CONTRACT LAW FOR THE SPENDING CLAUSE

DANIEL B. LISTWA & ADAM FLAHERTY***

ABSTRACT

The Second Circuit's recent en banc decision in Soule v. Connecticut Ass'n of Schools, *addressing transgender athletes' participation in school sports under Title IX, brings into sharp relief the problematic evolution of the* Pennhurst *doctrine, a cornerstone of Spending Clause jurisprudence. Under* Pennhurst, *damages actions are only available under statutes providing conditional federal aid to states when the statutory terms provide "clear notice" of a recipient state's legal obligations. The rationale underlying the doctrine is the contractual nature of such Spending Clause legislation. However, as* Soule *helps demonstrate, lower courts have increasingly applied the doctrine in a manner inconsistent with its purported contractual foundations, transforming the doctrine into a defense akin to qualified immunity. This trend threatens to undermine civil rights statutes by narrowing the circumstances in which they can be enforced through actions for damages.*

This Article uses the Soule *decision as an entry point to critically examine the* Pennhurst *doctrine's development and application. Drawing on principles such as the void-for-vagueness rule,* contra proferentem, *the implied covenant of good faith and fair dealing, and doctrines relating to changed circumstances, this Article proposes a reconstruction of the* Pennhurst *doctrine that better aligns with its contractual rationale and the distinctive federalism concerns implicated by conditional aid under Spending Clause legislation. This approach offers a more nuanced and flexible framework for interpreting Spending Clause legislation, particularly in evolving areas like Title IX enforcement—an area implicated by, among other things, recent litigation challenging the Biden Administration's regulations expanding the scope of Title IX to protect sexual orientation and gender identity discrimination. This revised doctrine can provide courts with a toolkit for navigating complex disputes in federal-state partnerships, balancing the need for clear congressional mandates with the realities of rapidly changing social norms and policy needs.*

* Daniel B. Listwa is a litigation associate at Wachtell, Lipton, Rosen & Katz and a nonresident fellow of the Center for Private Law at Yale Law School.

** Adam Flaherty is a member of the Yale Law School class of 2024.

TABLE OF CONTENTS

I. Introduction 68
II. Background. 73
A. The Scope and Limits of the Spending Power 74
B. *Pennhurst*'s "Clear Statement" Rule 76
C. *Pennhurst*'s Contract-Analogy Legacy. 79
III. *Soule v. Connecticut Ass'n of Schools*: A Case Study. 82
A. "Notice" as a Qualified Immunity-Like Analysis 83
IV. The Apparent Disanalogy Between the "Clear Statement" Requirement and Contract Doctrine 88
V. Reimagining the *Pennhurst* Doctrine. 91
A. Void for Vagueness 92
B. *Contra Proferentem*. 96
C. The Implied Covenant of Good Faith and Fair Dealing . . . 99
D. Changed Circumstances. 102
VI. Conclusion 103

I.
INTRODUCTION

In June 2020, the U.S. Supreme Court issued a landmark decision in *Bostock v. Clayton County*, ruling by a 6-3 majority that Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination in employments extends to discrimination on the basis of sexual orientation and gender identity.[1] The decision was a watershed moment for LGBTQIA rights, with some commentators calling it a "super precedent" likely to have "broad ramifications" beyond its particular facts.[2] But what was cause for celebration for some was cause célèbre for others: in his dissent, Justice Alito warned that the decision was "virtually certain to have far-reaching consequences," noting that "[o]ver 100 federal statutes prohibit discrimination because of sex."[3]

Among the likely flashpoints highlighted by his dissent, Justice Alito emphasized the question of "[w]omen's sports."[4] While

1. Bostock v. Clayton County, 590 U.S. 644 (2020).

2. William N. Eskridge Jr. & Christopher R. Riano, Bostock*: A Statutory Super-Precedent for Sex and Gender Minorities*, Am. Const. Soc'y: Expert F. (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities [https://perma.cc/S43W-UQH4].

3. *Bostock*, 590 U.S. at 724 (Alito, J., dissenting) ("What the Court has done today—interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.").

4. *Id.* at 727–28 (emphasis omitted).

challenges involving transgender athletes—and particularly student athletes—are not new,[5] public debate over the participation of transgender women and girls in traditionally sex-segregated sports teams has reached a fever pitch in recent years.[6] A focal point of these debates is Title IX of the Education Amendments of 1972, which bans sex discrimination in educational institutions that receive federal funding.[7] In his dissent, Justice Alito cautioned that under the Court's reasoning, Title IX could be read to prevent the exclusion of transgender student athletes from participating in sports teams consistent with their gender identity.[8]

Seeking to highlight the "threat" such a consequence would have, Justice Alito pointed to a complaint filed just a few months earlier in a federal district court by four Connecticut high school girls, including one Selina Soule, alleging that the Connecticut Interscholastic Athletic Conference ("CIAC") was violating Title IX through its policy permitting transgender students to participate in sex-segregated high school athletics.[9] According to the *Soule v. Connecticut Ass'n of Schools* complaint, the policy has cost the plaintiffs trophies and accolades because they have been forced to compete against transgender girls.[10] Justice Alito pointed to the *Soule* allegations as illustrating how

5. *See* Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc'y 271, 272 (2013) (writing about transgender athletes in women's and girls' sports seven years before *Bostock*).

6. *See, e.g.*, Jeré Longman, *Sport Is Again Divided Over Inclusiveness and a Level Playing Field*, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/22/sports/olympics/transgender-athletes-fina.html [https://perma.cc/MC2R-SDE6]; Gillian R. Brassil & Jeré Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. Times (Aug. 3, 2021), https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html [https://perma.cc/FZR4-4UMM]; Remy Tumin, *Title IX and the New Rule on Transgender Athletes Explained*, N.Y. Times (Apr. 7, 2023), https://www.nytimes.com/article/title-ix-transgender-athletes-school-sports.html [https://perma.cc/P58S-H878].

7. 20 U.S.C. §§ 1681–1687.

8. *Bostock*, 590 U.S. at 727 (Alito, J., dissenting) ("Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.").

9. *See id.*; Second Amended Verified Complaint for Declaratory & Injunctive Relief & Damages at 2–3 [hereinafter *Soule* Complaint], Soule v. Conn. Ass'n of Schs. (*Soule I*), No. 3:20-CV-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

10. *See Soule* Complaint, *supra* note 9, at 30–31 ("In sum, the real-world result of the CIAC Policy is that in Connecticut interscholastic track competitions, while highly competitive girls are experiencing the no doubt character-building 'agony of defeat,' they are systematically being deprived of a fair and equal opportunity to experience the 'thrill of victory.'").

the *Bostock* majority's reasoning may "undermine one of [Title IX's] major achievements, giving young women an equal opportunity to participate in sports."[11]

The *Soule* complaint was filed in 2020. Given the central billing the *Soule* action received in Justice Alito's dissent, one might have expected the case to have resulted in a notable opinion or two grappling with the question of whether Title IX provides the complainants in the case the protection they allege. And yet, while the case has worked its way up from a district court in Connecticut to a panel and then an en banc sitting of the Second Circuit Court of Appeals, it was not until the fall of 2024 that a court even touched on the merits of the plaintiffs' allegations. The reason for this long delay? The district court dismissed the entire suit right at the jump on jurisdictional grounds.[12]

The court's reasoning relied, in part, on the little-known *Pennhurst* doctrine.[13] The doctrine requires that statutes enacted pursuant to the Spending Clause—including Title VII, Title IX, and many others—provide "clear notice" of any enforceable legal obligations.[14] Originating in Justice Rehnquist's 1981 opinion in *Pennhurst State School & Hospital v. Halderman*, the doctrine has been characterized by some lower courts as a "clear statement" rule pursuant to which a defendant can only be found liable for damages for breaching a statutory proscription if the violation is "clear."[15] Applying this

11. *Bostock*, 590 U.S. at 727 (Alito, J., dissenting).

12. *Soule I*, 2021 WL 1617206, at *1.

13. The *Pennhurst* case went up to the Supreme Court twice. The "*Pennhurst* doctrine" referred to throughout this Article is the "clear statement" rule articulated by the Supreme Court in *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst I*), 451 U.S. 1, 17–18 (1981), not the sovereign immunity rule set out when the case returned to the Court a few years later in *Pennhurst State Sch. & Hosp. v. Halderman* (*Pennhurst II*), 465 U.S. 89, 98–99 (1984).

14. Soule v. Conn. Ass'n of Schs. (*Soule III*), 90 F.4th 34, 57 (2d Cir. 2023) (en banc) (Menashi, J., concurring) (quoting *Pennhurst I*, 451 U.S. at 25).

15. *See, e.g.*, Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 815 (11th Cir. 2022); Doe v. Elkhorn Area Sch. Dist., No. 24-CV-354, 2024 WL 3617470, at *15–16 (E.D. Wis. Aug. 1, 2024); J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F. Supp. 3d 833, 840–41 (S.D. Ind. 2019). The Supreme Court has characterized *Pennhurst I* as a "clear statement rule," Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (citing *Pennhurst I*, 451 U.S. 1), though—as is discussed herein—the Court's understanding of the rule does not necessarily align with how it has been applied by lower courts. Although not a focus of this Article, recent Supreme Court precedent suggests the doctrine applies to all forms of relief, not just damages. *See* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 220 (2022) ("A particular remedy is thus 'appropriate relief' in a private Spending Clause action 'only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.'" (quoting Barnes v. Gorman, 536 U.S. 181, 187 (2002))).

understanding of the rule to the allegations in *Soule*, the district court, and then the three-judge Second Circuit panel, held that this rule required dismissal of the complaint on the ground that there was not sufficiently "clear" notice of whether CIAC would violate Title IX if it permitted transgender athletes to participate in women's sports in light of the text of the law, prior judicial precedent, and agency guidance.[16]

Pennhurst's "clear statement" rule can insulate defendants from the reach of important civil rights statutes by invoking ill-defined concepts of clarity and notice. As initially interpreted by the district court and appellate panel in *Soule I* and *II*, the *Pennhurst* doctrine operates like a form of super-charged qualified immunity as it shields state actors, and not just individual officers,[17] from the reach of certain federal laws. And yet, despite the doctrine's potential significance, *Pennhurst*'s "clear statement" rule—in marked contrast to another "clear statement" rule, the Major Questions Doctrine—has largely evaded scholarly and judicial engagement and critique.[18]

That obscurity, this Article argues, has allowed the doctrine to metastasize far beyond what its rationale can support. As first articulated, the *Pennhurst* doctrine expressed the long-established notion that statutes enacted pursuant to the Spending Clause are essentially contracts: though the Spending Clause provides Congress with no authority to generate substantive law, Congress can leverage its

16. *See Soule I*, 2021 WL 1617206, at *8–10; Soule v. Conn. Ass'n of Schs. (*Soule II*), 57 F.4th 43, 54–56 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

17. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 554–55, 557 (1967) (holding that the qualified immunity defense protects a police officer from liability under the Civil Rights Act of 1871, so long as the officer acts in good faith and with probable cause).

