnes*, the Court rendered its decision in *Cummings*. In that case, the plaintiff, who was deaf and legally blind, had asked her health-care provider to make a sign

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230 *Id.* at 385–87.

231 David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 500 (2007).

232 Bagenstos, *Spending Clause Litigation*, *supra* note 228, at 385.

233 *Id.* at 350.

234 *Barnes*, 536 U.S. at 189–90.

235 *Id.* at 183–84.

236 *Id.* at 184.

237 *Id.* at 187.

language interpreter available during her physical therapy sessions.[238] The provider refused and the plaintiff sued, seeking damages for emotional distress under § 504 and § 1557.[239] Here again, the Court held that Cummings was not entitled to the damages sought—this time, emotional distress damages—because such damages are *not* among "the usual contract remedies in private suits."[240]

Justice Steven Breyer authored a dissenting opinion in *Cummings*, in which he was joined by Justices Sonia Sotomayor and Elena Kagan. The dissent did not challenge the legal structure underlying the majority's holding, according to which the Court should look to contract rules to answer whether the plaintiff is entitled to emotional distress damages.[241] Instead, the dissent argued that, under this very legal construction, the Court should have looked to *specific types* of contracts in which a breach was particularly likely to cause emotional harm.[242] According to the dissent, because damages for emotional distress are available in specific contracts to which the parties enter for nonpecuniary purposes, and because a "promise not to discriminate" falls into that category of contracts, recipients of federal funds should have known that they could be held liable for causing emotional distress.[243]

The majority, however, rejected that contextual approach. It distinguished between the "basic, general rules" of contract law and specific contract doctrines that might be "idiosyncratic or exceptional,"[244] holding that only the former can be considered in adjudicating disability rights disputes originating from Spending Clause legislation. Thus, unlike the examples discussed in Parts II.A and II.B, the *Cummings* Court provided at least partial discussion about the normative choices underlying the use of contract law to resolve disability rights disputes.

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238 *Cummings*, 142 S. Ct. at 1568–69.
239 *Id.* at 1569.
240 *Id.* at 1571.
241 *Id.* at 1577–78 (Breyer, J., dissenting).
242 *Id.* at 1578–79 (Breyer, J., dissenting).
243 *Cummings*, 142 S. Ct. at 1578–79 (Breyer, J., dissenting).
244 *Id.* at 1574.

III. ANALYZING THE CONTRACTUALIZATION OF DISABILITY RIGHTS LAW

The preceding Part showed that the implementation of disability rights law in the United States incorporates contract doctrines at key junctions across four distinct civil rights statutes. The discussion reveals a great deal of inconsistency: in some cases, administrative law judges were the actors involved in invoking contract law concepts; in others, it was the Supreme Court that used contract law to resolve a disability rights dispute. Moreover, legal decision-makers apply certain contract doctrines but not others.[245] Judges may also disagree about how to apply the same contract doctrine.[246]

There are also striking differences with respect to party configuration: the parties to an IEP are, by definition, a private individual (a disabled child represented by their parents) and a public entity (the school district); the parties to an interactive process under the ADA are typically a private individual (a disabled employee) and a private or public entity (an employer);[247] and the parties to a federal funding "contract" are the federal government and a recipient of federal funding (either a public or private entity). In fact, in those Spending Clause cases, disabled people are not actually parties to the "contract" in question; rather, their role is akin to that of a third-party beneficiary, although courts have struggled with determining how and when that doctrine should apply.[248] Of course, from a contract perspective, each of these types of relationships raises different questions for law and policy. Indeed, scholars have found it difficult to formulate a contract theory that fits the wide variation in party configuration.[249]

Nevertheless, examining the contractualization of disability rights law as a phenomenon allows for two general observations. One has to do with the tracks through which disability rights are

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[245] *See, e.g.*, *supra* notes 100–01 and accompanying text (describing how courts do not treat every failure to implement an IEP as a violation of the law).

[246] For a similar trend in the context of statutory interpretation, see generally Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608 (2022).

[247] The ADA defines "employer" as an entity with at least fifteen employees. 42 U.S.C. § 12111(5)(A).

[248] *See* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2381–91 (2020); *cf.* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1453–55 (2023) (rejecting a claim that invoked the third-party beneficiary doctrine as part of the "contract analogy" without addressing the question of how the doctrine applies to such situations).

[249] *See, e.g.*, Schwartz & Scott, *supra* note 23, at 550–54 (developing a utilitarian theory for transactions between firms); Markovits, *supra* note 23, at 1464 (developing a deontological theory pertaining to contracts between "natural" persons).

contractualized, and the second pertains to the nature of the contract paradigm that courts use.

A. A Dual Track of Contractualization

What is driving the contractualization of disability rights law? One logical place to look for an answer is the literature analyzing similar (albeit not identical) developments in other areas of law, including civil procedure,[250] statutory interpretation,[251] family law,[252] evidence,[253] criminal law,[254] and federalism.[255]

The literature offers four primary explanations for the broader contractualization phenomenon. The first involves the incorporation of economic logic into public law discourse and the distrust of governmental function—both have resulted in the "privatization" of a number of areas of public law, which in turn gives rise to an increased reliance on contract.[256] The second and perhaps related explanation is built upon the idea that people have the intrinsic right to exchange public entitlements, as long as such rights are not inalienable.[257] For example, under existing law, criminal defendants can waive their right to a trial in exchange for reduced punishment.[258] By definition, the liberty to exchange public entitlements "subsumes a freedom to contract for such an exchange."[259]

The third explanation, which pertains mostly to family law—in which the background (public) legal norm was "unjust and outdated" with negative consequences for women and sexual minorities—concerns the use of contract to promote autonomy and formal equality.[260]

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[250] *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 599 (2005).

[251] *See generally* Krishnakumar, *supra* note 246.

[252] *See generally* Adrienne Hunter Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 AM. J. COMPAR. L. 151 (2014).

[253] *See generally* Talia Fisher, *Trial by Design*, 60 AM. PHIL. Q., no. 2, 2023, at 149.

[254] *See generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

[255] *See generally* Fahey, *supra* note 248.

[256] *See* Helen Hershkoff & Judith Resnik, *Contractualisation of Civil Litigation in the United States*, *in* CONTRACTUALISATION OF CIVIL LITIGATION, 419, 424, 428, 429, 505 (Anna Nylund & Antonio Cabral eds., 2023); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1522–26.

[257] *See* Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 95 & n. 17 (2011).

[258] *Id.* at 112–14.

[259] Scott & Stuntz, *supra* note 254, at 1913.

[260] *See* Singer, *supra* note 256, at 1517–22, 1565. In this respect, however, contract has not fully lived up to its promise—both within and outside marriages. *See id.* at 1549 ("[P]rivatizing the procedures for resolving divorce and custody disputes may exacerbate, rather than ameliorate, existing gender-based power inequalities within the family.");

The fourth and final explanation focuses on institutional actors—namely Congress, the federal government, and courts. According to this explanation, legislators, regulators, and courts resort to contract-like instruments to fill in gaps in the law or to overcome structural challenges that might otherwise limit their power.[261] For example, Professor Bridget Fahey noted that "[w]here Congress lacks the authority to enact a policy program, or where it simply does not want to implement that program alone, it may use federal grants to engage the assistance of the states."[262] Conversely, Professors Katie Eyer and Karen Tani have recently shown how, in interpreting the exact measures discussed by Fahey, the Supreme Court has invoked contract law to "restrain the scope of Congress's spending power" and, in so doing, has expanded the Court's own authority.[263]

While this brief summary is far from a comprehensive, comparative analysis of the contractualization of public law, it shows that, perhaps unsurprisingly, such contractualization might be driven by a variety of factors and affected by different actors. And although these parallel contractualization trends are not made of one piece, certain aspects of these trends can be identified in the phenomenon documented in this Article.

For example, while the judiciary is the ultimate actor using contract law concepts as gap-fillers when adjudicating disability rights disputes, Congress and the EEOC have facilitated the contractualization of disability rights law by inscribing into disability rights statutes elements associated with contract formation: a negotiation or exchange framework. Moreover, the contractualization of disability rights law reflects, in some respects, the privatization of public law, insofar as antidiscrimination law is perceived as public law.[264] As described further below, however, the contractualization of disability rights law has one unique feature: it is driven in part by disability law's reliance on the concept of accommodation—a model that is not shared by other situations in which public law is contractualized.[265]

Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 82, 144 (2021) ("[T]he right to contract within marriage and the family more generally is still limited.").

[261] *See* Krishnakumar, *supra* note 246, at 610, 614–39 (documenting and analyzing the gap-filling role common law has played in statutory interpretation).

[262] Fahey, *supra* note 248, at 2339.

[263] Eyer & Tani, *supra* note 11, at 847, 896, 924.

[264] *See* Robin West, *The New Legal Criticism*, 117 COLUM. L. REV. ONLINE 144, 154–55 (2017).

[265] Recently, the Pregnant Workers Fairness Act has introduced an accommodation mandate—modeled after the ADA—to protect pregnant people from discrimination in the

Against this backdrop, it is possible to identify two specific tracks through which contract doctrines make their way into disability rights adjudication: the negotiation-for-accommodation mechanism and the Spending Clause contract theory.

1. The negotiation-for-accommodation mechanism.

The negotiation-for-accommodation mechanism is built on the idea that the reasonable accommodation model shares three principles[266] associated with negotiated contracts: individualization,[267] collaboration,[268] and information sharing.[269]

Indeed, the rhetoric used in the Senate report that laid the groundwork for the interactive process stresses the importance of

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workplace. 42 U.S.C. § 2000gg-1. Moreover, the Supreme Court recently interpreted Title VII of the Civil Rights Act of 1964 to include a more robust accommodation mandate than previously understood in the context of religion. *See supra* note 47 and accompanying text. Thus, it is possible that other statutes will be contractualized through the negotiation-for-accommodation mechanism.

[266] Professor Jon Romberg has previously identified collaboration, individualization, and contractualization as three procedural rights afforded by the IDEA. Romberg, *supra* note 94, at 419, 449.

[267] The concept of accommodation is inextricably linked to the unique individual needs and skills of each person. *See, e.g.*, S. REP. NO. 101-116, at 31 (1989) (explaining that the reasonable accommodation requirement "focuses on the needs of a *particular* individual in relation to problems in performance of a *particular* job" (emphasis added)). Individualization also lies at the core of the IEP. Literally, an IEP is an "individualized" program. *See* Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23 (1st Cir. 2008) (noting that the content of an IEP must differ from "a generic, one-size-fits-all program").