18. *See generally* Mila Sohoni, Case Comment, *The Major Questions Quartet*, 136 Harv. L. Rev. 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 Fla. L. Rev. 251 (2024); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 217 (2022); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 Harv. L. Rev. 515 (2023); Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron*, and More*, 65 Wm. & Mary L. Rev. 1265 (2024); Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J.L. & Pub. Pol'y 463 (2021); Kevin Tobia et al., *Major Questions, Common Sense?*, 97 S. Cal. L. Rev. 1153 (2024).

power of the purse to induce state actors to agree to take on substantive obligations with those obligations then having the force of law.[19] Because those statutory obligations are, if not literally, at least analogous to contractual provisions, core contractual principles apply—including the very basic idea that vague or hortatory terms are unenforceable.

So far, so good. But some lower courts have transformed the *Pennhurst* doctrine into something more extreme. These courts have drawn on imprecise language in the *Pennhurst* decision itself to justify taking a qualified immunity-like approach to the doctrine that bars damages actions under arguably ambiguous statutory terms, not only ones that meet the narrow void-for-vagueness standard.[20] This development threatens to undermine virtually every major Spending Clause statute. But it is not just problematic from a policy perspective. It also lacks doctrinal coherence. This is because the qualified immunity-like approach flips the doctrine's contractual rationale on its head.

Contract law generally treats ambiguity, unlike vagueness, as an issue of interpretation, not enforcement. Courts seek to resolve ambiguities by discerning the parties' intent and giving effect to the essence of their agreement, rather than invalidating contracts due to imprecise language.[21] By not requiring parties to foresee and plan for every contingency, this approach lowers the cost of contracting and, so, promotes valuable exchanges. The qualified immunity version of the *Pennhurst* doctrine displayed in *Soule I and II*, on the other hand, does the opposite—it impedes Congress's ability to craft Spending Clause legislation by forcing legislators to anticipate and respond to all future possibilities or else see its Spending Clause legislation given limited effect. Consequently, this approach may stifle legislative innovation and limit the federal government's capacity to

19. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–77 (2012); South Dakota v. Dole, 483 U.S. 203, 210–11 (1987); Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937); United States v. Butler, 297 U.S. 1, 64 (1936); David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 34–35 (1994).

20. *See Soule III*, 90 F.4th at 57, 61–63 (Menashi, J., concurring) (describing the resemblance between qualified immunity and the district court's application of *Pennhurst I*); *Soule I*, 2021 WL 1617206, at *9 (framing the *Pennhurst* issue in terms of "clear notice," and finding that "OCR did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track").

21. *See* Restatement (Second) of Conts. §§ 200–204 (Am. L. Inst. 1981); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91–92 (1989).

address complex, evolving societal issues through cooperative federalism frameworks.

But while this ambiguity-focused conception of the *Pennhurst* doctrine ought to be rejected, the doctrine need not be narrowed to nothing more than a vagueness rule. We propose that a more nuanced view of contract law provides a path towards constructing a different conception of the doctrine, one that better aligns with the contract-based rationale articulated in the Supreme Court's original decision, while still expanding the doctrine beyond the narrow concept of void for vagueness. This reconstruction would draw on established contract law principles such as *contra proferentem*, the implied covenant of good faith and fair dealing, and changed circumstances.[22] It would also acknowledge that Congress sometimes intentionally uses open-textured language in statutes like Title IX to delegate discretionary authority to federal agencies, as even the Court's recent *Loper Bright* decision recognized. Such delegation allows for flexibility in implementing broad mandates like prohibiting sex discrimination in education. Rather than applying a rigid "clear statement" rule, courts could focus on whether the statute implies such a delegation. If so, they could then apply contract law principles like the implied covenant of good faith and fair dealing to ensure that this discretion is exercised reasonably and in line with the parties' expectations.

This reconstructed—or, perhaps more accurately, reimagined—doctrine would provide a more sophisticated framework for courts to navigate challenging issues like transgender athletes' participation in sports under Title IX, balancing the need for clear congressional mandates with the realities of evolving social norms and adaptive policymaking in federal-state partnerships.

II.
BACKGROUND

The Spending Clause has long been a powerful tool for federal policymaking, yet its reach and limitations remain subjects of ongoing legal debate. This Part examines the Spending Clause's scope and the evolution of the *Pennhurst* doctrine. Beginning with an overview of the Spending Power's historical development and constraints, the discussion then turns to the origins and rationale of *Pennhurst*'s "clear statement" rule.

In so doing, this Part highlights a significant divergence that has emerged in the doctrine's application: while the Supreme Court

22. *See infra* Sections V.B, V.C, V.D.

has primarily invoked *Pennhurst* to emphasize the contractual nature of Spending Clause legislation, lower courts have focused on its "clear statement" rule as an interpretive canon. This split legacy has created considerable uncertainty in how the doctrine should be applied, particularly in complex cases involving evolving social norms and policies. By exploring this dichotomy and its implications, we set the stage for a critical reevaluation of the *Pennhurst* doctrine's role in modern Spending Clause litigation.

A. The Scope and Limits of the Spending Power

The Taxing and Spending Clause of the Constitution, the first clause of Article I, Section 8, empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[23] Modern doctrine interprets this Clause to confer no independent regulatory power, unlike Congress's other powers enumerated in the remaining clauses of Article I, Section 8—such as the Commerce Clause and the Postal Clause. And yet, Congress's authority under the Spending Clause remains a potent tool for federal policymaking. In large part, this is due to the Supreme Court's determination that the Clause permits Congress to constitutionally condition federal aid to states, thus incentivizing states to cooperate in achieving federal aims that are beyond the scope of Congress's direct regulatory authority under its other enumerated powers.

Congress's history of using conditional grants of federal aid dates to at least the Reconstruction period, when in 1890, Congress passed the Second Morrill Act.[24] That law authorized the Secretary of Treasury to withhold funding for state colleges and universities that excluded black students.[25] The authorization of the federal income tax following the ratification of the Sixteenth Amendment enlarged the federal government's revenue and, as a result, expanded Congress's capacity to utilize such conditioned grants.[26] This facilitated, among other things, one of the federal government's first forays into social welfare legislation—the Sheppard-Towner Act of 1921, commonly referred to as the "Maternity Act," which provided

23. U.S. Const. art. I, § 8, cl. 1.

24. *See* Douglas M. Spencer, *Sanctuary Cities and the Power of the Purse: An Executive* Dole *Test*, 106 Iowa L. Rev. 1209, 1219 (2021).

25. Agricultural College Act of 1890, ch. 841, § 1, 26 Stat. 417 (codified as amended at 7 U.S.C. § 323). However, the Second Morrill Act did allow states to maintain these colleges "separately for white and colored students." *Id.*

26. Spencer, *supra* note 24, at 1219; Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 218 (2023) (Thomas, J., dissenting).

states with funds to be spent on public health programs targeting infant and maternal mortality.[27]

Congress's use of conditioned grants only grew in the decades to follow, from the enactment of the Social Security Act of 1935 during the New Deal to the establishment of Medicaid in 1965 as part of President Johnson's "Great Society."[28] But one of the most significant developments in Congress's exercise of its spending power has been in connection with its enactment of statutes imposing general conditions not linked to any particular grant of federal funds. Examples include Title VI of the Civil Rights Act of 1964,[29] section 504 of the Rehabilitation Act of 1973,[30] and Title IX of the Education Amendments of 1972,[31] which prohibit race-, disability-, and sex-based discrimination, respectively. Rather than grant funds themselves, these provisions set out threshold conditions for receiving federal aid distributed pursuant to other programs: Title VI and section 504 govern "any program or activity receiving Federal financial assistance," and Title IX governs "any education program or activity receiving Federal financial assistance."[32]

Though Congress's power under the Spending Clause is a powerful lever for achieving policy aims, it is not unlimited. To prevent Congress's spending power from swallowing its enumerated ones, the Supreme Court has identified four restrictions on the use of federal funding conditions. First, the condition must relate to the program or funding it restricts.[33] Second, the condition may not be unduly coercive.[34] Third, the condition may not induce the recipients to violate a separate provision of the Constitution.[35] And fourth, and most relevant for present purposes, a recipient must have clear notice of its obligations under the statutory conditions.[36]

While "clear notice" is a familiar constitutional concept, with clarity and notice playing important roles in many constitutional

27. *See* Spencer, *supra* note 24, at 1219–20, 1220 n.52; Sheppard-Towner Act, ch. 135, 42 Stat. 224 (1921) (expired 1929). The Supreme Court dismissed a challenge to the constitutionality of the Act in *Massachusetts v. Mellon*, 262 U.S. 447, 479–80 (1923).

28. Spencer, *supra* note 24, at 1220–21; *see Talevski*, 599 U.S. at 218–19 (Thomas, J., dissenting).

29. 42 U.S.C. § 2000d.

30. 29 U.S.C. § 794.

31. 20 U.S.C. § 1681(a).

32. 42 U.S.C. § 2000d; 29 U.S.C. § 794; 20 U.S.C. § 1681(a).

33. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

34. *Id.* at 211.

35. *Id.* at 207–08.

36. *Id.* (citing *Pennhurst I*, 451 U.S. 1, 17 (1981)).

doctrines such as due process,[37] the application of this concept to state bodies is distinctive. Unlike in due process cases where states are bound by the Fourteenth Amendment, in the context of Spending Clause legislation, states become the beneficiaries of a notice requirement.[38] This unusual inversion stems from an analogy to contract law, which provides the rationale for the *Pennhurst* doctrine. Understanding this contractual foundation is crucial for proper application of the doctrine and helps courts avoid conflating Spending Clause "clear notice" with similar concepts in other areas of constitutional law.

B. Pennhurst*'s "Clear Statement" Rule*

The "clear notice" requirement originated in *Pennhurst State School & Hospital v. Halderman*, decided in 1981. *Pennhurst* involved the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the "DDA Act"), under which Congress made funding available for states to provide services to individuals with developmental disabilities.[39] To receive funding under the program established by the statute, a state had to first "submit an overall plan [for providing services] satisfactory to the Secretary of HHS."[40] The Secretary, in turn, could approve the plan only if it complied "with several specific conditions set forth in [42 U.S.C.] § 6063," such as the requirement that any services provided "be consistent with standards prescribed by the Secretary."[41]

The DDA Act also contained a findings section, 42 U.S.C. § 6010, referred to as the "bill of rights," stating, among other things, that persons with developmental disabilities have "a right to 'appropriate treatment'" and that such treatment should be provided in "the setting that is least restrictive of . . . personal liberty."[42] Residents of the Pennhurst State School and Hospital, located in Pennsylvania,

37. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

38. *Cf.* South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union . . . ."); Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976) (stating that the Fourteenth Amendment "protect[s] people, not States").