[268] The ADA's interactive process is based on collaboration and its attended benefits. *See* S. REP. NO. 101-116, at 32; *see also* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1138 (9th Cir. 2001) (referring to the interactive process as a "cooperative dialogue" and noting that it fosters a "problem-solving" framework). The IDEA similarly perceives the parents as partnering with educators to improve educational outcomes of disabled students. 20 U.S.C. § 1400(d)(3); *see also* Caruso, *supra* note 18, at 174 (noting that the IEP constitutes "a particular mode of cooperation between families of children with disabilities and school districts"). Some judges and scholars believe that collaboration is also a central contract law principle. For example, Judge Posner has analogized a contract to a "cooperative venture," which gives rise to an obligation for "a minimum of cooperativeness" imposed on both parties. AMPAT/Midwest, Inc. v. Ill. Tool Works Inc., 896 F.2d 1035, 1041 (7th Cir. 1990); *see also* Mkt. St. Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (noting that contracts "set in motion a cooperative enterprise, which may to some extent place one party at the other's mercy"). Scholars, too, identify cooperation or collaboration as key for theorizing contract law. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1, 21 (2022) (emphasizing cooperation as a core of contract performance theory); Markovits, *supra* note 23, at 1421, 1464 (relying on Kantian principles to identify "collaboration" as the core justification of contract law).

[269] Information sharing is considered key for a successful interactive process. *See* Stein, *supra* note 63, at 160. In a similar vein, scholars have long argued that IEP negotiations may allow school districts to make "wiser and more informed" decisions by serving as a platform for information exchange. Romberg, *supra* note 94, at 451–52.

information exchange for securing accommodations.[270] Significantly, this language is remarkably similar to the language used by law and economics scholars when discussing the contract process.[271] In addition, some scholars have argued that the interactive process is consistent with feminism and communitarianism, suggesting that information sharing serves more than just economic efficiency.[272] In any event, under each of these understandings of the interactive process, the idea of negotiation is embedded in the process of securing an accommodation.

Unlike alternative dispute resolution mechanisms embedded in federal antidiscrimination law,[273] accommodation-based negotiations occur *before* any dispute arises. The purpose of the ADA's and IDEA's mandatory negotiation processes is not to settle disputes, but rather to tailor services and accommodations to an individual's needs and skills. Thus, when parties negotiate over accommodations, they do not only negotiate "in the shadow of the law."[274] Rather, negotiation is an inherent and inevitable aspect of any accommodation framework.[275]

What does all of this have to do with the incorporation of contract law into disability rights statutes? The answer involves gap filling. As described above, although the IDEA and, to a lesser extent, the ADA, include procedural safeguards aimed at regulating accommodation negotiations, these safeguards do not address all aspects of the accommodation process. And when judges encounter gaps in those provisions, they resort to concepts and doctrines that can be found in contract law.

2. The Spending Clause contract theory.

While the negotiation-for-accommodation mechanism is the driving force behind the contractualization of ADA and IDEA, it cannot explain the contractualization of § 504 of the Rehabilitation

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[270] S. REP. NO. 101-116, at 34 (noting that an employee's suggested accommodation is often "simpler and less expensive than the accommodation the employer might have devised," which may result in "mutual[ ] benefit[ ]" to the parties).

[271] Avery W. Katz, *Economic Foundations of Contract Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 184 (Gregory Klass, George Letsas & Prince Saprai eds., 2014) (noting that the extent of contractual surplus depends on the parties' decision "to disclose relevant information to their counterparties," among other factors).

[272] *See, e.g.*, Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105, 149 (2005).

[273] *See generally* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671 (2005).

[274] Mnookin & Kornhauser, *supra* note 182, at 968.

[275] *Cf.* Lin, *supra* note 18, at 1834 (making a similar point).

Act and § 1557 of the ACA. Indeed, when it comes to cases like *Barnes* and *Cummings*, courts inject contract law into the disability rights framework through a different track: the "contract theory" of Spending Clause legislation. Under this track, courts resort to contract concepts to fill statutory gaps in antidiscrimination legislation. Specifically, the gap that the Court filled in *Barnes* and *Cummings* pertains to the available remedies under § 504 and § 1557. "Because the statutes at issue are silent as to available remedies," the *Cummings* Court held, resorting to the contract analogy was appropriate to decide whether federal funding recipients had sufficient "notice" about their potential liability.[276]

Unlike the accommodation-focused track, the Spending Clause–related track extends beyond the disability realm. Indeed, the "contract analogy" that underlies enforcement of § 504 and § 1557 claims pertains to a wide array of statutes, including other antidiscrimination provisions, such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972—what Professor Joy Milligan referred to as "Spending Clause civil rights statutes."[277] What this means is that the holdings in cases like *Cummings* and *Barnes* directly apply to claims of race and sex discrimination in programs funded under Congress's spending power.

Still, disability cases, in particular, "have been and continue to be key" in the Court's development of the contract theory of Spending Clause legislation.[278] In fact, that theory was formulated in a disability-related case.[279] Moreover, when it comes to disability law, the theory's reach extends beyond the realm of Congress's Spending power.[280] Specifically, courts have applied the reasoning of *Cummings* to lawsuits brought under Title II of the ADA, which prohibits public entities from discriminating on the basis of disability.[281] The underlying theory is that, although Title II was not enacted under Congress's spending power, its "remedies provision incorporates the related provision from the

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[276] *Cummings*, 142 S. Ct. at 1571.

[277] Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 97 & n. 171 (2022) (explaining that the term refers to "this overall complex of statutes prohibiting discrimination in programs based on Spending Clause authority").

[278] Eyer & Tani, *supra* note 11, at 924.

[279] *See supra* note 221 and accompanying text.

[280] *See* Harris et al., *supra* note 11, at 1725–28.

[281] 42 U.S.C. § 12131; *see, e.g.*, A.W. *ex rel.* J.W. v. Coweta Cnty. Sch. Dist., 2022 WL 18107097, at *3 (N.D. Ga. Nov. 16, 2022); Doherty v. Bice, 101 F.4th 169, 173–75 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 381 (2024).

Rehabilitation Act."[282] As a result, since *Cummings* was decided, disabled people have been barred from seeking emotional distress damages in cases alleging disability discrimination under Title II.[283]

B. The Commercial Contract Paradigm

Although the contractualization of disability rights law occurs through two distinct tracks, these tracks have something in common: the contract law paradigm courts use when they adjudicate disability rights disputes. In short, courts tend to adopt a Willistonian approach to contracts, one that perceives contract law as a general discipline that focuses on commercial transactions.[284]

This paradigm, sometimes referred to as "classical"[285] or "general"[286] contract law, is associated with the work of Harvard Law Professor Samuel Williston,[287] who sought to create "a national, uniform legal architecture for commerce" during the early twentieth century.[288] The Willistonian approach is still reflected in much of contemporary contract law discourse in the United States, which is "dominated by the notion of general contract law and is structured around" the paradigm of "commercial contracting."[289]

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[282] *A.W.*, 2022 WL 18107097, at *3.

[283] *See id.* (collecting cases).

[284] DAGAN & HELLER, *supra* note 23, at 8 (noting that the transformation of contract law in the United States pushed contract theory toward a "trans-substantive, stylized, and seemingly universal approach"); *id.* at 9 (referring to the Willistonian agenda as being supported by a "thin utilitarian scaffolding").

[285] *See* Daniel P. O'Gorman, *Langdell and the Foundation of Classical Contract Law*, 70 CLEV. STATE L. REV. 459, 477, 527 (2022) (describing the development of the "classical contract law" and disagreements among three of its "architects," including Williston); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 n.2 (1978) ("Classical contract law refers (in American terms) to that developed in the 19th century and brought to its pinnacle by Samuel Williston."). Some writers distinguish between "classical contract law" (associated with Williston) and the set of rules enshrined in the Second Restatement and the Uniform Commercial Code which they refer to as "neoclassical contract law." *See, e.g.*, Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738–39 (2000). For the purpose of this Article, these differences are less important, given that "neoclassical contract law," although more sensitive to context, still aspires for generality and focuses on commercial transactions at its core. *Id.*

[286] *See* Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 80–81 (2009) (noting that Williston "organized his casebook on contracts not around particular transactions, but rather around general concepts like mutual assent, consideration, parties affected by contracts, implied conditions, impossibility, novation, and the like").

[287] DAGAN & HELLER, *supra* note 23, at 8.

[288] *Id.* Of course, Williston was not the only jurist pursuing this project, which began in the late nineteenth century. *See* O'Gorman, *supra* note 285, at 519–20. A complete account of the Willistonian project extends beyond the scope of this Article.

[289] DAGAN & HELLER, *supra* note 23, at 8.

The Willistonian approach can be contrasted with the approach preceding it (that is, the prevailing approach to contract law until the late nineteenth century), when contract law was considered "the law of relations."[290] During that time, each type of contractual relationship (e.g., vendor and purchaser, bailor and bailee, landlord and tenant) was governed by a specific set of rules that took into consideration the circumstances typically surrounding the interaction.[291]

The Willistonian approach to contract law has transformed the field, giving rise to a more generalized set of abstract rules aimed primarily at governing discrete transactions[292] between sophisticated parties,[293] typically two firms.[294] Other types of contractual relationships, which did not fit that paradigm, have been subjected to regulatory frameworks that led to the emergence of new legal fields such as employment law, family law, and consumer protection law.

Notably, Professor Dylan Penningroth has recently shown that the Willistonian approach has not only obscured the contexts in which various contractual relationships were formed; it has also erased the racial identity of some contractual parties, particularly Black people.[295] Indeed, even though Black people's litigation was key to the development of important "classical" contract concepts, most notably objectivism,[296] contract jurists (Williston included) turned Black people "into an abstraction" to develop

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290 ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 202 (2006).

291 *Id.* at 202 & n.38.

292 Macneil, *supra* note 285, at 865 (describing "classical contract law" as following "discrete transactional patterns").

293 Legal historians have shown how, at the core of classical contract law, there was generally an "individual with market consciousness, for whom most things can be reduced to market goods and their ultimately abstracted measure, money." KREITNER, *supra* note 290, at 228; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 201 (1977); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 515 (4th ed. 2019) ("The developing law of contract assumed the impersonal, frictionless market of economic theory."); Macneil, *supra* note 285, at 865 (describing "classical contract law" as "constitut[ing] the stereotype of interfirm (or firm and consumer or firm and employee) contracting of the laissez faire era").