39. *Pennhurst I*, 451 U.S. at 5.

40. *Id.* at 14.

41. *Id.*

42. *Id.* at 8 (quoting Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, sec. 201, § 111(1)–(2), 89 Stat. 486, 502 (1975) (repealed 2000)).

a state that had accepted funds pursuant to the Act, claimed that the hospital violated the "bill of rights" section of the statute by subjecting them to dangerous and inhumane living conditions—including, as the district court found, physical abuse and drugging by staff members.[43] The question on appeal before the Supreme Court then was whether these "rights" found in the findings section created additional conditions for the recipient of federal funds that could serve as a basis for a suit by private actors.[44]

This was, in a sense, a very standard issue of statutory interpretation: based on the language of the statute, were the findings part of the conditions? Although the statute required recipient states to implement plans that made "satisfactory" "assurances" that they would "protect[]" the "rights" of persons with developmental disabilities "consistent with" the findings section of the Act, there was nothing explicit in the Act suggesting that satisfaction of these rights was a condition for receipt of the funds, let alone that their violation might support a private cause of action.[45] As one of the lawyers for the resident plaintiffs would later acknowledge, "nobody thought" that the states were actually bound to satisfy the "lovely language" of the Act's "[b]ill of [r]ights"; the Third Circuit nonetheless directed them to brief this argument.[46]

But rather than simply engage with the text, the Supreme Court—in an opinion by Justice Rehnquist—began by examining Spending Clause legislation on a conceptual level. Justice Rehnquist explained that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."[47] Additionally, the opinion continued, "[t]he legitimacy of Congress'[s] power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[48]

---

43. *Id.* at 7. Plaintiffs also asserted constitutional claims and statutory claims under the 1973 Rehabilitation Act. *See* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1183–84 (2022) (explaining that, although the district court relied on these other claims in granting relief, the Third Circuit, on appeal, relied on the claims under the Developmentally Disabled Assistance and Bill of Rights Act and Pennsylvania's Mental Health and Mental Retardation Act of 1966).

44. *Pennhurst I*, 451 U.S. at 10.

45. *Id.* at 26.

46. Tani, *supra* note 43, at 1189 n.226 (quoting plaintiffs' attorney, Tom Gilhool); *see id.* at 1183 (explaining that the statutory "bill of rights" claims were only added in plaintiffs' second amended complaint).

47. *Pennhurst I*, 451 U.S. at 17.

48. *Id.*

Drawing on this contractual theory, Justice Rehnquist went on to establish what has come to be known as *Pennhurst*'s "clear statement" rule[49]: because there can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it . . . if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[50] Applying this principle, the Court noted that, in contrast to the conditions spelled out "in clear terms" elsewhere in the statute, there was an "absence of conditional language in § 6010."[51] Given this contrast, the Court concluded that the findings located in the "bill of rights" were merely precatory statements, as the language of the statute "fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010."[52]

Reading the *Pennhurst* decision today, it is challenging to see what work Justice Rehnquist's "clear statement" rule is doing. From the textualist perspective that now dominates the judiciary, it is not hard to conclude that a findings section is merely "hortatory," as the Court described them, and thus creates no mandatory obligations.[53] But 1981 was a different time. For one, the march toward modern textualism—which arguably began when Justice Scalia joined the Court in 1986—was still years away.[54] Moreover, the Court was then still in the early stages of what we can now recognize as an extended period of retrenchment in terms of the recognition of enforceable private rights.[55] Only two years earlier, Justice Rehnquist concurred in a decision—*Cannon v. University of Chicago*—that recognized an implied private right of action to enforce Title IX, albeit in an opinion that raised the burden for recognizing such implied causes of action in the future.[56] *Pennhurst* would prove to be a marker of a turning tide. In the years that followed, the Court would continue

49. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

50. *Pennhurst I*, 451 U.S. at 17.

51. *Id.* at 23.

52. *Id.* at 25.

53. *Id.* at 24.

54. Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. Rev. 1033, 1070 (2023).

55. *See, e.g.*, Pauline E. Calande, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 Yale L.J. 1144, 1144–47 (1985); Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevolution against Federal Litigation 130–91 (2017).

56. Cannon v. Univ. of Chi., 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) ("Not only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.").

to narrow the circumstances under which it would find that federal statutes gave rise to private causes of action and, by the turn of the twenty-first century, made clear its break from the approach to recognizing statutory rights that it had embraced in the decades before.[57]

C. Pennhurst*'s Contract-Analogy Legacy*

Perhaps because of these broader shifts in the Supreme Court's jurisprudence, the legacy of the *Pennhurst* doctrine in the U.S. Supreme Court has been defined less by its creation of the specific "clear statement" rule and more by its analogization of Spending Clause legislation to contracts. To take one recent example, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Court held that emotional distress damages are not recoverable in private actions to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act (both Spending Clause statutes) in light of the "hornbook law that 'emotional distress is generally not compensable in contract.'"[58] And similarly, in *Barnes v. Gorman*, the Court invoked *Pennhurst* to conclude that punitive damages—a form of relief "generally not available for breach of contract"—are not recoverable in actions under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, both enacted pursuant to the Spending Clause.[59]

The contract analogy has also played a role in shaping the doctrine surrounding the availability of damages in private actions brought pursuant to Title IX—the issue central to *Soule*. In 1992, in *Franklin v. Gwinnett County Public Schools*, the Court first recognized the availability of damages in such suits, holding that a high school student could pursue monetary relief against her school district for taking no action to stop the repeated sexual harassment she incurred from a teacher despite the school being made aware of the continuing wrongdoing.[60] Six years later, in *Gebser v. Lago Vista Independent School District*, the Court was asked to extend this holding to a case similar in all but one regard. Like the plaintiff in *Franklin*, Alida Gebser alleged that she was sexually harassed by her high school teacher and sued her school district for damages.[61] But unlike in

57. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (no private cause of action to enforce regulations promulgated under section 602 of Title VI of the Civil Rights Act of 1964).

58. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 221 (2022) (quoting Douglas Laycock & Richard L. Hasen, Modern American Remedies 216 (5th ed. 2018)).

59. Barnes v. Gorman, 536 U.S. 181, 186–87, 189 (2002).

60. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 63–64, 76 (1992).

61. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–79 (1998).

Franklin, the complaint in *Gebser* contained no allegations that the school district had actual notice of the harassment or had otherwise done anything wrong.[62]

The Court declined to hold that damages were available in such a situation, explaining that, based on the majority's reading of the statute, "Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice."[63] In reaching this decision, the Court relied, in part, on "Title IX's contractual nature," citing *Pennhurst*.[64] The Court's invocation of *Pennhurst* is somewhat obscure, but the key insight seems to be this: given the language of the statute, while a school board accepting federal funds would understand it was agreeing "not to discriminate on the basis of sex," it would not expect to be liable for its employees' discriminatory acts on the basis of respondeat superior[65]—a doctrine grounded in tort law, not contract.[66]

As these cases reflect, the Supreme Court usually invokes *Pennhurst* to draw on its "contract-law analogy," as Justice Kavanaugh recently referred to it,[67] to narrow the scope of the obligations generated by Spending Clause legislation. Thus, while *Pennhurst* has been cited regularly by the Court in the decades since it was first decided, there are precious few decisions that actually offer guidance on how a court should go about determining whether a statute speaks with the requisite degree of clarity.[68] But the opposite trend can be observed among the lower courts. In federal district and circuit courts, *Pennhurst* is generally invoked not for the broad concept

62. *Id.* at 279.

63. *Id.* at 288.

64. *Id.* at 286–87.

65. *Id.* at 287–88 (quoting Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 654 (5th Cir. 1997)).

66. *See* Phila. & Reading R.R. Co. v. Derby, 55 U.S. (14 How.) 468, 485 (1852) ("[T]he maxim of '*respondeat superior*' . . . is wholly irrespective of any contract, express or implied . . . .").

67. Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 230–31 (2022) (Kavanaugh, J., concurring).

68. A rare example of the *Pennhurst* doctrine appearing to function in a Supreme Court decision as a true "clear statement" rule is *Arlington Central School District Board of Education v. Murphy*, where the Court invoked the doctrine to narrowly construct the scope of potential damages available under the Individuals with Disabilities Education Act. *See* 548 U.S. 291, 296–304 (2006). Other instances in which *Pennhurst I* was invoked as a "clear statement" rule within the pages of the U.S. Reports are largely found in dissents. For example, Justice Kennedy accused the majority of adopting a "watered-down version of the Spending Clause clear-statement rule" in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 686 (1999) (Kennedy, J., dissenting).

that Spending Clause legislation is contractual in nature, but rather as the source of an interpretive "clear statement" rule—a thumb on the scale against interpreting a statute to find an obligation imposed on the states—or something similar.[69]

This split legacy is understandable: consistent with the more doctrinal approach to case resolution typical of the federal district and circuit courts, lower courts have frequently treated the *Pennhurst* doctrine as creating a familiar form of substantive canon. The Supreme Court, by contrast, has looked to the more theoretical apparatus of the contract-law analogy as a resource—though not without resistance[70]—in resolving the sometimes-perplexing issues of first impression that typify its docket. At the same time, the Court has done little to clarify how the "clear statement" formulation should apply (or even whether it is still good law).[71] Important, even fundamental, questions about how the *Pennhurst* doctrine should be applied have been left unresolved as a result.

To understand the nature of this uncertainty, one need look no further than the recent controversy over a different "clear

69. *See, e.g.*, Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 584 F.3d 253, 271 (6th Cir. 2009) ("This is not to say that the Secretary's interpretation of the Act is frivolous. But the only relevant question is whether the Act provides *clear notice to the States* of their obligation."); Saint Anthony Hosp. v. Whitehorn, 100 F.4th 767, 788 (7th Cir. 2024) ("We think Congress spoke sufficiently clearly here. The clear-statement rule explains that 'States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain."'" (quoting *Arlington*, 548 U.S. at 296)), *vacated and reh'g en banc granted*, No. 21-2325, 2024 WL 3561942 (7th Cir. July 24, 2024); Pierre-Noel *ex rel.* K.N. v. Bridges Pub. Charter Sch., 113 F.4th 970, 979 (D.C. Cir. 2024) (stating that "we need only apply ordinary tools of statutory construction" to determine "whether the District made an 'informed choice' to assume" the obligation at issue (quoting *Pennhurst I*, 451 U.S. 1, 25 (1981))). There are exceptions, however. Particularly in recent years, circuit courts have questioned the idea that *Pennhurst I* is a "rule of construction," and instead viewed it through the lens of "principles of contract law." West Virginia v. U.S. Dep't of the Treasury, 59 F.4th 1124, 1142 (11th Cir. 2023); *see also* Texas v. Yellen, 105 F.4th 755, 769 (5th Cir. 2024) (rejecting argument that *Pennhurst I*'s restriction is a "mere rule[] of statutory construction" and noting that the decision is "explicit in relying on principles of contract").