294 KREITNER, *supra* note 290, at 233 ("The corporation, as disembodied individual subject, comes close to assuming the powers of abstraction and calculation that contract theory lays at its own foundations . . . thus, it is the corporation that becomes the model of contractual man.").

295 Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1229 (2022) (noting that classical contract theorists' "starting presumption was that, in contract law, race had no legal meaning of its own").

296 *Id.* at 1231–37.

and advance the "uniform, predictable legal rules that a modernizing national economy needed."[297] As Professor Penningroth explained, omitting facts about the racial identity of litigants from judicial decisions and treatises (and thereby ignoring a reality of substantial unequal bargaining power) was the only way classical jurists could develop a general paradigm for commerce during the formative era of modern contract law.[298]

The Willistonian nature of the contract concepts employed by courts in disability rights adjudication manifests itself in a variety of ways. The clearest example comes from *Cummings*, the 2022 Supreme Court case that raised the question whether damages for emotional distress are available under Spending Clause civil rights statutes.[299] As discussed above,[300] in that case, the Supreme Court essentially had to choose which "contract law" to apply: general contract law or laws governing specific types of contracts—those entered for "nonpecuniary purposes."[301] In rejecting the latter approach, the Court emphasized that the test is whether the remedy in question "is 'traditionally,' 'generally,' or 'normally' available for contract actions."[302] In fact, the majority referred to the "basic,"[303] "general," "usual,"[304] or "universal"[305] rules of contracts more than fifteen times. As the dissent in *Cummings* noted, the majority opinion's logic fits "commercial contracts entered for pecuniary gain."[306]

Other examples of courts' preference for the general, commercial contract paradigm are less explicit yet still apparent. As Part II described, when courts invoke substantive contract doctrines in adjudicating disability rights disputes, they often use abstract contract rules based on the premise that the same rule should apply to different types of relationships. They tend to treat the parties as formally equal,[307] applying the rules symmetrically[308] without creating "systematic distributional benefits for

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297 *Id.* at 1232, 1235.

298 *See id.* at 1220.

299 *Cummings*, 142 S. Ct. at 1569.

300 *See supra* Part II.C.3.

301 *Cummings*, 142 S. Ct. at 1574–75.

302 *Id.* at 1572–73 (citing *Barnes*, 536 U.S. 181, 188).

303 *Id.* at 1574.

304 *Id.* at 1573.

305 *Id.* at 1576.

306 *Cummings*, 142 S. Ct. at 1578 (Breyer, J., dissenting).

307 Macneil, *supra* note 285, at 863 ("[C]lassical law initially treats as irrelevant the identity of the parties to the transaction.").

308 *See, e.g.*, Application of N.Y.C. Dep't of Educ., No. 11-147, at 28 (N.Y. State Dep't of Educ., Off. of State Rev. Jan. 23, 2012), https://perma.cc/7WFW-3KYY ("The impartial

particular classes of parties."[309] Applying such abstract contract doctrines aligns with Williston's aspiration for a unified, transsubstantive system of contract law and may promote predictability and efficiency.[310]

Take, for example, the parol evidence rule. As discussed above, even though judges and scholars have proposed or used a specialized parol evidence rule that allows disadvantaged parties to introduce extrinsic evidence in some specific contexts (such as consumer contracts), in applying the rule to IEP disputes, some courts have expressed preference for formal communication over oral promises.[311] In fact, in one IDEA case, a federal district court specifically relied on the "the general rule against parol evidence" to exclude evidence regarding the promises made by a teacher during an IEP negotiation.[312]

For another example, in the context of the ADA's interactive process, courts have imposed the duty of good faith symmetrically on both employers and employees.[313] By contrast, specific contractual relationships, such as employment or landlord-tenant contracts, include asymmetric rules. For example, in employment relationships, the employer is prohibited from discriminating against a job applicant on the grounds of race, sex, or disability, but the opposite is not true—an individual's choice as to whether to apply to a certain position is generally not subject to legal antidiscrimination norms.[314] Similarly, the mandatory warranty of habitability applies to landlords but not to tenants.[315]

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hearing officer cannot both hold the district to the 'four corners' of the IEP, so to speak and, at the same time permit the parents to go beyond the IEP."). *See generally* Application of N.Y.C. Dep't of Educ., No. 12-034 (N.Y. State Dep't of Educ., Off. of State Rev. Apr. 12, 2012), https://perma.cc/A7T7-ZN37 (making a similar point).

309 Schwartz & Scott, *supra* note 23, at 555.

310 For an argument that the "abstract principles of contract law serve essential economic functions," see Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437, 448 (1990).

311 *See supra* Part II.A.3.d.

312 Oskowis v. Ariz. Dep't of Educ., 2020 WL 3396776, at *6 (D. Ariz. June 19, 2020).

313 *See, e.g.*, EEOC v. Kohl's Dep't Stores, Inc., 774 F.3d 127, 132 (1st Cir. 2014) ("[B]oth the employer and the employee have a duty to engage in good faith.").

314 There is one exception, however: § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (granting "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"). Because § 1981 applies to all contracts—regardless of the specific role of the parties in the contractual relationship—it prohibits, at least in theory, an employee from discriminating against an employer. *Cf.* Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 225 n.12, 247 (2016) (making the same point in the context of customers).

315 *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (1970) (recognizing "the landlord's obligation to keep his premises in a habitable condition").

Another example of the adoption of a general commercial contract paradigm is legal decision-makers' reliance on the "objective" approach to IEP formation. While scholars disagree as to whether the transition from a "subjective" to "objective" approach to contract formation was driven by commercial considerations or a change in evidence law,[316] there seems to be no dispute that the objective theory is more strongly associated with the need to maintain a "workable system of commerce and economic exchange."[317] And, in fact, some scholars have noted that the objective approach is sometimes incompatible with more specific types of contracts, particularly standard form contracts that "consumers simply do not read."[318]

Scholars who have studied other instances of the incorporation of contractarian ideology into other bodies of law similarly identified that courts tend to rely on general contract law principles in such situations.[319] Relatedly, the fact that general contract law is the focus of the typical "Contracts" course in U.S. law schools[320] may suggest that, when judges encounter a contract-like instrument that is based on collaboration and information-sharing—such as an IEP or the interactive process—they are more likely to resort to general, commercial contract principles as gap-fillers.

There are, of course, exceptions. In some cases, courts do modify the general contract doctrine and adjust it to fit a disability rights framework. One example, described above, is the unique use of "duress" claims in ADA's reasonable accommodation disputes, in which some courts have considered an employee's claim that they were effectively forced to agree to the employer's proposed accommodation.[321] In doing so, courts seem to

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316 *See* Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 429–32, 443–44 (2000) (criticizing the scholarly approach associating the rise of the objective theory with the development of the classical contract doctrine and the focus on commerce).

317 Barnes, *supra* note 118, at 1129; *see also* BIX, *supra* note 102, at 128 (noting that the move from subjective to objective standards "has been imposed to serve interests of economic efficiency").

318 Barnes, *supra* note 118, at 1150, 1152–57.

319 *See* Fahey, *supra* note 248, at 2336 (noting, with respect to the rules that govern agreements between states and the federal government, that "courts most frequently draw on a kind of 'freestanding' contract law, comprised of the Restatements of Contracts and contract treatises"); Resnik, *supra* note 250, at 599 (noting that agreements between litigating parties (or prospective litigating parties) regarding the litigation procedure are primarily governed by "ordinary rules of contract law").

320 DAGAN & HELLER, *supra* note 23, at 9–10.

321 *See supra* notes 199–207 and accompanying text.

have taken into consideration the specific power dynamics that characterize reasonable accommodation negotiations, signaling a deviation from the Willistonian approach.

In some respects, however, this exception proves the general rule—that the commercial contract paradigm does generally serve as the default background norm. This is for two reasons. First, as described above, while some courts use the "duress" language to allow employees not to be bound by their own consent to unfair accommodations, other courts similarly allow employers to "withdraw" accommodations they have previously agreed to provide.[322] Thus, there is some form of symmetry in the way courts treat past consent to reasonable accommodations. Second, the use of "duress" as an interpretive tool demonstrates the various ways in which general contract concepts could be adjusted and tailored to the specific context of disability rights adjudication. However, as illustrated above, courts have failed to follow this example in other instances in which they applied general, commercial contract law to disability rights disputes.[323]

IV. THE MISMATCH AND ITS IMPLICATIONS

Now that we have a better understanding of the contractualization of disability rights law, the next question is whether using contract principles in shaping and enforcing disability rights is a good thing. The answer, of course, depends on which normative framework one employs (utilitarian, deontological, etc.). For our purposes, however, one does not need to commit to any external theory or framework. Rather, this analysis uses an internal lens built on the normative underpinnings of disability rights law—the promotion of egalitarian and dignitary objectives—that can be distilled from the statutes themselves.[324]

By using this internal lens, I do not wish to overstate the case. As Part I recognized, there was more than one underlying theory guiding the advocacy for and development of disability rights statutes, and even in situations in which promoting equality was the unmistaken motivation behind the adoption of disability rights provisions, the provisions themselves may have resulted from interest convergence or may have been designed in a way that is prone to judicial backlash or ideological drift. For example, Professor Karen Tani recently described how the disability

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322 *See supra* notes 183–85 and accompanying text.

323 *See supra* Part II.

324 *See supra* note 71 and accompanying text.

rights framework "continues to rely on disabled people's labor to enforce the law, in a manner that might be called participatory but might also be called exploitative."[325]

But as Part I also showed, most commentators agree that the achievements of the Civil Rights Movement in the 1960s propelled the formation of the disability rights movement; that one of the disability rights movement's goals was to use the law to promote equality and dignity for disabled people; and that disability law's internal normative structure involves egalitarianism, at least to a certain extent.[326]

A. Identifying the Mismatch

From this perspective, there is a mismatch between those principles—equality and dignity—and the contract paradigm used to adjudicate disability rights disputes. Conceptually, the mismatch manifests itself in two primary dimensions: (1) the "transaction" type and (2) the parties' identities.

With regard to the type of the transaction, while disability rights laws are meant to promote equality and dignity, in interpreting these statutes, courts usually use contract doctrines that are designed to promote efficient transactions. Moreover, while some disability rights laws typically involve intense "relational" interactions,[327] particularly in the employment and education arenas,[328] the commercial contract paradigm was designed with discrete transactions in mind.[329]

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[325] Tani, *After 504*, *supra* note 210.