70. *See Cummings*, 596 U.S. at 230–31 (Kavanaugh, J., concurring) (questioning the relevance of the contract-law analogy in the case).

71. To the contrary, invocations of *Pennhurst* within the U.S. Reports have probably contributed to the confusion. For example, in her dissent in *Sossamon v. Texas*, a case about sovereign immunity, Justice Sotomayor appears to conflate *Pennhurst II*'s sovereign immunity rule with the "clear statement" rule set out in the 1981 *Pennhurst I* decision. *See* Sossamon v. Texas, 563 U.S. 277, 295 (2011) (Sotomayor, J., dissenting). Likely due to this conflation, Judge Bush recently invoked *Sossamon* as an example of a case applying *Pennhurst*'s "clear statement" rule. *See* Kentucky v. Yellen, 67 F.4th 322, 325–27 (6th Cir. 2023) (mem.) (Bush, J., statement).

statement" rule—the Major Questions Doctrine, which directs courts to approach certain agency policies with "skepticism" and demands that the agency "point to 'clear congressional authorization.'"[72] In the short time since the Supreme Court explicitly recognized the doctrine in *West Virginia v. EPA*, judicial and scholarly engagement with—and criticism of—the Major Questions Doctrine has exploded.[73] In particular, many have puzzled over how it is to be applied and integrated into the standard statutory interpretation suite—with some asking how "major" a question need be for the rule to be triggered, and when congressional authorization is "clear" enough to overcome it.[74] And only a year after announcing the Major Questions Doctrine, Justice Barrett wrote a concurring opinion, in *Biden v. Nebraska*, seeking to dispel some of the uncertainty, in which she denied that the doctrine even is a "clear statement" rule, and (predictably) touched off a whole new wave of debate and controversy.[75]

But *Pennhurst*'s "clear notice" rule has never attracted that level of attention or engagement. As a result, questions have been raised as to its application—such as what role agency or judicial interpretations can have in either providing clarity or giving rise to a lack of clarity—which have gone unanswered for decades.[76] But while *Pennhurst* has remained out of the spotlight, it has not been dormant. To the contrary, though unnoticed by commentators, the doctrine has metastasized into something that bears little resemblance to its contract-analogy roots or even the "clear statement" canon with which the decision has come to be associated. As illustrated by the *Soule* decisions, *Pennhurst*'s notice rule has come to operate more like a form of qualified immunity. We turn next to that development.

III.
SOULE V. CONNECTICUT ASS'N OF SCHOOLS: A CASE STUDY

Rehearings en banc are famously rare in the Second Circuit.[77] But in February 2023, the court did something apparently unprece-

72. West Virginia v. EPA, 597 U.S. 697, 732 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

73. *See* Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 Geo. Wash. L. Rev. 1117, 1119–20 nn.6–13 (2024) (collecting cases and articles discussing the Major Questions Doctrine).

74. *See, e.g.*, Deacon & Litman, *supra* note 18, at 1015.

75. *See* Biden v. Nebraska, 600 U.S. 477, 510–11 (2023) (Barrett, J., concurring).

76. *See, e.g.*, Peter J. Smith, Pennhurst*,* Chevron*, and the Spending Power*, 110 Yale L.J. 1187, 1188–91 (2001).

77. *See* Ricci v. DeStefano, 530 F.3d 88, 89–90 (2d Cir. 2008) (mem.) (Katzmann, J., concurring in the denial of rehearing en banc).

dented: it sua sponte issued an order for rehearing en banc in *Soule*. The scope of the rehearing was limited primarily to two threshold issues: (1) the plaintiffs' standing to pursue monetary damages and injunctive relief in connection to their challenge to CIAC's transgender-inclusion policy, and (2) whether the *Pennhurst* doctrine barred the plaintiffs from seeking damages on their Title IX claim.[78] In limiting the scope of the rehearing in this manner, the Second Circuit zeroed in on the grounds that had allowed the district court to avoid addressing plaintiffs' claims on the merits. This Part discusses how these threshold questions barred relief in the district court and in the panel decision before turning to the en banc court's rulings.

A. "Notice" as a Qualified Immunity-Like Analysis

The *Soule* plaintiffs—female, cisgender high school students who ran for their school's track team—initiated their suit in February 2020, alleging that CIAC and its member high schools violated Title IX by enforcing the Transgender Participation Policy (the "Policy"),[79] which permits high school students to compete on gender-specific athletic teams consistent with their gender identity if they meet certain criteria.[80] The plaintiffs, who sought both damages and injunctive relief, all alleged to have competed in races in which they placed after one of two transgender students, Andraya Yearwood and Terry Miller.[81] But before the district court could hear the plaintiffs, the COVID-19 pandemic closed schools throughout Connecticut and all "interscholastic athletic competition was suspended indefinitely."[82]

In August 2020, CIAC and the high school, along with Yearwood and Miller, who had joined the case as defendants-intervenors, moved to dismiss the complaint, and, a few months later, on April 25, 2021, the district court granted the motion, holding that (1) the plaintiffs' requests for injunctive relief were moot given that the two

78. *See Soule III*, 90 F.4th 34, 44–45 (2d Cir. 2023) (en banc).

79. *Soule I*, No. 3:20-CV-00201, 2021 WL 1617206, at *1–2 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

80. The Policy requires schools to determine a student's eligibility "based on the gender identification of that student in current school records and daily life activities in the school and community." Students are not permitted to participate on gender-specific teams "that are different from their publicly identified gender identity . . . or to try out simultaneously for CIAC sports teams of both genders." *Soule III*, 90 F.4th at 42 (quoting Conn. Intersch. Athl. Conf., *CIAC By-Laws*, *in* 2024–2025 Handbook 48, 65 (2024)).

81. *Soule I*, 2021 WL 1617206, at *1, *3; *Soule II*, 57 F.4th 43, 48 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

82. *Soule I*, 2021 WL 1617206, at *2.

transgender students had graduated, and (2) the plaintiffs' requests for damages were barred by *Pennhurst* because CIAC did not receive adequate notice whether its Policy violated Title IX.[83]

In support of the second holding, the district court emphasized the lack of consistent guidance from the Federal Department of Education, which has been statutorily authorized to promulgate regulations pursuant to Title IX's broad prohibition of sex discrimination.[84] The court walked through the last decade of guidance provided by the Department of Education's Office of Civil Rights ("OCR"), which has on multiple occasions "reversed course" with changes in presidential administrations—at times interpreting the statute as protecting transgender students, while at others seemingly viewing it as requiring such students' exclusion.[85] The district court also noted the lack of judicial decisions indicating that Title XI re-

83. *Id.* at *5–6, *8, *10.

84. *See id.* at *8–9 ("In light of [the Department of Education's contradictory guidance on transgender athletes from 2016–2021] . . . [the Department] did not provide the defendants with clear notice that they would be liable for money damages if they permitted Yearwood and Miller to compete in girls' track.").

85. The background set out by the district court features a number of turns and reversals:

> Beginning in 2014, [OCR] notified schools that "[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX." In 2015, OCR gave notice that "[t]he Department's Title IX regulations permit schools to provide sex-segregated . . . athletic teams . . . [and] [w]hen a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." In 2016, OCR went further, stating unequivocally that "transgender students must be allowed to participate in such activities . . . consistent with their gender identity."
>
> Plaintiffs argue that OCR reversed course when it issued a Dear Colleague letter in 2017. The 2017 letter did not provide any new or different guidance, however. Instead, it stated that OCR was rescinding the 2016 Guidance "in order to further and more completely consider the legal issues involved." The letter expressed OCR's belief that it was required to give "due regard for the primary role of the States and local school districts in establishing educational policy." . . .
>
> No further guidance was provided to the defendants until May 2020, several months after this action was brought, when OCR sent them a Letter of Impending Enforcement Action based on a complaint it had received about Yearwood and Miller competing in girls' track. In August 2020, a Revised Letter of Impending Enforcement Action was issued to the defendants, informing them for the first time that OCR interpreted Title IX and its implementing regulations to require that sex-specific sports teams be separated based on biological sex. This letter and the previous letter were withdrawn in February 2021. In withdrawing the Revised Enforcement Letter, OCR stated that the letter had been "issued without the review

quires exclusion of transgender students, further supporting the position that CIAC would not have been on notice that its Policy violated the law, assuming it did.[86]

The panel decision on appeal, written by Judge Chin, was similar in its reasoning, noting both the lack of clear agency guidance as well as the fact that many judicial decisions—including the *Bostock* decision and several other circuit courts—all pointed away from a finding that the defendants violated the law.[87] The panel determined that this constellation of previous authorities, though not actually resolving the question at issue in the case, implied that the defendants lacked "clear notice" of any liability they might face under Title IX, if any.[88]

At a level of abstraction, the line of reasoning followed by both opinions is consistent with the broad notion of "notice." But it is foreign when compared to the application of a standard "clear statement" rule. As discussed above, typically, a "clear statement" rule functions as a thumb on the scale for courts resolving statutory interpretation questions, weighing in favor of resolving the ultimate merits issue in a particular manner—such as against a finding that a federal law preempts state law[89] or that an amendment applies retroactively[90]—but not otherwise altering the merits disposition.

But as articulated by the *Soule* courts, the *Pennhurst* doctrine differs in two major ways. First, while the *Pennhurst* decision invoked the "clear statement" requirement in resolving the merits question of whether the "bill of rights" granted privately enforceable rights, in *Soule*, the *Pennhurst* doctrine operated as a defense to liability (though only a partial one, since it only blocked a damages action, not one for injunctive relief), leaving the ultimate merits question unresolved. Second, while the *Pennhurst* court confined its inquiry to

---

required for agency guidance documents" and should therefore "not be relied upon in this or any other matter."

Id. at *9 (citations omitted).

86. *See id.* at *10 ("Courts across the country have consistently held that Title IX requires schools to treat transgender students consistent with their gender identity. . . . This unbroken line of authority reinforces the conclusion that the plaintiffs' claims for money damages are barred." (citations omitted)).

87. *See Soule II*, 57 F.4th 43, 55–56 (2d Cir. 2022) ("[T]he Supreme Court's recent decision in *Bostock v. Clayton County*, interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and the decisions of our sister circuits interpreting Title IX strongly support the conclusion that the CIAC and its member schools lacked notice that a policy such as that at issue here violates Title IX." (citation omitted)), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023).

88. *Id.* at 56.

89. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009).