[326] *See, e.g.*, *supra* note 71; Tani, *After 504*, *supra* note 210 (noting that § 504's regulations reflected the notion that "pursuing equality meant treating members of protected groups differently, including by granting accommodations"); Ruth Colker, *Disability Misappropriation*, 72 AM. U. L. REV. 1619, 1642 (2023) ("[W]hen Congress drafted the ADA in the late 1980s, it was aware of the horrific conditions at many of these institutions and sought to make the ADA a tool to improve the lives of disabled people who lived in those congregate settings."); Jeffrey M. Brown, *What Makes Disability Discrimination Wrong?*, 40 LAW & PHIL. 1, 18–21 (2021) (noting that the general requirement to provide reasonable accommodations is consistent with relational egalitarianism); Ball, *supra* note 272, at 135–47 (arguing that the reasonable accommodation model is consistent with feminist theory and substantive equality).

[327] By "relational intensity," I mean contractual interactions that involve long-term relationships; that are inherently incomplete; and that typically require a high degree of cooperation, flexibility, and sensitivity to context. *See* Feinman, *supra* note 285, at 748.

[328] *See, e.g.*, Hugh Collins, *Relational and Associational Justice in Work*, 24 THEORETICAL INQUIRIES L. 26, 39 (2023).

[329] Macneil, *supra* note 285, at 862–65. This is, of course, an oversimplification, given that many commercial transactions involve "relational" elements and no contract is fully discrete; it is perhaps more accurate to speak in terms of a continuum of intensity of relationality. *Id.* at 865. The point is not that commercial transactions are not "relational contract[s]"; many of them are. *See id.* at 867 (discussing relational contracts between firms).

J.E. v. Jackson Public School District,[330] a case cited in Part II, helps to demonstrate this incongruity. In that case, the mother of a student with Down syndrome sued the school district after her daughter was sexually assaulted by another student during the school day, claiming that the school breached an oral promise to escort her daughter "to and from class."[331] Ruling for the school, a Mississippi state court reasoned that, because the duty to escort was not specified in the IEP, it was inappropriate to consider "extrinsic evidence" about promises made prior to the IEP.[332] An appellate court affirmed, adopting the same reasoning.[333] While not necessarily a typical IEP dispute, this case nevertheless demonstrates the values and interests at stake in such cases: safety, dignity, and equality. By contrast, when it comes to a commercial contract (think the acquisition of one company by another), the parties' interests primarily involve money. Thus, the Mississippi courts' preference for formality and formal communication (e.g., promises made in writing)—often associated with the values underlying the commercial paradigm—do not fit the type of relationship between the school district and the parent and the inherently noncommercial values implicated by it.

As for the parties' identities, disability rights cases typically include at least one individual who belongs to a protected group, on one side, and a sophisticated entity (for example, an employer, school district, or health-care provider), on the other side. Thus, these interactions are characterized by disparities in access to information and resources. Indeed, scholars have long documented the ways in which employers and school districts can capitalize on their informational advantages and status as repeat players in negotiations over accommodations.[334] Conversely, some disabled people's impairments may negatively affect their decision-making when it comes to engaging in negotiations.[335]

Rather, the point is that the law governing the commercial contract paradigm aspires for discreteness as opposed to intense relationality. *Id.* at 893.

330 264 So. 3d 786 (Miss. Ct. App. 2018).

331 *Id.* at 789–90.

332 *Id.* at 790, 794. Uncharacteristically, the court was willing to assume that the IEP constituted a contract. *Id.*

333 *Id.* at 794–95.

334 For the employment context, see Lin, *supra* note 18, at 1866–70, 1884. Notably, because the ADA applies only to employers with at least fifteen employees, 42 U.S.C. § 12111(5)(A), there are not many situations where an employee's resources are greater than those of the employer. For the educational context, see *supra* note 148.

335 Christopher P. Guzelian, Michael Ashley Stein & Hagop S. Akiskal, *Credit Scores, Lending, and Psychosocial Disability*, 95 B.U. L. REV. 1807, 1829 (2015) (explaining how

Here again, these power dynamics are clearly reflected in the cases cited in Part II. For example, in *Student v. Bellflower Unified School District*,[336] an administrative case in which the parties disagreed on whether there was mutual "assent" with respect to the formation of an IEP, the parent-plaintiffs who advocated for their disabled child were themselves disabled; one parent testified that he "had difficulty reading" and both testified that "they would sign anything the District requested, if they thought that it would help their daughter."[337] In two other cases cited above—one involving an ADA claim[338] and the other an IDEA claim[339]—the plaintiffs were not represented by counsel. In all of those cases, the legal decision-makers adjudicating the case ruled for the defendants. And while these types of fact patterns are certainly not typical in commercial contract disputes, they are common in disability rights disputes.

Moreover, under disability rights statutes, the parties often play specific roles, which in turn define the terms of the interaction. For example, in the IDEA context, the party drafting the IEP is often the school district, which may affect the language used in the final version of the document. Conversely, in the ADA context, a disabled employee seeking accommodations is effectively required to initiate the interactive process, which entails disclosing sensitive information and exposing the employee to stigma.[340] By contrast, under the commercial contract paradigm, it is sometimes impossible to know a priori which party would initiate the negotiation or draft the final agreement.

Taken together, these conceptual differences reveal the lack of a normative fit between the commercial contract paradigm and disability rights law's objectives.

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some psychosocial impairments affect communication and negotiation in the financial context); *see also* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 490 (2013) (noting, in the context of plea negotiations, that some capital defendants' cognitive and emotional impairments may result in the defendants forgoing favorable plea bargains).

336 No. 2005080006 (Cal. Off. of Admin. Hearings June 26, 2006), https://perma.cc/98CK-5HXX.

337 *Id.* at 15, 23.

338 Mynatt v. Morrison Mgt. Specialist, Inc., 2014 WL 619601, at *1 (E.D. Tenn. Feb. 18, 2014).

339 Oskowis v. Ariz. Dep't of Educ., 2020 WL 3396776, at *1 (D. Ariz. June 19, 2020).

340 *See* Lin, *supra* note 18, at 1847 & n.91, 1858–59 (describing negative disclosure experiences).

B. The Mismatch's Implications

This Section uses three brief case studies to show how applying the commercial contract paradigm risks ignoring the specific egalitarian and dignitary interests that an antidiscrimination regime seeks to promote.

1. Deciding civil rights remedies.

Let us begin with the Spending Clause contract theory. In writing his dissent in *Cummings*, Justice Breyer came close to recognizing the mismatch and its ramifications. According to Justice Breyer, employing general contract principles designed to serve commerce and promote efficiency means something very different from a legal framework designed to protect dignitary and egalitarian values. Indeed, Justice Breyer argued that the incorporation of commercial contract logic into § 504 and § 1557 distorts "the basic purposes" underlying those provisions.[341] He reasoned that those statutes were not designed to serve "mere economics"[342] but rather "to vindicate human dignity."[343]

The consequences are far from trivial. Using commercial contract logic to decide whether damages for emotional distress should be available under those provisions, Justice Breyer warned, would operate to the detriment of "students who suffer discrimination at the hands of their teachers, patients who suffer discrimination at the hands of their doctors, and others."[344]

Analyzing *Cummings* from a historical perspective with a focus on federalism, Professor Tani recently pointed to the negative consequences of the decision for disabled individuals.[345] She explained that the injuries resulting from violations of disability rights statutes are often not monetary but rather dignitary—the exact injuries for which plaintiffs cannot receive compensation under the Court's holding.[346] Thus, she noted, the (commercial) contract analogy "allowed accused discriminators to elude responsibility, or at least to significantly lower the cost of discriminating."[347]

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341 *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting).
342 *Id.*
343 *Id.*
344 *Id.*
345 Tani, *The* Pennhurst *Doctrines*, *supra* note 11, at 1204–06.
346 *See id.* at 1203.
347 *Id.* at 1206.

2. Identifying "bad faith" behaviors.

Similar harmful consequences result from the application of commercial contract doctrines through the negotiation-for-accommodation mechanism. Consider, for example, the ways courts apply the duty of good faith to the ADA's interactive process. The duty is not only applied symmetrically (affecting both employers and employees) but also imposes significant disclosure obligations on disabled employees. In fact, some courts treat an employee's failure to produce personal information, including medical documentation, as bad faith.[348]

This association between the failure to provide medical documentation and bad faith is problematic given the dignitary interests associated with one's medical information—interests that are usually not implicated in commercial contracts. Indeed, it is one thing to require a corporation to provide a contractual party with financial information necessary for performance but quite another to expect an employee to share with an employer (and perhaps also coworkers) personal information that may be integral to their identity. Thus, even if there is a justification for requiring employees to disclose medical or personal information as part of the accommodation process,[349] framing the failure to comply with such a requirement as bad faith seems odd.

Criticizing the extensive medical documentation requirements imposed by employers and upheld by courts, Professor Katherine Macfarlane described the interactive process as an unfair system.[350] She drew on her personal experience to note that, as a result of the burdensome formality that characterizes the interactive process, even the accommodations she did receive were not worth the price she paid "in time, money, and dignity."[351] Macfarlane's critique reflects the mismatch between the ADA's

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348 *Supra* note 198 and accompanying text.

349 Professor Katherine Macfarlane traced the medical documentation requirement under the ADA's interactive process to the EEOC's guidance from 2000 in which the agency specified that an employer should ask for documentation in situations in which the disability of the employee is not "known or obvious." EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000); *see also* Macfarlane, *Disability Without Documentation*, *supra* note 198, at 83–89. As described further below, Macfarlane criticized that guidance, arguing that it is incompatible with modern disability rights philosophy and with the ways in which workplace religious accommodations are being evaluated under federal civil rights law. *See generally* Macfarlane, *Disability Without Documentation*, *supra* note 198.

350 Macfarlane, *Disability Without Documentation*, *supra* note 198, at 101.

351 Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U. L. REV. 1971, 2016 n.277 (2023).

goals and the application of the good-faith duty to ADA disputes. Specifically, while the ADA assumes that the reasonable accommodation mandate is needed to rectify an unequal environment, the way that courts use the duty of good faith ignores the systematic power imbalances between the parties and the deeply personal implications for disabled employees.

3. Excluding evidence that pertains to parties' intentions in developing educational plans.

Another example of the mismatch's implications under the negotiation-for-accommodation mechanism can be found in the way in which courts apply the parol evidence rule to IDEA cases. Consider the 2020 case *Oskowis v. Arizona Department of Education*.[352] In that case, the father argued that the school district had breached its promise that certain services would be provided to the child by the teacher (as opposed to a paraprofessional).[353] To support his claim, the father had tried to introduce a digital recording of the IEP meeting in which the promise had been made by a special education teacher.[354]

Relying on the content of the IEP itself, the administrative law judge had ruled for the school district, holding that it did not breach the IEP by allowing the paraprofessional to provide the services. On appeal, a federal district court affirmed, citing the "*general* rule against parol evidence."[355] It reasoned that "extrinsic evidence is not admissible to change the IEP's meaning."[356]

As noted above, applying a strict parol evidence rule makes most sense when dealing with a contract between two firms because the parties are sophisticated and aim to maximize their profits.[357] In such a case, there is reason to believe that the parties have negotiated the terms, read the contract, and understood it.[358] Excluding extrinsic evidence in such cases would thus be both fair and efficient, serving the purposes behind the parol evidence rule: to encourage and protect written contracts, provide certainty regarding terms, and avoid conflict.[359]

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[352] 2020 WL 3396776 (D. Ariz. June 19, 2020).
[353] *See id.* at *4.
[354] *Id.* at *5.
[355] *Id.* at *6 (emphasis added).
[356] *Id.* at *5.
[357] *See supra* note 147 and accompanying text.
[358] *See supra* note 147 and accompanying text.
[359] BIX, *supra* note 102, at 60, 61, 65.

This logic does not fully apply, however, to IEP disputes. As noted, IEPs are usually drafted by one party (the school district), which enjoys significant informational advantages over the other, unsophisticated party (the parent).[360] While it is a good practice for parents to read and understand the meaning of an IEP, it may be unfair to expect parents to identify each and every discrepancy between the final version and oral promises made by school administrators.[361] Furthermore, IEPs must be in writing, so there is no need to incentivize the parties to create a written document.

Applying a strict parol evidence rule in the context of an IEP is also in tension with the "relational" nature of interactions between parents and school personnel.[362] IEPs are not one-off contracts; they are renegotiable by design, usually for several consecutive years. In between IEP negotiations, parents and school administrators constantly interact, in part to address unexpected developments in a child's education. Thus, refusing to consider any oral promises made by school district representatives runs counter to the relational intensity characterizing interactions between the parties. Lastly, ignoring an oral promise made by a teacher to the parent of a disabled child simply does not seem to vindicate either equality or dignity. If a parent relied on an oral promise in agreeing to an IEP, they should generally be able to introduce evidence regarding that promise, even if the promise is in contrast with the IEP's terms. This does not mean that parents should win every dispute with their school district but rather that ignoring this promise in the name of efficiency undermines, as opposed to vindicates, the purposes of the IDEA.

In sum, these three brief case studies demonstrate how invoking the substantive provisions of commercial contract doctrines in disability rights cases can have devastating consequences for disabled litigants. But the mismatch presents hurdles even before the litigation commences. For example, because low-income people lack sufficient resources and access to informational networks, they may find it difficult or even impossible to negotiate effectively over accommodations under a commercial

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360 *See supra* note 148 and accompanying text.

361 *Cf.* RESTATEMENT OF CONSUMER CONTS. § 9 cmt. 1 (AM. L. INST. 2024) ("Since the standard contract terms do not result from a combined effort by both parties to draft a negotiated agreement, there is . . . less reason to allow them to override affirmations of fact or promises made to the consumer.").

362 Feinman, *supra* note 285, at 748.

contract regime.[363] In fact, during such negotiations, disabled individuals are unlikely to even be aware of the existence of these commercial contract concepts, while the other side (e.g., school districts or employers) may be adept at applying them.

V. PATHS FORWARD

If this Article is correct that the exercise of disability rights in the United States is both built upon and burdened by its relationship to the commercial contract paradigm, as Parts II–IV argued, then avenues to address this problem ought to be considered. To this end, this Part discusses two possible paths forward: (1) replacing the individualized reasonable accommodation model with a set of uniform measures developed and specified by state authorities and (2) changing the contract paradigm that courts use—from a general, commercial paradigm to a disability-specific set of rules.

As this Part shows, while the idea of replacing individualization with uniform measures seems promising, it does not provide an adequate response to the mismatch problem. This is because a reasonable accommodation model is a necessary part of any effective disability rights regime, if only as a residual model. Changing the contract paradigm, by contrast, is more likely to comprehensively address the problems identified in this Article.

A. Abandoning Individualization?

One possible avenue to address the mismatch can be found in a burgeoning body of scholarship that criticizes the "privatized"[364] and individualized[365] model of reasonable accommodations and

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[363] *See* Baldwin Clark, *supra* note 18, at 419–31 (showing how white middle- and upper-class parents take advantage of their access to resources and valuable information to secure better IDEA services and less stigmatizing services for their children, exacerbating racial disparities in access to educational resources); Lin, *supra* note 18, at 1835, 1868 (noting that empirical studies show that the employees most affected by the imbalance in bargaining power are women and people of color); Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1835 (2022) [hereinafter Colker, *The ADA's Unreasonable Focus*] ("[T]he reasonable accommodation process is likely to merely be an occasion for some highly paid employees to be able to take advantage of additional benefits while lower paid employees attain no structural benefits.").

[364] Lin, *supra* note 18, at 1857.

[365] Colker, *The ADA's Unreasonable Focus*, *supra* note 363, at 1847 (referring to the existing conceptualization of disability accommodations as "a highly individualized approach"); Pasachoff, *supra* note 18, at 1419 (using similar terminology in describing the IDEA's enforcement regime).

disability rights' enforcement mechanisms.[366] According to this literature, which this Article refers to as the "individualization critique" of disability rights statutes, such statutes disappoint those who need their protection the most because of their flawed institutional design, particularly their reliance on negotiation and individualized accommodations.[367]

For example, in a recent work, Professor Ruth Colker argued that the concept of reasonable accommodation "shifts all the costs onto the private sector, one person at a time."[368] Because of these features, Colker noted, the reasonable accommodation framework may actually "exacerbate existing structural inequities."[369] Thus, Colker argued that the reasonable accommodation concept should become "relatively obsolete" and be replaced by "universal design" principles, government subsidies, and other "structural remedies."[370] While Colker believed that "it is important to use all aspects of the ADA, including the reasonable accommodation rules,"[371] to promote ex ante interventions, she also argued that, in some social arenas, "we should abandon this conceptualization of reasonable accommodation as a highly individualized approach."[372] To this end, Colker particularly called on the federal government to take proactive disability-related measures.[373]

Along the same lines, Professor Karen Czapanskiy proposed to replace IEPs with "standardized plans"[374] that would apply to "students who share similar assessments."[375] Other scholars, including Professors Shirley Lin and Heidi Liu, similarly argued that the existing reasonable accommodation framework has been

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366 In prior work, I have also pointed to problems with the "individualized focus of the disability rights model." Yaron Covo, *Inverse Integration and the Relational Deficit of Disability Rights Law*, 124 COLUM. L. REV. 563, 616 (2024). However, my analysis was limited to the ways this model may affect interpersonal relationships and did not extend to the model's potential to address disability discrimination and generate social change. *See generally id.*

367 Although some individualization skeptics use the word "structural" to describe their proposed reforms, *e.g.*, Colker, *The ADA's Unreasonable Focus*, *supra* note 363, at 1835, their arguments differ from those advanced by other disability rights scholars who advocated for "structural" interventions, mainly in the form of social welfare, to address the limits of antidiscrimination law, *see, e.g.*, BAGENSTOS, LAW AND THE CONTRADICTIONS, *supra* note 25, at 117–30, 136–50; Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 83 WASH. L. REV. 513, 558, 567 (2008).

368 Colker, *The ADA's Unreasonable Focus*, *supra* note 363, at 1820.

369 *Id.* at 1819.

370 *Id.* at 1819–20, 1823.

371 *Id.* at 1835.

372 *Id.* at 1847.

373 Colker, *The ADA's Unreasonable Focus*, *supra* note 363, at 1845–47.

374 *See* Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1, 1 (2016) [hereinafter Czapanskiy, *Kids and Rules*].

375 *Id.* at 1, 4.

ineffective in tackling "structural inequities within workplaces"[376] and may "further entrench"[377] such inequities because "it expects individual employees to achieve social change through" private bargaining.[378] They, too, called on the state to take measures that would "vastly reduce the need for individuated bargaining."[379]

Skeptics of individualization typically focus on four major avenues of reform: (1) state-based data collection and dissemination, (2) state-based monitoring and investigation, (3) uniform accommodations, and (4) subsidies. With respect to data collection, scholars propose that the state create new or strengthen preexisting information gathering and disclosure mechanisms.[380] Once available to the public, that data could be used by stakeholders in the accommodation process in both the employment and the education contexts.[381] With respect to monitoring and investigation, individualization skeptics propose to expand state-based systems that monitor covered entities for compliance with the pertinent federal laws, for example by investigating and assessing "a series of IEPs in targeted locations."[382]

Regarding uniform accommodations, scholars suggest adopting standardized educational plans that would serve groups of children that "fit the same profile."[383] As for subsidies, individualization skeptics propose to reimburse small and medium companies for the costs of accommodations[384] as well as to subsidize lawyers who would help parents to advocate on behalf of their children in IEP negotiations.[385] Although these sets of interventions differ in many respects, they all reflect an attempt to introduce systematic measures.[386] Specifically, they tend to prefer public enforcement over private enforcement, measures paid by the state over accommodations paid by private entities, and a universal design approach over individualized negotiations.

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376 Lin, *supra* note 18, at 1828.

377 Liu, *supra* note 33, at 268.

378 Lin, *supra* note 18, at 1828.

379 *Id.* at 1889; *see also* Liu, *supra* note 33, at 269, 273 (advocating measures that aim to "minimize the need for disabled employees to request accommodations," including expanding existing data collection measures by the state).

380 *See* Pasachoff, *supra* note 18, at 1465–70; Lin, *supra* note 18, at 1879–89.

381 *See* Liu, *supra* note 33, at 268.

382 Pasachoff, *supra* note 18, at 1473–77.

383 *See* Czapanskiy, *Kids and Rules*, *supra* note 374, at 2.

384 *See* Lin, *supra* note 18, at 1895–1900.

385 *See* Pasachoff, *supra* note 18, at 1454–55 (noting that such a move would be a "good idea" but is not politically viable).

386 Czapanskiy, *Special Kids*, *supra* note 148, at 763; Lin, *supra* note 18, at 1889.

Adopting such an approach would address part of the mismatch identified in this Article, specifically the problems associated with the use of the commercial contract paradigm under the negotiation-for-accommodation mechanism. Simply put, reducing the reliance on contract law to resolve disability rights disputes would subsequently reduce the reliance on the *commercial* contract concepts in resolving such disputes. This trend, in turn, would narrow the incongruity between disability rights law's normative underpinnings and the animating values of the commercial contract paradigm.