90. *See* Greene v. United States, 376 U.S. 149, 160 (1964).

the "clarity" of the statute itself, the *Soule* courts' inquiry considered a broader constellation of potential authorities, including agency guidance and judicial decisions.[91]

Though these characteristics distinguish the "clear notice" requirement invoked in *Soule* from other "clear statement" rules, it bears a remarkable resemblance to a very different doctrine: qualified immunity. Qualified immunity shields government actors in their personal capacities from suit when they have not violated a plaintiff's "clearly established" rights.[92] According to the Supreme Court, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[93] *Pennhurst*'s "clear statement" rule, in the hands of the district court and the panel, likewise shields funding recipients from liability for damages absent clear notice of a potential violation of a statutory funding condition.[94]

The issues of when and how lower courts should apply the "clear statement" rule raised in *Soule* were sufficiently thorny for consideration by an en banc Second Circuit.[95] But apparently unable to agree on how the doctrine should apply in the case, a majority instead vacated and remanded on the narrow ground that the district court should not have treated the doctrine as jurisdictional without providing further guidance on whether either of the lower courts had correctly analyzed the adequacy of notice.[96] Of the various opinions in the case—including three concurrences, three further concurrences in part, and a dissent—only Judge Menashi's concurrence (joined by Judge Park) engaged at length with *Pennhurst*'s contract rationale.[97]

Drawing on the rationale in support of the majority's jurisdictional holding, Judge Menashi explained his view that "[b]ecause the question is whether there has been an *acceptance* of contractual terms, *Pennhurst* operates as a defense to liability. Such a defense is

91. The *Soule* decisions were not unique in this regard. *See, e.g.*, Tennessee v. Becerra, 117 F.4th 348, 359 (6th Cir. 2024) ("True, the statutory language does not illuminate the nature of any such conditions on the grant. But these questions can be resolved by looking to both statutes *and* an agency's authorized regulations.").

92. *E.g.*, Pearson v. Callahan, 555 U.S. 223, 231 (2009).

93. *Id.*

94. *See Soule III*, 90 F.4th 34, 57 (2d Cir. 2023) (en banc) (Menashi, J., concurring) (stating that the *Pennhurst I* clear notice requirement operates as a waivable defense to liability).

95. *See generally Soule III*, 90 F.4th 34.

96. *Id.* at 53.

97. *Id.* at 57 (Menashi, J., concurring).

waivable and not jurisdictional."[98] He continued that he would have gone further than the majority to hold that the district court erred by "failing to address whether the [challenged policy] was intentional conduct and therefore not subject to the notice requirement at all," suggesting that the *Pennhurst* doctrine should be narrowed so as not to reach "intentional conduct" like the promulgation of an official policy.[99]

Judge Menashi's suggested limitation of the *Pennhurst* doctrine so as not to apply to "intentional" actions addresses one of the most glaring incongruities between this doctrine, as originally conceived, and the qualified immunity-like quality it has assumed. Qualified immunity is best justified when it is used to afford officers discretion in making split-second decisions, often in high-pressure situations involving potential use of force.[100] This rationale has no relevance to state actors deliberating and adopting policies on issues like transgender student participation in sports teams. But while offering a sensible limitation of the qualified immunity model of the doctrine, Judge Menashi neither grounded this limitation in contractual principles nor offered any insight into the more fundamental issue of why any version of the *Pennhurst* doctrine's "clear statement" rule is justified.

To the contrary, his position that *Pennhurst* was inapplicable because the challenged policy constituted "intentional conduct that violates the clear terms of the statute"[101] is, in some sense, redundant. The *Pennhurst* doctrine applies only when a statute is unclear. So, if conduct violates the statute's "clear terms," the doctrine has no applicability—regardless of whether the conduct was intentional or not. Thus, though Judge Menashi's reading rejects the qualified immunity conception of the "clear statement" rule, it provides only a limited path forward for making sense of this doctrine. Accordingly, the opinions of the en banc court provide little guidance for how *Pennhurst*'s "clear statement" rule ought to be understood. If anything, considered together, they make only more salient the challenge

98. *Id.* (footnote omitted).

99. *Id.* at 55, 58.

100. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

101. *Soule III*, 90 F.4th at 58, 61 (Menashi, J., concurring) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999)) ("Because the CIAC Policy is intentional conduct, the remaining question is whether that conduct 'violates the clear terms of the statute.'" (quoting *Davis*, 526 U.S. at 642)).

of articulating a coherent and functional framework for applying the *Pennhurst* doctrine.[102]

IV.
THE APPARENT DISANALOGY BETWEEN THE "CLEAR STATEMENT" REQUIREMENT AND CONTRACT DOCTRINE

At a certain level of abstraction, the appeal to contract principles to justify the "clear statement" rule reflected in *Pennhurst* seems plausible. According to Justice Rehnquist, the "clear statement" rule ensures that recipient states have assented to the conditions of their "contract" with Congress under Spending Clause legislation. Ambiguous terms, on this view, vitiate a recipient state's assent: you cannot have assented to terms you could not have known were there, the logic goes.[103] But simple as this view may be, it misconceives a fundamental feature of contract law: rather than treating ambiguous terms as a problem of contract formation (including of mutual assent), contract law instead treats ambiguous terms as a problem of contract interpretation.[104]

Under blackletter contract doctrine, courts usually construe ambiguous terms rather than voiding them, so long as the terms are "reasonably certain."[105] It is ordinarily no defense for an allegedly breaching party to claim that they understood the term differently.[106] In the absence of affirmative misfeasance by their counterparty, a

102. Perhaps reflecting this challenge, on remand the district court side-stepped the question of whether "the clear-notice requirement of *Pennhurst*" bars the plaintiffs' request for monetary relief, holding only that the plaintiffs are "not necessarily preclude[d]" from obtaining such relief and suggesting the requirement "can be better assessed" later in the case. Soule v. Conn. Ass'n of Schs., No. 3:20-CV-00201, 2024 WL 4680533, at *20 (D. Conn. Nov. 5, 2024).

103. *Pennhurst I*, 451 U.S. 1, 17 (1981).

104. *See* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 Conn. L. Rev. 155, 172 (2004).

105. *See* Restatement (Second) of Conts. § 33(1) (Am. L. Inst. 1981); *cf.* Ayres & Gertner, *supra* note 21, at 91–92.

106. Friedrich Kessler, Grant Gilmore & Anthony T. Kronman, Contracts: Cases and Materials 179 (3d ed. 1986) ("[O]nce the objective manifestations of assent are present, their author is bound, even if he did not read the contract or understand the meaning of its terms." (citing Restatement (Second) of Conts. § 26 (Am. L. Inst. 1981) for the proposition that, this notwithstanding, a manifestation of willingness to enter into a bargain does not always imply a manifestation of assent)).

party with contractual capacity is generally bound by even ambiguous terms to which they agree.[107]

Courts address ambiguity in this manner for a reason. "Incomplete contracts—contracts that do not clearly instruct the court how they should be applied in all circumstances—are both inevitable and often deliberately drafted by contracting parties."[108] Rather than treating the ambiguous terms that attend incomplete contracts as a defense in a damages action for breach, contract law facilitates incomplete contracting to promote efficiency and deploys a variety of doctrinal tools to "manage[] incompleteness, by curtailing transaction costs and ensuring that ambiguities and oversights will not be used as an opportunity for strategic behavior or risk-shifting."[109] The *Pennhurst* doctrine, when treated simply as a "clear statement" rule, flips this around, treating ambiguity as a reason for shielding states and state actors from liability. In this manner, the "clear statement" rule goes beyond what the contractual nature of Spending Clause legislation can logically support.

Thus, the *Pennhurst* doctrine, particularly as it has been developed in the lower courts, sits uneasily with its purported roots within contract principles. The doctrine's approach to ambiguity in Spending Clause legislation diverges from contract law's treatment of ambiguous terms, which generally favors interpretation and enforcement over invalidation. Moreover, lower courts' application of the *Pennhurst* doctrine as only barring monetary relief, and not injunctive relief, further undermines its contractual justification, as contract principles do not typically differentiate between types of remedies when determining the validity or interpretation of

---

107.

> Anxious not to incur the reproach of being a destroyer of bargains, modern contract law has abandoned the idea advanced during the last century that a contract presupposes a meeting of minds in full and final agreement, a consensus of mind. All that is required is the mutual manifestation of assent. The law, furthermore, permits the parties to keep the arrangement flexible and takes into account that businessmen often "record the most important agreements in crude and summary fashion." . . . [B]efore courts are ready to strike down a bargain, "indefiniteness must reach the point where construction becomes futile."
>
> . . . .
>
> . . . [C]ourts . . . frequently resort to using the "hypothetical intentions" of the parties, [before finding such indefiniteness] if this technique of filling gaps and preserving the contract can be reconciled with notions of fairness and justice.

Id. at 180–81 (citations and footnotes omitted).

108. Galle, *supra* note 104, at 172.

109. *Id.*

contractual terms—and to the extent they do, generally favor damages over injunctive relief.[110]

One possible conclusion to draw is that the invocation of contract law to justify the *Pennhurst* doctrine is mere rhetoric and that the doctrine's true foundations may lie elsewhere, perhaps in concerns about federalism or judicial interpretive authority, rather than in contract law. For example, one might situate the "clear statement" rule as an extension of the Constitution's anticommandeering principle, purportedly serving as a safeguard against federal overreach by preventing the federal government from using ambiguous language to effectively commandeer state resources.[111] Something in this direction was suggested by the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, which cited *Pennhurst*'s view of Spending Clause legislation being "much in the nature of a *contract*" as a source of the "insight [that] has led [the] Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes."[112]

Reading the *Sebelius* decision, lower courts may be tempted to jettison the contractual analogy and instead accept the *Pennhurst* doctrine as nothing more than a "clear statement" rule grounded in principles of federalism and constitutional structure. But such a move would be unwise, as it would only magnify the degree to which the doctrine acts as a constraint on Congress's ability to craft effective legislation, particularly in complex or evolving policy areas. This concern is amplified by the Supreme Court's recent *Loper Bright* decision, which narrowed the deference given to federal agencies on interpretive questions, thereby placing additional pressure on Congress to legislate with precision.[113] The combination of a stringent *Pennhurst* doctrine and reduced agency deference could create a legislative straitjacket, making it increasingly difficult for Congress to address broad policy goals without exhaustive specificity.[114]

---

110. *See* Restatement (Second) of Conts. § 33 cmt. b (Am. L. Inst. 1981) (discussing authority for the position that greater clarity is sometimes required before specific performance, as opposed to damages, will be awarded).

111. The anticommandeering doctrine encapsulates the Tenth Amendment's bar on Congress "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Printz v. United States, 521 U.S. 898, 935 (1997).

112. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576–77 (2012) (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

113. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

114. The relationship between the *Loper Bright* decision and *Pennhurst I* is discussed further in the next Part. *See infra* notes 149–50 and accompanying text. As a practical matter, the actual impact of *Loper Bright* on agency deference is hard

Considering these challenges, courts instead should aim to reconstruct the *Pennhurst* doctrine in a way that respects the fundamental principle of contract law: parties need not anticipate every specific future scenario to create a binding agreement.[115] Such a reconstruction is consistent with the Supreme Court's recent *Talevski* decision, which reaffirmed that "firmly rooted" principles of contract law may be relevant in determining how such legislation may be enforced.[116] As the next Part aims to illustrate, adhering to those principles would allow more flexible and adaptable Spending Clause legislation, enabling Congress to maintain its role in shaping policy while still respecting state sovereignty in our federal system.

V.
REIMAGINING THE *PENNHURST* DOCTRINE

The *Pennhurst* doctrine, with its "clear statement" rule, has long been a cornerstone of Spending Clause jurisprudence.[117] But, as this Article has demonstrated, its application and interpretation have often diverged from the contract law principles that supposedly underpin it. This Part seeks to imagine how the doctrine can be re-grounded in these contractual foundations by exploring various

---

to predict. Empirical studies suggest that courts are generally reluctant to second guess agency decisions, particularly those that have factual—in addition to legal—components. *See, e.g.*, John C. Brinkerhoff Jr. & Daniel B. Listwa, Essay, *Deference Conservation—FOIA's Lessons for a* Chevron*-less World*, 71 Stan. L. Rev. Online 146, 147–48 (2018) (observing that, in the FOIA context, courts shift deference on matters of statutory interpretation to other aspects of litigation, and suggesting that a similar dynamic might reveal itself more broadly in administrative law cases following *Chevron*'s abrogation); Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 Yale L.J. 548, 552–54 (2019) (observing that courts will defer to agency fact-finding in the absence of "red flags" in the administrative record suggesting evidence of factual manipulation).

115. *See infra* Part V.

116. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 599 U.S. 166, 178 (2023). *Talevski* presented the question of whether the Federal Nursing Home Reform Act, a Spending Clause act that established the minimum standards of care that nursing-home facilities must satisfy to receive funding through Medicaid, created rights enforceable by private plaintiffs via 42 U.S.C. § 1983. *Id.* at 171–72. In holding that it does, the Supreme Court rejected an argument raised by petitioners that beneficiaries to Spending Clause legislation are essentially third-party beneficiaries to a contract between the state and the federal government and, as such, have no standing to sue because third-party beneficiaries to a contract purportedly could not sue to enforce a contract under the common law as it was established at the time § 1983 was enacted. *Id.* at 178. In declining to adopt this position, the Court relied on evidence that contradicted the claim that third-party beneficiaries lacked standing to enforce a contract in the 1870s. *Id.* at 179.

117. *See supra* Section II.B.

contract interpretation principles—including void for vagueness, *contra proferentem*, the implied covenant of good faith and fair dealing, and doctrines of changed circumstances—and evaluating how they can be used to support and further develop the *Pennhurst* doctrine. In so doing, its goal is to provide courts and litigants with the starting points for novel approaches to interpreting and applying Spending Clause legislation.

This collection of contract law principles yields a framework that often proves more favorable to federal authority than a traditional "clear statement" approach. Reflecting contract law's general reluctance to render agreements unenforceable, doctrines like void for vagueness are quite limited in scope, applying only where obligations are entirely indeterminate rather than merely subject to interpretation. Meanwhile, principles like *contra proferentem* give way when broad language reflects an intentional delegation of authority, and the implied covenant of good faith and fair dealing primarily serves to police unreasonable deviations from settled expectations rather than cabin discretion entirely. Even doctrines of changed circumstances, while protecting states from truly unexpected shifts in obligations, set a high bar for rendering commitments unenforceable. The result is a framework that, while still protective of state interests, better accommodates the complex and evolving nature of federal-state partnerships under the Spending Clause.

A. Void for Vagueness

We begin by recalling the facts of *Pennhurst* that gave rise to the doctrine's "clear statement" rule. The dispute there was over the statute's "bill of rights," whose aspirational language the Court took to be merely "hortatory, not mandatory."[118] That is more than a finding that the terms in the statutory "contract" were ambiguous; it is a finding that these statutory provisions were either not terms at all or, at the very least, created no obligations of performance. This rationale is familiar to common law contract doctrine: courts adjudicating contract disputes must first use principles of contract construction to decide what terms are within the four corners of the agreement between the parties.[119] As part of this determination, under the framework of what is sometimes called the "void-for-vagueness

118. *Pennhurst I*, 451 U.S. 1, 24 (1981).

119. Daniel Markovits & Gabriel Rauterberg, Contracts: Law, Theory, and Practice 605 (2018).

doctrine,"[120] courts in contract cases will render unenforceable vague statements of purpose—finding that they do not actually give rise to obligations.[121]

Contractual promises require "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made."[122] Even when expressed through "words of promise," "mere statements of intention" that "by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue" will not give rise to a contract.[123] An enforceable contractual promise "must be distinguished from a statement of opinion or a mere prediction of future events."[124] Aspirational or hortatory language is therefore insufficiently definite to create a binding contractual obligation.[125]

Accordingly, one way to read *Pennhurst* consistent with contract doctrine is to see the Court's construction of the contract between Congress and recipient states as excluding the hortatory "bill of rights" on a void-for-vagueness basis. As the Court said, "[n]othing in either the 'overall' or 'specific' purposes of the Act reveals an intent to require the States to fund new, substantive rights."[126] The language

120. Likely because of the term's close association with the constitutional doctrine of "void for vagueness," the term is not now commonly invoked in connection to contract disputes—with courts instead referring more generally to contracts being "unenforceably vague." *See, e.g.*, Cook v. Birmingham News, 618 F.2d 1149, 1152 (5th Cir. 1980) ("This agreement is unenforceably vague."). This is somewhat ironic given evidence that the modern due process "void-for-vagueness" doctrine "did not emerge until the turn of the 20th century," *see* Sessions v. Dimaya, 584 U.S. 148, 208–09 (2018) (Thomas, J., dissenting), while courts have been addressing common law "void-for-vagueness" arguments in connection to contract disputes since at least the mid-19th century, *see, e.g.*, Blair v. Snodgrass, 33 Tenn. (1 Sneed) 27 (1853) ("If these papers be taken separately, it is perfectly clear that, as contracts, they are void for vagueness and uncertainty."); Ives v. Armstrong, 5 R.I. 567, 588–89 (1855) ("The contract itself, as set forth in the memorandum, is void for vagueness, uncertainty, and inconsistency. . . . It is not a case of ambiguous or inadequate description, or of false or superfluous description, but of no description at all; is void for insufficiency of description, and is incapable of being aided by parol at the common law.").

121. *See* 1 Timothy Murray, Corbin on Contracts § 4.1, LEXIS (database updated Nov. 2024) ("Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.").

122. Restatement (Second) of Conts. § 2 (Am. L. Inst. 1981).

123. *Id.* § 2 cmt. e.

124. *Id.* § 2 cmt. f.

125. *See generally id.*

126. *Pennhurst I*, 451 U.S. 1, 18 (1981).

in the Act's "bill of rights" was merely, as a lawyer for the plaintiffs put it, "lovely language" that "nobody thought" created binding obligations.[127] This interpretation of *Pennhurst* thus understands the decision as extending a version of the constitutional "void-for-vagueness" defense that typically only applies to federal penal laws to all legislation under the Spending Clause.[128]

While such a reading of the *Pennhurst* decision brings a conceptual coherence to its eponymous doctrine, it also renders that doctrine far, far narrower than it is often understood. Consider *Soule* once again. There, the issue was whether CIAC's transgender participation policy violated Title IX's prohibition of discrimination on the basis of "sex."[129] There was no question that Title IX's prohibition was generally enforceable. Rather, the dispute was with how this prohibition extended to specific issues involving transgender students. But contractual vagueness deals with whether a contract has been formed, not how it applies in particular cases.[130] Because there is no contention that Title IX's prohibition on sex discrimination is missing the "essential" elements so as to be generally unenforceable,[131] the contractual vagueness defense is beside the point.[132]

---

127. Tani, *supra* note 43, at 1189 n.226 (quoting plaintiffs' attorney, Tom Gilhool).

128. Pursuant to the constitutional void-for-vagueness doctrine, a penal statute is unenforceable where it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595 (2015). The doctrine applies to both criminal statutes and civil statutes—such as civil forfeiture—that impose a penalty on any person who transgresses them. *See* Wooden v. United States, 595 U.S. 360, 396 n.5 (2022) (Gorsuch, J., concurring in the judgment) (stating that "'penal' laws" historically extended to all "laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines"). Notably, Justice Thomas has recently argued that the void-for-vagueness doctrine lacks a legitimate basis in the Due Process clause. *See* Sessions v. Dimaya, 584 U.S. 148, 206 (2018) (Thomas, J., dissenting).

129. *Soule III*, 90 F.4th 34, 40 (2d Cir. 2023) (en banc).

130. *See* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981) ("If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract."); *see also* 1 MURRAY, *supra* note 121, § 4.1 ("If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.").

131. *Cf.* RESTATEMENT (SECOND) OF CONTS. § 33 cmt. a (AM. L. INST. 1981).

132. Another way of putting this is that a contract will only be void on vagueness grounds if it is unenforceably vague in every context in which it could be enforced—that is, contractual vagueness is a ground for facial invalidity. *See* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would

The inapplicability of the contractual void-for-vagueness doctrine to Title IX's prohibition of sex-based discrimination has direct implications for ongoing litigation that, like *Soule*, involves the relationship between Title IX and transgender rights. In a final rule promulgated in April 2024, the Department of Education amended regulations implementing Title IX so as to make explicit that sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity.[133] Though these regulations should not directly impact the litigation in *Soule*, since that litigation focuses on liability for conduct predating these new regulations, the challenges to these new regulations have nonetheless implicated the *Pennhurst* doctrine. At least two dozen state attorneys general filed suit in federal district courts seeking to enjoin the regulations from going into effect on the ground that they are inconsistent with the statutory text of Title IX.[134] A number of these suits have been successful, resulting in temporary injunctions.[135] And in August 2024,

---

be valid."); *see also* Wagner v. BRP Grp., Inc., 316 A.3d 826, 879 n.241 (Del. Ch. 2024) (discussing facial invalidity challenges to contracts and the applicability of the *Salerno* standard). This is, potentially, a place where contractual void for vagueness breaks from its due process cousin. Though there are cases suggesting a challenged provision will be void for vagueness "only if the enactment is impermissibly vague in all of its applications," Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494–95 (1982), other cases suggest a provision may be void even when "there will be straightforward cases" enforcing it, Johnson v. United States, 576 U.S. 591, 602 (2015); *see also id.* at 637 (Alito, J., dissenting).

133. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.10 (2024).