From the perspective developed in this Article, however, this approach is inapt, or at least insufficient. To begin with, as some individualization skeptics recognize, it is not likely that Congress would adopt some of the proposed reforms, given budgetary constraints[387] and current levels of polarization.[388] Reforms aimed at increasing the federal government's involvement in protecting disability rights are also unlikely under the Trump Administration.[389]

Moreover, even if lawmakers were to adopt all of the reforms proposed by individualization skeptics, an individualized accommodations model would still be needed. For example, the dissemination of information and the provision of legal aid services—two of the reforms proposed by skeptics—are aimed at assisting people to negotiate accommodations under an individualized accommodation model, not at supplanting this model.

Other proposed reforms would be likely to reincorporate individualized elements over time, thus making illusory their promise to overcome individualization.[390] Consider, for example, Czapanskiy's proposal to replace IEPs with standardized educational plans.[391] As Czapanskiy acknowledged, her proposal retains two individualized components: (1) the assessment of each and every student's needs, and (2) the development of individualized

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387 *See, e.g.*, Pasachoff, *supra* note 18, at 1454–55, 1478, 1480 (recognizing this concern).

388 *See, e.g.*, David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 8–10 (2019) (discussing polarization in the constitutional context); Bagenstos, *Discourse of Justice*, *supra* note 61, at 28 (discussing polarization in the disability context).

389 *See* Kenya Hunter, *The Trump Administration Withdrew 11 Pieces of ADA Guidance. How Will It Affect Compliance?*, ASSOCIATED PRESS (Apr. 8, 2025), https://apnews.com/article/ada-guidance-disabilities-trump-ed2214921ac719b72b81d76c03e330c4 (describing the removal of ADA-related guidance by the Administration).

390 I thank Professor David Pozen for helping me think through this point.

391 *See generally* Czapanskiy, *Kids and Rules*, *supra* note 374.

plans for the children whose needs cannot be met by the standardized plan.[392] Taken together, these components would likely give rise to disagreements and negotiations between school districts and parents, even in cases in which the school determines that the standardized plan should apply. Parents may argue, for example, that their child's needs were not properly assessed and that, in fact, their child deserved an individualized plan.

Finally, and most importantly, there are also substantive reasons why we should not rid disability rights frameworks of individualization. While a comprehensive defense of the individualized model of reasonable accommodations extends beyond the scope of this Article, it is worth noting that an individualized framework is needed to challenge blanket policies that impose a disproportional burden on disabled people—including policies aimed at promoting other socially desirable goals.[393]

For example, while imposing a national masking requirement in schools to protect immunosuppressed students during pandemics is a promising measure from both disability rights and public health perspectives,[394] an individualized framework would still be necessary to accommodate disabled students whose impairments *prevent* them from wearing masks.[395] Likewise, an individualized negotiation framework is sometimes the only effective way to address situations in which people accompanied by service animals and individuals with severe pet allergies share

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[392] *Id.* at 34.

[393] *Cf.* Belt & Dorfman, *supra* note 50, at 182 (noting that disability accommodations "are intended to be tailor-made to individual needs and, although they often can be suited to others, they are not one-size-fits-all").

[394] Colker, *The ADA's Unreasonable Focus*, *supra* note 363, at 1841–47 (arguing that attempts to promote masking requirements through the reasonable accommodation mandate should be abandoned and replaced with national masking requirements in schools imposed by the federal government).

[395] *See* Doron Dorfman, *Pandemic "Disability Cons"*, 49 J.L. MED. & ETHICS 401, 403 (2021); Elizabeth Pendo, Robert Gatter & Seema Mohapatra, *Resolving Tensions Between Disability Rights Law and COVID-19 Mask Policies*, 80 MD. L. REV. ONLINE 1, 9 (2020).

the same space,[396] or in which a request for disability accommodation clashes with a collective bargaining agreement.[397]

This is not to oppose a universal design approach or any of the specific reforms proposed by individualization skeptics.[398] Nor is it to say that the reasonable accommodation framework is sufficient to address structural inequalities. Quite the contrary; as early as 2004, Professor Samuel Bagenstos pointed to the limits of the "individualized nature of the 'reasonable accommodation' determination."[399] Scholars in other fields, from health law to information law, have also identified problems with individualized legal frameworks, advocating for more structural avenues. And yet, neither Bagenstos nor those other scholars have proposed to jettison individualistic approaches altogether.[400]

The upshot is that uniform and individualized approaches are not mutually exclusive. Rather, they supplement each other.[401] Calling on the state to play a larger role in the protection of disability rights does not obviate the need for an individualized accommodation framework. Individualized negotiations are sometimes the only recourse for disabled individuals; in other times, they are necessary to fix problems that arise from rule-based regimes that impose uniform measures. Either way, it would be a mistake to forgo the individualized model of reasonable accommodation.

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396 *Cf.* Bennett v. Hurley Med. Ctr., 86 F.4th 314, 328 (6th Cir. 2023) (describing the need to conduct "an individualized assessment" in certain circumstances in which such a conflict arises under the ADA's Title II); Entine v. Lissner, 2017 WL 5507619, at *1 (S.D. Ohio Nov. 17, 2017) ("[T]his case is about a thorny and largely unmapped legal issue: how the University should reconcile the needs of two disabled students whose reasonable accommodations are (allegedly) fundamentally at odds."); Cohen v. Clark, 945 N.W.2d 792, 794 (Iowa 2020) ("This case involves a tenant with pet allergies who moved into an apartment building due to its no-pets policy, a neighboring tenant who sought a waiver of the no-pets policy for his emotional support dog, and a landlord in a pickle trying to accommodate both of them.").

397 *See* Stacy A. Hickox, *Bargaining for Accommodations*, 19 U. PA. J. BUS. L. 147, 174 (2016) ("[T]here are several areas of potential conflict between a [collective bargaining agreement] and a request for accommodation that could be reconciled through negotiation at the inception of the [collective bargaining agreement] or on an individualized basis.").

398 *See supra* notes 370–86 and accompanying text.

399 Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 56 n.221 (2004).

400 *See* Lindsay F. Wiley, *From Patient Rights to Health Justice: Securing the Public's Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833, 874 (2016) ("[T]he health justice model asserts the importance of collective interests, alongside individual interests, in decisions about medical treatment."); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1156–57 (2017) (expressing "uncertainty about whether FOIA requests ought to be phased out wherever feasible or retained in some modified form"). *See generally* Samuel R. Bagenstos, *Mend It, Don't End It* (Wash. Univ. St. Louis Sch. of L., Working Paper No. 07-04-05, 2007).

401 *See* Bagenstos, *Subordination*, *supra* note 71, at 434.

B. Changing the Contract Paradigm

In the previous Section, this Article argued that some form of individualized accommodation framework should remain in place, if only as a residual framework. This Section takes the argument one step further, claiming that individualization and contractualization can and should be part of the disability rights framework, as long as they are calibrated to match the values underlying disability laws. Thus, the way to fix the mismatch is not to abandon contractualization but rather to change the contract paradigm upon which courts rely when adjudicating disability rights cases.

In both theory and doctrine, there is growing recognition that contract doctrines should not have the same meaning across different types of contracts.[402] Instead, the distinct animating values and party configuration that underlie different contractual relationships need to be taken into account when crafting doctrinal interventions.[403] This Section extends this notion beyond the realm of actual contracts, developing a new set of "contract rules" for disability rights frameworks.

Altering the specific rules that pertain to the contractualization of disability rights is a promising avenue for several reasons. First, this intervention can be adopted in addition to some of the state-based, universal design reforms proposed by individualization skeptics.[404] Second, this approach appears to be more politically feasible than abandoning individualization altogether. Although the adoption of robust civil rights protections seems unlikely in today's political climate, at least one of the doctrinal interventions discussed below builds on a recent bipartisan initiative.[405] Third, designing a "contract law" for disability rights adjudication may assist in developing a coherent solution to the problems that arise from the two tracks through which disability rights frameworks are contractualized: the negotiation-for-accommodation mechanism and the Spending Clause contract theory.

Before describing specific interventions, it would be useful to identify the basic scaffolding for this new type of "contract law" for disability rights. First, the new types of contract rules proposed here are not aimed at replacing the existing statutory

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402 *See* Kastner & Leib, *supra* note 147, at 1283.
403 *See generally* DAGAN & HELLER, *supra* note 23.
404 *See supra* notes 370–86 and accompanying text.
405 *See infra* notes 443–46 and accompanying text.

framework. Instead, these rules would establish and reinforce an egalitarian infrastructure for negotiating accommodations. They would also instruct courts on how to use contract concepts as gap-fillers in interpreting disability rights statutes. Second, by referring to these rules as "contract law," I do not mean that they should be limited to common law, judge-made rules.[406] Rather, these rules should be codified into disability rights statutes, strengthening the procedural and substantive safeguards enshrined in those laws. Third, as noted above, these rules must attend to the animating values of disability rights laws as well as to the power dynamics and relational intensity that characterize many of the interactions governed by disability rights statutes.[407] Generally speaking, recognizing these features entails favoring ex post considerations and robust judicial discretion (e.g., in the form of applying equity-based doctrines and remedies) in situations in which ex ante norms fail to address the complexity and ever-changing circumstances characterizing the accommodation process in the education and employment contexts.[408]

Fourth, to address "information asymmetry, cognitive biases, and strategic behavior,"[409] lawmakers should use mandatory rules and "sticky" defaults. (A default is sticky when it is relatively difficult for the parties to contract around it.[410]) These rules and types of defaults can prevent situations in which employers or school districts manipulate individuals into waiving their rights. For an example of what such a sticky default might look like, consider the current IDEA default rule regarding the required participants in an IEP meeting. While the IDEA enumerates a list of actors whose participation is mandatory (including the

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406 For the growing recognition that private law can be shaped by statute, see, for example, Shyamkrishna Balganesh, *Private Law Statutory Interpretation*, 92 S. CAL. L. REV. 949, 956–57 (2019). Given that my proposal involves legislative interventions, in what way is it different from the proposals advanced by individualization skeptics? The difference lies in the fact that the rules proposed here do not seek to remove individualized negotiations from the disability rights framework but rather to change the ways in which those negotiations are conducted and enforced.

407 *See supra* notes 327–40 and accompanying text.

408 *See* Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915, 920 (2012) ("[W]e might believe that the leaner the relation, the more it would be governed by norms relevant for ex ante structuring; the greater the relational intensity, the more ex post type considerations would govern the contract.").