134. *See* Alabama v. Cardona, No. 7:24-CV-533, 2024 WL 3607492 (N.D. Ala.), *preliminary injunction pending appeal granted sub nom.* Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024); Arkansas v. U.S. Dep't of Educ., 742 F. Supp. 3d 919 (E.D. Mo. 2024); Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ., 741 F. Supp. 3d 515 (N.D. Tex. 2024); Kansas v. U.S. Dep't of Educ., 739 F. Supp. 3d 902 (D. Kan.), *appeal filed*, No. 24-3097 (10th Cir. July 11, 2024); Louisiana v. U.S. Dep't of Educ., 737 F. Supp. 3d 377 (W.D. La.), *partial stay denied*, No. 24-30399, 2024 WL 3452887 (5th Cir.), *denial of partial stay aff'd*, 603 U.S. 866 (2024) (per curiam); Rapides Par. Sch. Bd. v. U.S. Dep't of Educ., No. 1:24-CV-00567 (W.D. La.) (consolidated with Louisiana v. U.S. Dep't of Educ., No. 3:24-CV-00563); Okla. State Dep't of Educ. v. United States, No. 5:24-CV-00459 (W.D. Okla. Jan. 16, 2025); Oklahoma v. Cardona, No. 5:24-CV-00461, 2024 WL 3609109 (W.D. Okla. July 31, 2024); Tennessee v. Cardona, 737 F. Supp. 3d 510 (E.D. Ky.), *partial stay denied*, No. 24-5588, 2024 WL 3453880 (6th Cir.), *denial of partial stay aff'd sub nom.* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam); Texas v. Cardona, No. 4:23-CV-00604, 2024 WL 3658767 (N.D. Tex. Aug. 5, 2024).

135. *See Louisiana*, 737 F. Supp. 3d at 410; *Tennessee*, 737 F. Supp. 3d at 572; *Kansas*, 739 F. Supp. 3d at 936–37; Texas v. United States, 740 F. Supp. 3d 537, 559 (N.D. Tex. 2024); *Carroll Indep. Sch. Dist.*, 741 F. Supp. 3d at 526; *Arkansas*, 742 F. Supp. 3d at 951.

the Supreme Court declined the Department of Education's request to stay the injunctions while the litigation challenging the new regulations continue.[136]

In at least some of these cases, the courts have cited the *Pennhurst* doctrine as part of the justification for enjoining the regulations.[137] For example, in a decision by the Sixth Circuit denying a stay of a preliminary injunction, Chief Judge Sutton cited *Pennhurst*'s "clear statement" rule as weighing against the Department of Education's more expansive reading of the statute.[138] In so doing, he treated it as a standard "clear statement" rule, providing a thumb on the scale against the Department of Education's argument that *Bostock*'s broad reading of sex discrimination in the Title VII context should be imported to Title IX.[139] Thus, somewhat ironically, in this context, the *Pennhurst* doctrine is being used to shield states resisting transgender protections, in contrast to *Soule*, where it was raised to defend a state seeking to be inclusive of transgender athletes. But, the *Pennhurst* doctrine, at least under a contractual void-of-vagueness understanding, is an equally awkward fit—in either case, it cannot be said that Title IX fails to give rise to an enforceable obligation. Accordingly, if the *Pennhurst* doctrine is understood to incorporate only contractual void-for-vagueness, then it offers no defense in these sorts of disputes arising from Title IX.

B. Contra Proferentem

But *Pennhurst* need not be understood to incorporate only void-for-vagueness. Other principles of contract law may also be justifiably invoked under the broader contract analogy. One such principle is the canon of *contra proferentem*, which counsels courts to construe an ambiguous term against the drafter when it has exhausted other interpretive tools—a thumb on the scale in favor of the non-drafter.[140]

---

136. Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam).

137. *See, e.g.*, *Louisiana*, 737 F. Supp. 3d at 403; *Arkansas*, 742 F. Supp. 3d at 936, 939.

138. Tennessee v. Cardona, No. 24-5588, 2024 WL 3453880, at *3 (6th Cir.), *denial of partial stay aff'd sub nom.* Dep't of Educ. v. Louisiana, 603 U.S. 866 (2024) (per curiam).

139. *Id.* ("Congress enacted Title IX as an exercise of its Spending Clause power, which means that Congress must speak with a clear voice before it imposes new mandates on the States. The same is not true of Title VII. All of this explains why we have been skeptical of attempts to export Title VII's expansive meaning of sex discrimination to other settings." (citations omitted)).

140. 5 Timothy Murray, Corbin on Contracts § 24.19, LEXIS (database updated Nov. 2024) ("The maxim '*verba chartarum fortius accipiunter contra proferentem*'— '[c]ontract terms will be most strongly interpreted against the drafter'—is a

This canon is appropriately used "where the written contract is standardized and between parties of unequal bargaining power."[141] As the Supreme Court has repeatedly explained, the *Pennhurst* doctrine and its "clear statement" rule reflect the risk that Congress will use its Spending Clause power to coerce recipient states.[142] This is a standard case of unequal bargaining power. The application of *contra proferentem* to Spending Clause legislation aligns with the power dynamics between Congress and states in federal funding scenarios. Just as this canon protects the weaker party in standard form contracts, it could serve to safeguard states' interests when interpreting ambiguous terms in federal legislation.

But the *contra proferentem* canon has its limits. The canon typically does not apply when it can be inferred that both parties understood the contract to have been intentionally written broadly so as to grant discretion to the drafter.[143] This is because the anti-drafter principle is meant to protect against unfair surprises or unclear terms, not to override mutually understood and agreed-upon flexibility.[144] When both parties acknowledge that the contract's broad language is deliberate and designed to allow discretion, interpreting ambiguities against the drafter would contradict the contract's purpose and the parties' intentions.

The same principle should apply to the *Pennhurst* doctrine. The Supreme Court has essentially recognized as much. In *Bennett v. Kentucky Department of Education*, a case addressing whether Kentucky had complied with the conditions of a Title I education grant, the Court rejected the argument that ambiguities should be resolved

---

rule of construction applied to ambiguous contracts when all conventional methods of interpretation have failed and two reasonable meanings are possible. It is applied when the terms of a written contract have been authored by one of the parties and merely assented to by the other. It works *in favor* of the underdog non-drafting party, and *against* the drafting party." (alteration in original) (footnote omitted) (quoting Balanoff v. 83 Maiden LLC, No. 1:98-CV-06442, 2000 U.S. Dist. LEXIS 109, at *21 n.3 (S.D.N.Y. Jan. 10, 2000))).

141. Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1262 (Ohio 2003).

142. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012).

143. *See* RESTATEMENT (SECOND) OF CONTS. § 206 reporter's note, cmt. a (AM. L. INST. 1981) (stating that the canon "has less force when the other party has taken an active role in the drafting process, or is particularly knowledgeable").

144. *See id. § 206* cmt. a ("Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.").

against the drafting party.[145] The Court emphasized that the structure of Title I established an ongoing, cooperative endeavor between the federal government and the states, in which the federal government set "general guidelines for the allocation and use of funds, and the [s]tates agreed to follow those guidelines in approving and monitoring specific projects developed and operated at the local level."[146] "Given the structure of the grant program, the [f]ederal [g]overnment simply could not prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I," and "grant recipients had an opportunity to seek clarification of the program requirements."[147] The Court reasoned that applying the anti-drafter rule in this context would be inappropriate, as it would unduly restrict the federal government's ability to manage and adapt the program over time.[148]

The *Bennett* Court recognized that sometimes statutes—like private contracts—utilize broad language to effectuate an intentional delegation of discretion to one of the parties. To apply the anti-drafter canon in this context would thus undermine the particular bargain struck. The idea of broad language effecting a delegation is a familiar one in statutory interpretation—it has long been part of the justification for *Chevron* deference.[149] Importantly, the *Loper Bright* decision, though overturning *Chevron*, recognized that statutes sometimes "delegate[] discretionary authority to an agency."[150] Questions remain as to what exactly this means—including what type of language implies a delegation—but one implication would seem to be that where a delegation can be inferred from the text, a "clear statement" rule derived from contract law would not militate in favor of narrowing that discretion, at least on anti-drafter grounds.

Title IX fits this model of intentional delegation because it expressly grants authority to federal agencies to promulgate rules. Specifically, Title IX authorizes the Department of Education to issue regulations to effectuate the law's prohibition of sex discrimination in education programs receiving federal funding.[151] This explicit delegation of rulemaking power indicates Congress's intent to allow for flexibility and discretion in implementing Title IX's broad

145. *See* Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 669 (1985).

146. *Id.* at 669; Jeff Gordon, *Statutory Contracts*, 42 YALE J. ON REGUL. (forthcoming 2025).

147. *Bennett*, 470 U.S. at 669.

148. *See id.*

149. *See, e.g.*, Smith, *supra* note 76, at 1193–95.

150. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

151. 20 U.S.C. § 1682.

mandate. As such, applying a strict anti-drafter interpretation or "clear statement" rule to Title IX would be inconsistent with the statute's purpose of granting agencies the ability to adapt and refine the law's application over time in response to evolving understandings of sex discrimination in education. This has direct implications for the ongoing litigation challenging the Department of Education's expanded Title IX regulations, indicating that *contra proferentem* cannot be relied on to invalidate the regulations.[152]

C. The Implied Covenant of Good Faith and Fair Dealing

But a finding that a statute delegates discretion to a federal agency does not end the inquiry. To the contrary, various doctrines in contract law apply even in cases of delegation to protect the expectations of the parties. Foremost among these is the implied covenant of good faith and fair dealing.[153] When a contract grants broad discretion to one party, this covenant operates as a constraint, ensuring that the discretionary power is not exercised arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.[154] It essentially imposes a duty to exercise discretion reasonably and with proper motive, preventing abuse of

152. *See supra* notes 133–39 and accompanying text.

153. Restatement (Second) of Conts. § 205 (Am. L. Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

154. *Id.* § 205 cmt. a ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."); *see, e.g.*, Hometown Folks, LLC v. S & B Wilson, Inc., 643 F.3d 520, 527 (6th Cir. 2011) ("The purpose of [the] implied covenant [of good faith and fair dealing] is: '(1) to honor the reasonable expectations of the contracting parties and (2) to protect the rights of the parties to receive the benefits of the agreement into which they entered.'" (quoting Lamar Advert. Co. v. By-Pass Partners, 313 S.W.3d 779, 791 (Tenn. Ct. App. 2009))); Dieckman v. Regency GP LP, 155 A.3d 358, 367 (Del. 2017) ("The implied covenant is inherent in all contracts and is used to infer contract terms 'to handle developments or contractual gaps that the asserting party pleads neither party anticipated.' It applies 'when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected.' The reasonable expectations of the contracting parties are assessed at the time of contracting." (footnotes omitted) (quoting Nemec v. Shrader, 991 A.2d 1120, 1125–26 (Del. 2010))).

discretionary authority while still preserving the flexibility intended in the agreement.[155]

Such an inquiry bears resemblance to the application of the arbitrary and capricious standard used to review agency regulations pursuant to the Administrative Procedure Act (the "APA").[156] But the challenge would be procedurally different: for example, in the context of a declaratory judgment action, rather than a section 704 APA challenge. This would provide a means for challenging agency actions—like the promulgation of an interpretive letter—that are not "final agency actions" and thus cannot be challenged under section 704.[157] The substantive standard would also be different and, arguably, more friendly to the regulated entity (here, the state actor). Because the implied covenant places greater emphasis on the parties' reasonable expectations—including their reliance interests[158]—while an agency's action might be deemed "arbitrary and capricious" for failing to *consider* reliance interests, so long as the agency has documented its reasons for nonetheless diverging from its prior policy, the new policy would likely survive review under the APA.[159] In contrast, where a party can show that the contracting parties' past practice gave rise to settled expectations as to how the contract would be performed, deviation from that practice may well be sufficient to show a breach of the implied covenant.[160]

---

155. *See* Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 Stan. J.L. Bus. & Fin. 137, 179 (2019).

156. *See id.*

157. Ripeness would still be a jurisdictional barrier, even in the absence of a final agency action requirement. *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967). Some courts have required final agency action to satisfy ripeness, apparently as a means of blocking declaratory judgment actions seen as trying to circumvent the APA's limitations. *See, e.g.*, Consensys Software, Inc. v. SEC, No. 4:24-CV-00369, 2024 WL 4438969, at *3 (N.D. Tex. Sept. 19, 2024) (dismissing declaratory judgment action as unripe where the "[p]laintiff failed to identify final agency action that would render the claim fit for judicial review").

158. 1 Murray, *supra* note 121, § 1.1 ("[O]ne of the chief rationales for protecting the reasonable expectations of promisees is to promote and facilitate reliance on agreements." (citing Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 Yale L.J. 52, 59–62 (1936))).

159. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30–31 (2020) (explaining that "[i]t would be arbitrary and capricious to ignore" reliance interests and that "consideration [of any reliance interests] must be undertaken by the agency in the first instance" (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009))).

160. *See* Listwa, *supra* note 155, at 150; Steven J. Burton, *History and Theory of Good Faith Performance in the United States*, *in* Comparative Contract Law: British and American Perspectives 210, 212–13, 218 (Larry DiMatteo & Martin Hogg eds., 2016).

Unlike the void-for-vagueness doctrine, the implied covenant of good faith and fair dealing is a theory of breach, not a defense of breach. Nevertheless, good faith provides a framework for considering invocations of the *Pennhurst* doctrine. Consider, once again, the *Soule* decision. Had there been a long-running agency interpretation of Title IX requiring the exclusion of transgender athletes from sex-segregated teams, plaintiffs could have cited such an interpretation as evidence of a settled expectation. However, because the Department of Education had given contradictory guidance on the issue leading up to the lawsuit, as the district court observed, the position that CIAC breached its obligations was undercut.[161] Likewise, in the ongoing litigation relating to the recent Title IX regulations, the Department of Education can cite the absence of any settled expectation as a defense against the charge that newly promulgated rules represent a bad faith break from an established understanding.[162]

Thinking about the *Pennhurst* doctrine through the lens of the implied covenant thus broadens the relevant "notice" inquiry beyond the words of the statutory text to consider other grounds upon which a regulated entity might reasonably develop expectations for how a particular statutory scheme would be enforced, such as past agency practices or judicial decisions. But it broadens this inquiry while also confining it by requiring a regulated entity to demonstrate both a preexisting settled expectation, and that the expectation was disturbed. The implied covenant thus provides a contractual basis for the type of broader inquiry followed by some courts—including in *Soule I* and *II*[163]—ostensibly under the *Pennhurst* notice framework, while also supplying guardrails on what might otherwise be an amorphous examination.

161. *See Soule I*, No. 3:20-CV-00201, 2021 WL 1617206, at *9 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *vacated en banc and remanded*, 90 F.4th 34 (2d Cir. 2023); *see also supra* note 85 and accompanying text.

162. Invocation of the implied covenant may also provide a means for scrutinizing the agency's motives, something that the APA typically precludes, at least absent egregious facts. *Compare* Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1129–30 (N.J. 2001), *with* Dep't of Com. v. New York, 588 U.S. 752, 781–82 (2019). This raises the question of whether a litigant challenging an agency's regulation might be able to argue that it is unenforceable because it was adopted in bad faith.

163. *See supra* note 91 and accompanying text; *see also* J.S. v. N.Y. State Dep't of Corr. & Cmty. Supervision, 76 F.4th 32, 48 (2d Cir. 2023) (noting that for "textual, historical, and other reasons[,]" a state would have known its obligations under the federal statute).

D. Changed Circumstances

Beyond the implied covenant and other contract doctrines discussed in this Part, various defenses relating to changed circumstances—including impossibility,[164] impracticability,[165] and frustration of purpose[166]—can be invoked to protect state actors from the unexpected. A state that agrees to receive funding in return for enforcing anti-discrimination laws, for example, does so against a background legal framework that specifies the content and purpose of its obligations. When subsequent agency interpretations, statutes, or court decisions unilaterally modify those obligations after a state agrees to a funding condition in reliance on the previous legal framework, these doctrines arguably furnish the states with an affirmative defense to a damages action for breach of the funding condition. As the Court in *Pennhurst* explained, "[t]hough Congress'[s] power to legislate under the spending power is broad, it does not include surprising participating [s]tates with post acceptance or 'retroactive' conditions."[167] Understanding the *Pennhurst* doctrine as broadly encompassing these contractual principles thus provides a means of achieving what the *Pennhurst* court set out to do in a manner far better than a "clear statement" rule.

Like the principles of good faith discussed in the previous section, doctrines like changed circumstances center the reliance interests and expectations of the parties.[168] But one key difference is that while the implied covenant of good faith focuses on actions by one of the parties to the agreement that purportedly upset expectations, the doctrine of changed circumstances instead looks to events external to the parties. In the Spending Clause legislation context, this would imply that, while actions by the agency empowered to enforce the statute in question could be covered by the implied covenant, unexpected shifts caused by other actors—such as courts—might be addressed through a changed circumstances lens.

---

164. Restatement (First) of Conts. §§ 454–469 (Am. L. Inst. 1932).

165. Restatement (Second) of Conts. § 261 (Am. L. Inst. 1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.").

166. *Id.* § 265.

167. *Pennhurst I*, 451 U.S. 1, 25 (1981).

168. Something similar could be said of the void-for-vagueness doctrine. One scholar has observed that the constitutional void for vagueness doctrine can be understood as an impossibility defense. *See* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 Tex. L. Rev. 1049, 1097 (2020).

Consider the Court's recent decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[169] One could imagine follow-on litigation seeking to hold universities liable for damages due to past practices that were widely considered lawful under previous interpretations of Title VI and the Equal Protection Clause. Contract doctrines relating to changed circumstances would give lower courts a toolkit for assessing whether monetary damages should be available in these challenges. Specifically, universities could argue that the Supreme Court's decision in *Students for Fair Admissions* represented a fundamental change in circumstances that altered the very nature of their obligations under Title VI. They could contend that when they initially accepted federal funding, they did so with the reasonable expectation that tailored race-conscious admissions policies were permissible under both constitutional and statutory law. The sudden shift in legal interpretation, they might argue, frustrates the purpose of their agreement to comply with Title VI as it was understood at the time—making the point that they understood their affirmative action policies to forward the anti-discrimination purposes of Title VI, not violate them. This defense, rooted in contract law principles, could shield universities from retrospective damages liability while still requiring them to adjust their policies going forward.

Whether courts will find such arguments compelling is yet to be seen. But what this Article has sought to show is that when reimagined through the lens of contract law, the *Pennhurst* doctrine can offer a more nuanced approach to interpreting Spending Clause legislation and assessing alleged violations. By incorporating principles of changed circumstances and frustrated purposes—along with doctrines such as void for vagueness, *contra proferentem*, and the implied covenant of good faith and fair dealing—it is possible to construct a framework that better balances the need for clear congressional mandates with the realities of complex federal-state partnerships. The result is a framework allowing for intentional delegations of discretion while still protecting states from unfair surprises or retroactive conditions.

VI.
CONCLUSION

Courts have struggled to reconcile the *Pennhurst* doctrine's "clear statement" rule with its purported foundations in contract law and constitutional principles. This Article has demonstrated that

169. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

the doctrine's current application often diverges from its purported contractual grounding, creating tension between theoretical justification and practical implementation. Yet rather than abandon the contract-law analogy altogether, we propose that courts can better serve both federalism principles and congressional intent by embracing a more nuanced understanding of how contract law actually treats ambiguity.

At its core, contract law recognizes that so long as terms are "reasonably certain" and not so vague as to make it impossible for courts to detect a breach or craft a remedy, ambiguous terms in an agreement should be enforced rather than invalidated.[170] Contract law accepts the ambiguity that attends incomplete contracting as inevitable and even desirable. Rather than invalidating ambiguous terms, courts adjudicating contract claims employ a variety of doctrinal tools—doctrines such as *contra proferentem*, the implied covenant of good faith and fair dealing, and rules related to changed circumstances—to manage ambiguity.

This sophisticated approach to managing ambiguous terms offers a rich framework for reimagining the *Pennhurst* doctrine. Such a reconstruction allows courts to move beyond the rigid confines of a simple "clear statement" rule while still protecting state sovereignty and legitimate reliance interests. Moreover, it provides a more coherent theoretical foundation for distinguishing between prospective and retrospective relief, a distinction that has long been central to the doctrine's application but has lacked a convincing rationale.

The implications of this reconstructed doctrine extend beyond academic interest. As courts continue to grapple with novel questions arising under Spending Clause legislation—from transgender rights in education to race-conscious admissions policies—they need interpretive tools that can accommodate both evolving social understandings and settled expectations. The framework proposed here offers precisely that: a means of protecting state sovereignty without unduly constraining Congress's ability to craft effective legislation or agencies' capacity to adapt to changing circumstances.

This Article's proposed reconstruction of the *Pennhurst* doctrine suggests a path forward that better aligns with both contract law principles and the practical realities of cooperative federalism. By drawing on contract law's nuanced treatment of ambiguity, courts can develop a more sophisticated approach to interpreting Spending Clause legislation—one that promotes clarity and predictability while still maintaining the flexibility necessary for effective

170. *See supra* note 105 and accompanying text.

governance in our complex federal system. As the Supreme Court continues to reshape the landscape of anti-discrimination law and administrative authority, such a reconstruction becomes not merely desirable but essential for maintaining the delicate balance between federal policy objectives and state autonomy.