409 DAGAN & HELLER, *supra* note 23, at 110.

410 Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2086 (2012).

child's special education teacher and a school-district representative),[411] the statute also specifically instructs the parties on how to opt out of this default. According to the IDEA, to relieve an actor from its duty to attend, the parents must agree "in writing" that the attendance of a certain IEP team member "is not necessary."[412] This rule makes it difficult to contract around the default and less likely that an IEP team member would be relieved from participation. In other words, it makes the default regarding participation in the IEP meeting sticky.

And finally, in designing mandatory and default rules, lawmakers should draw inspiration from consumer law,[413] family law, employment law, and insurance law. Each area has specific categories of rules governing contractual relationships that were developed to address power imbalances and promote noncommercial values in contractual or quasicontractual relationships. In other words, when it comes to disability rights frameworks, changing the contract paradigm means rejecting the Willistonian approach and its focus on abstract concepts and preference for symmetry.

With these principles in mind, the rest of this Part offers a range of specific interventions for changing the contract paradigm, including rules of damages, interpretative principles, mandatory and default terms, and disclosure requirements. The first intervention pertains to the Spending Clause contract theory, whereas the others focus on the negotiation-for-accommodation mechanism.

1. Making emotional distress damages available under § 504 and § 1557.

First and foremost, this Article maintains that the outcome in *Cummings*—which denied plaintiffs the ability to receive emotional distress damages under Spending Clause civil rights statutes—should be overturned. As the dissent in *Cummings* argued, that outcome resulted from a misguided application of commercial contract principles to interactions that are clearly not commercial.[414] In contrast to the majority's holding, the proper analogy is to "finely parsed" contractual rules that govern "unusually personal

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411 *See* 20 U.S.C. § 1414(d)(1)(B).

412 *Id.* § 1414(d)(1)(C).

413 For a recent proposal to turn to consumer law—not as a source of inspiration but rather as an actual source for redress—to address exploitative employment relationships, see generally Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. 1 (2024).

414 *See Cummings*, 142 S. Ct. at 1578–79.

contracts."[415] Under those rules—which involve situations such as mistreatment or expulsion of guests by hotels and wrongful removal of individuals from entertainment venues—damages for emotional distress are available.[416] Thus, the Supreme Court should have recognized the availability of emotional distress damages under § 504 of the Rehabilitation Act and § 1557 of the ACA.

It is unlikely, however, that the Court will overrule *Cummings* anytime soon. Thus, any redress will need to be at the congressional level.[417] While legislative measures may not seem politically feasible at this time, there is precedent for that type of action: in 2008, Congress enacted an amendment to the ADA with the sole purpose of overturning the Supreme Court's narrow interpretations of the definition of disability under the Act.[418]

2. Using menus, mandatory floors, and equity doctrines.

To address power imbalances between the parties to an IEP or the ADA's interactive process, Congress or the federal agencies responsible for promulgating regulations under the pertinent statutes should incorporate into disability rights frameworks, when appropriate, menus of minimum services and accommodations that must be provided to a disabled child or employee.

By "menu," I mean "a nexus of at least two simultaneous offers,"[419] not unlike the one usually used in restaurants.[420] Such menus would allow the parties to choose among several mandatory accommodations as the baseline for negotiation. For example, such a rule may require school districts to provide every preschool child with speech impairments at least *X* hours a week of speech therapy or at least *Y* hours a week of sign language instruction. Similarly, employers may be required to allow blind workers to choose between two types of screen readers to access

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415 David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORDHAM L. REV. 1221, 1226 (2012).

416 *Id.* at 1226–27.

417 *Cf. Cummings* 142 S. Ct. at 1582 (2022) (Breyer, J., dissenting) (implicitly calling on Congress to "fix this inequity").

418 The Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110–325, § 2, 122 Stat. 3553, 3553 (codified as amended in scattered sections of 29 and 42 U.S.C.) (overturning the holdings in *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), which, according to congressional findings, "have narrowed the broad scope of protection intended to be afforded by the ADA").

419 Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 3 (2006).

420 *Id.* at 9.

digital materials. Recognizing the individualistic nature of accommodations, these rules should only constitute a floor from which negotiations should proceed.

The menus proposed here constitute a combination of mandatory and default rules. They reflect a mandatory rule in that the services identified in each scenario cannot be modified by the parties. They reflect a default in that the parties are allowed (indeed, even expected) to increase the quality or quantity of services provided in each scenario. In this respect, similar to the implied duty of good faith, these menus can be described as "a default with mandatory floor."[421]

When it comes to substantive rights, the pertinent disability statutes rely primarily on open-ended standards (e.g., "appropriate education" and "reasonable accommodation"), which, while important to maintaining individualization, leave (too) much room for negotiation. In that sense, the regulatory framework adopts a somewhat laissez-faire approach similar to that used in commercial transactions. The only limitation under the existing disability rights regime pertains to "aversive interventions" (such as the use of electrical shocks), which the parties are *prohibited* from incorporating into an IEP.[422] There is, however, no similar substantive rule that *requires* school districts or employers to provide a minimum set of services or accommodations.

By contrast, the laws governing certain types of contractual relationships may include such substantive rules that effectively reduce (without eliminating) the parties' scope of bargaining. For example, federal, state, and local laws across the United States require employers to pay minimum wages.[423] Likewise, some jurisdictions require surrogacy contracts to include provisions whereby the prospective parents are obligated to pay for health insurance for the surrogate.[424] Similar to those requirements, I propose that lawmakers identify, when appropriate, mandatory accommodations in the education and employment contexts—

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421 AYRES ET AL., *supra* note 131, at 691. Another way these rules create a default is by listing the options in a certain order, implicitly encouraging the parties to choose the first option. *See* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 838 (2007).

422 Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 210–11 (2d Cir. 2012).

423 *See State Minimum Wages*, NAT'L CONF. OF STATE LEGISLATURES (last updated July 1, 2025), https://www.ncsl.org/labor-and-employment/state-minimum-wages. Unfortunately, federal law still allows paying disabled people subminimum wages. 29 U.S.C. § 214(c)(1)(A).

424 *See* Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 461 (2021).

particularly in situations in which there is obvious, almost universal need for the accommodation (such as screen readers for blind employees).

While determining the exact details of such rules requires further research and extends beyond the scope of this Article, an example can be found in Czapanskiy's proposal to develop standardized educational plans for different categories of impairments, discussed above.[425] Czapanskiy's proposed IEP for autistic children involves a certain ratio of student-teacher-paraprofessional (6:1:1), a certain educational methodology (Applied Behavioral Analysis), and 270 minutes of speech and language therapy a week, among other services.[426] Unlike Czapanskiy's proposal, however, my proposal does not aim to abandon individualized negotiations but rather to create a starting point for such negotiations.

To be sure, there is a concern that school districts and employers would stick to that baseline, turning the floor into a ceiling. To address this problem, future legislation should create a presumption that an IEP or workplace accommodation that only incorporates the minimum mandatory requirements violates the pertinent law.

Another concern is that, in unique situations, both parties might genuinely oppose the mandatory accommodations services listed in the menu. To address this concern, lawmakers may allow the parties, in certain circumstances, to opt out and adopt a different set of accommodations by specifying a series of steps that the parties must take. For example, such a rule may require express agreement in writing, after the parents or the employee have been notified of their right to receive the services listed in the menu.

Another way to address power imbalances between the parties to accommodations negotiations involves the courts as the institutional actor that polices the fairness and adequacy of the process.[427] Under this approach, in reviewing IEPs and workplace accommodations, courts should use specific doctrines typically used in the consumer and insurance contexts, such as unconscionability or *contra proferentem* (interpretation against the drafter).[428] The ways

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[425] *See supra* notes 374–75 and accompanying text.

[426] Czapanskiy, *Kids and Rules*, *supra* note 374, at 15.

[427] *Cf.* Caruso, *supra* note 18, at 194–95 ("IEPs could be interpreted with the same range of judicial discretion and gap-filling power enjoyed by common-law courts in contract cases.").

[428] BIX, *supra* note 102, at 58 (noting that the *contra proferentem* principle "is most often applied with insurance agreements and other agreements in which there is a significant imbalance in sophistication and bargaining power, and the agreement is on a standard

in which some courts apply the "duress" doctrine in ADA disputes may serve as an example of how modified "classical" contract doctrines could assist courts in considering the values and power dynamics surrounding negotiations over accommodations.

Using the unconscionability or *contra proferentem* doctrines as interpretive tools might be helpful in addressing problems that result from an application of the objective theory to one-sided negotiation processes, including situations in which employees feel forced to agree to a certain accommodation or parents do not understand the meaning or consequences of an IEP they sign.[429] Because courts generally exercise discretion in applying these doctrines, they would be able to distinguish between situations involving wealthy and well-informed parties who have access to experts, on the one hand, and low-income parties who are more likely to agree to the terms of a proposed accommodation or IEP without questioning the other party's rationale, on the other.[430]

3. Designing asymmetric rules.

As noted, one of the differences between commercial contracts and specific contract types such as employment or landlord-tenant contracts is that the former are usually governed by symmetric rules (meaning that the same rule applies to both parties) whereas the latter are usually governed by asymmetric rules (meaning that some rules apply only to one party).[431] In most cases, the reason behind such asymmetric rules is an attempt to police and balance one-sided contractual relationships.

Although the interactions governed by disability rights statutes are similarly characterized by disparities in access to resources and information, courts have applied a number of contract

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form"); *see also* Saleh, *supra* note 19, at 390 (proposing, in the context of IEP adjudication, to adopt an approach that is "comparable to the common law contractual doctrine of *contra proferentem*").

[429] *See supra* Part II.A.3; *cf.* RESTATEMENT OF CONSUMER CONTS. § 9 (AM. L. INST. 2024) (outlining the circumstances in which unconscionability should be applied to consumer contracts).

[430] *See* Caruso, *supra* note 18, at 178–80 (discussing differences between low-income and wealthy families in the context of IEP negotiations); Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 820 (9th Cir. 2007) ("[E]ven if the principle that ambiguous terms are interpreted against the drafting party applied, it would not help Van Duyn. His parents played a central role in the drafting of the IEP, so it is unclear who the IEP's 'author' is for contract law purposes."). *But see* Kastner & Leib, *supra* note 147, at 1304–05 (expressing skepticism as to whether courts can easily distinguish between two categories of contractual relationships for the purpose of applying *contra proferentem* and other contract doctrines).

[431] *See supra* notes 307–15 and accompanying text.

doctrines, most notably the parol evidence rule and the duty of good faith, somewhat symmetrically. This trend, which reflects the mismatch identified in this Article, should be addressed.

So what would applying contract rules asymmetrically in the context of disability rights mean? A recent work by Professor Gregory Klass provides an example. Focusing on the parol evidence rule, Klass proposed to apply the rule asymmetrically in consumer contracts, meaning that standard terms in such contracts would be "completely integrated against consumer-side communications" but "not integrated against business-side communications."[432] Klass relied, in part, on the "asymmetries between the parties to a consumer transaction," in which a sophisticated business that is a repeat player sells a product to an individual who usually does not read or understand the terms.[433]

Based in part on this pattern, Klass argued that considerations of fairness mandate that consumers always be allowed to present extrinsic evidence stemming from "affirmations or promises" made by the business's agents—even if these affirmations or promises "extend beyond" the standard terms.[434] This is exactly the opposite of the way some legal decision-makers understand "fairness" in adjudicating disability rights.[435]

Klass's analysis is important on a number of levels. On a general level, it shows that even "classical" contract law concepts need not be applied symmetrically when it comes to disability rights cases. On a more practical level, it demonstrates why courts should apply a specific, asymmetric parol evidence rule to IEP disputes, whereby IEPs would be considered "integrated" against parent-side communications but should not be integrated against school district–side communications.

4. Creating disclosure requirements.

To address informational asymmetries, this Article proposes that school districts and employers be required to disclose certain information to parents and employees during accommodation negotiations. Such information may include, for example, data

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[432] Klass, *supra* note 97, at 484.

[433] *Id.* at 479–80.

[434] *Id.* at 483. A variation of this rule has been introduced in the new RESTATEMENT OF CONSUMER CONTS. § 9 (AM. L. INST. 2024).

[435] *See, e.g.*, Application of N.Y.C. Dep't of Educ., No. 11-147, at 29 n.20 (N.Y. State Dep't of Educ., Off. of State Rev. Jan. 23, 2012), https://perma.cc/7WFW-3KYY (noting, in the context of the "four corner" rule, that "the same theory should be applied to both parties in the same case as a matter of fundamental fairness").

regarding accommodations previously provided to similarly situated parties.[436] Because such disclosure would be specific and occur as part of the negotiations, it would differ from the disclosure proposals advocated by individualization skeptics, which focus on disseminating information to the public at large.

The idea that a party should be required to disclose certain information to the other side is not foreign to contract law. For example, the Second Restatement stipulates that a contractual party must disclose information to the other side under certain circumstances.[437] Yet even in their most robust form, such disclosure requirements are still centered on the Willistonian approach and thus insufficient to ameliorate the informational disparities characterizing disability rights disputes.

Therefore, lawmakers should turn to other contractual areas of law, such as employment or consumer law, for guidance.[438] In the employment context, for example, a number of states—including California, New York, and Colorado—recently passed statutes requiring employers to disclose pay range when advertising new positions.[439] Such disclosure is designed to address gender and racial pay gaps by correcting informational asymmetries.[440] In addition, in the context of layoffs, federal law requires employers to disclose certain information to workers over forty, including the ages, job titles, and statuses of all employees in the relevant decisional unit.[441] Here again, the purpose is to provide workers with information that will allow them to uncover patterns of age-based discrimination. Taken together, these measures demonstrate how mandatory disclosure rules can be used to provide disabled employees and parents of disabled children information that might help them secure accommodations and services.

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436 This should involve balancing competing interests, including the privacy interests of third parties. *See, e.g.*, 20 U.S.C. § 1232g(b)(1) (prohibiting schools that receive federal funds from releasing education records of students to unauthorized entities without "written consent" of the students' parents); *cf.* Pasachoff, *supra* note 18, at 1467–68 (recognizing the need to "protect students from being personally identified" as part of IDEA-related data collection and publication).

437 RESTATEMENT (SECOND) OF CONTS. § 161 (AM. L. INST. 1981).

438 *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 113–14 (2022) (describing specific disclosure requirements in the context of private homes).

439 Stephanie Bornstein, *The Enforcement Value of Disclosure*, 72 DUKE L.J. 1771, 1789 (2023) (collecting statutes).

440 *Id.*

441 29 U.S.C. § 626(f)(1)(H). Specifically, this duty arises when the employer offers "an exit incentive" to a group of terminated employees in exchange for a waiver of the employees' rights to sue. *Id.*

Note that in some situations, such disclosure requirements may pertain to information that is *already* public. In these situations, disclosure rules may serve as what Professor Elizabeth Emens calls "framing rules"—"rules about the information, context, and wording that frame a decision, as well as the timing of the frame."[442] When it comes to disability rights, framing rules can dictate the kind of information provided to parents and employees before they begin to negotiate with their respective school districts and employers. For example, a recent bipartisan federal bill[443] would require school districts to inform parents of their right to be accompanied by an advocate in their IEP meetings, including "a lawyer, a therapist or other subject-matter expert or even a family member with knowledge of the child."[444] Notably, the information that the bill requires school districts to disclose is already public—indeed, the right to bring an advocate to an IEP meeting is enshrined in the IDEA.[445] There is reason to believe, however, that not all parents are aware of their right to bring an advocate, which was the impetus of the bill.[446]

In sum, by requiring the disclosure of information about accommodations and services provided to similarly situated employees or students as well as notifications regarding parents' right to be accompanied by lawyers or experts, lawmakers can assist disabled individuals and their families—particularly those who lack access to informational networks and resources—in negotiating over accommodations and services.

5. Using private law tools to address stigma.

As noted above, one of the problems with the current accommodation framework is that some disabled employees may avoid requesting reasonable accommodations for fear of stigma.[447] Specifically, because it is the employee who has to request an accommodation, employees with hidden impairments may prefer not to disclose their disability to their employer or coworkers.

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442 Emens, *Framing Disability*, *supra* note 74, at 1409.

443 Amendment to the Individuals with Disabilities Education Act, H.R. 4259, 118th Cong. (2024).

444 Shaun Heasley, *House Panel Advances Bill Clarifying Parents' Rights at IEP Meetings*, DISABILITY SCOOP (Sept. 19, 2023), https://perma.cc/U95X-USGH.

445 *See* 20 U.S.C. § 1414(d)(1)(B)(vi).

446 *See Molinaro Passes 7th Standalone Bill with Bipartisan Support*, RIVER REP. (Sept. 26, 2024), https://perma.cc/3CWE-3MB6; Exec. Order. No. 14,242, 90 Fed. Reg. 13,679 (Mar. 20, 2025).

447 *See supra* note 340 and accompanying text.

One solution for this problem in the employment context is what Professor Jasmine Harris calls "disability identity escrow."[448] Building on Professors Ian Ayres and Cait Unkovic's work,[449] Harris described the disability identity escrow as an instrument that allows employees to control the disclosure of information regarding their disability vis-à-vis their employer and coworkers.[450] Under the identity escrow, the employee first discloses information about their disability to an "escrow agent," an intermediary who is a fiduciary of the employee.[451] Only when the number of employees who similarly share their information passes a certain threshold, is the escrow agent allowed to disclose that information to the employer.[452] Grounded in private law, this tool enables disabled employees to control their own information and form coalitions within the same workplace.

Another way to address the problem of stigma-driven disclosure avoidance is to require employers to "take the first step in offering accommodations to new employees"[453] and to provide periodic notifications to existing workers about their right to ask for accommodations. This proposal builds upon a recent article by Professor Heidi Liu,[454] which identifies the time immediately after hiring as the point when such a "proactive process" would take place.[455] Under the proposal advanced here, by contrast, the employer would be required not only to initiate an interactive process when the employment relationship begins but also to provide periodic "reminders" about the right to request accommodations over the course of employment.

In a way, this idea reflects a "must ask, may tell" norm (meaning that the employer must ask if the employee needs an accommodation, but the employee is not required to disclose their disability), to use Professors Adam Samaha and Lior Strahilevitz's phrase.[456] In fact, as Samaha and Strahilevitz noted, "must ask, may tell" may already be the norm when it comes to the duty to

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448 Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1747 (2021).

449 *See generally* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145 (2012).

450 *See* Harris, *supra* note 448, at 1746–48.

451 *See id.*

452 *See id.*

453 Liu, *supra* note 33, at 233.

454 *See generally id.*

455 *Id.* at 271.

456 *See generally* Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—and Other Combinations*, 103 CALIF. L. REV. 919 (2015).

accommodate under the ADA—in cases in which the employee's impairment and the need for accommodation are obvious.[457]

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In sum, this Part explored two avenues of reform to address the mismatch identified in this Article: (1) adopting uniform measures that would replace individualized accommodations and (2) incorporating more egalitarian "contract rules" into existing disability rights frameworks. Of the two avenues, this Article favors the latter, providing multiple examples of interventions aimed at changing the contract paradigm from a transsubstantive model to specialized rules designed for disability rights adjudication. While the proposed list of interventions is by no means exhaustive, it illustrates how the contractualization of disability rights law can be directed toward a more promising normative path within the existing regulatory structure.

CONCLUSION

Legal scholars have long explored how the social construction of certain axes of identity, such as race[458] and gender,[459] mediate and complicate contract doctrines. This Article has explored the inverse phenomenon—the ways contract concepts shape the adjudication and implementation of identity-based statutes. In doing so, this Article has shown that courts employ general, commercial contract doctrines and concepts to resolve disability rights disputes. Largely overlooked by existing scholarship, the use of such contract doctrines permeates disability adjudication through two distinct tracks: the negotiation-for-accommodation mechanism and the Spending Clause contract theory.

Turning to the commercial contract paradigm to fill gaps in disability rights statutes may seem like a natural (and perhaps even neutral) choice, given the central role commercial transactions play in U.S. legal education and scholarly discourse. And yet, as this Article has argued, resorting to commercial contract

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457 *See id*. at 955 n.165.

458 *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146–47 (1991) (drawing on a personal experience to describe the role race plays in contractual negotiations); Penningroth, *supra* note 295, at 1202 (using an archivally informed approach to document "the role of African Americans and race in the development of modern contract law").

459 *See, e.g.*, Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1250 (1999) (arguing that "contract law is as susceptible to 'male bias' or sexism as any other area of the law").

law in disability rights adjudication is neither natural nor neutral. Instead, it reflects a normative choice. This choice, in turn, has negative ramifications for disabled individuals, whose accommodation requests and civil rights claims are more likely to be denied under the commercial contract paradigm.

To solve this problem, this Article proposes a different contract paradigm—one that is tailored to address the vulnerability and power disparities that characterize disability rights frameworks.