

CLEAR THE WAY: REMOVING SOURCES OF NOTICE FROM SPENDING CLAUSE JURISPRUDENCE

Abstract: In 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Supreme Court held that individuals cannot recover emotional distress damages in private actions brought under the antidiscrimination sections of the Rehabilitation Act of 1973 (RA) and the Affordable Care Act (ACA). Since the decision, many district courts have expanded the ruling to other Spending Clause legislation, such as Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. Now, many individuals facing sex-based, race-based, and other forms of discrimination do not have remedies for the emotional damages done to them. In *Cummings*, the Court relied upon the clear notice requirement and the contract law analogy, two tools increasingly employed by the Court in deciding Spending Clause decisions. This Note argues that the clear notice requirement and the Court’s heightened reliance on contract law distort the meaning and purpose of many antidiscrimination provisions of Spending Clause legislation. This Note further argues that the Court should look to the statutes’ legislative history and purpose—as it does when interpreting other pieces of legislation—rather than relying on contract law principles. This Note contends that other aspects of antidiscrimination Spending Clause legislation are likely to be narrowed and that individuals may be unable to receive appropriate remedies unless Congress intervenes or the Court changes course.

INTRODUCTION

For three-and-a-half years, Anthony Zeno, who is half-white, half-Latino, was harassed by his classmates at Stissing Mountain High School (SMHS), a racially-uniform high school.¹ Students would yell racial slurs at him, graffiti the bathroom walls with phrases such as “Zeno will die,” and physically attack him.² After Anthony, his mother, and his lawyer reported these events, the school district made scarce effort to support Anthony and subdue student-on-

¹ *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 658–59 (2d Cir. 2012). At SMHS, non-white students accounted for less than five percent of the student body. *Id.* at 659. The students who harassed Anthony seemed to mistakenly believe that he was Black. *See id.* (stating that a teammate who had hit Anthony had said he planned to “kick [Anthony’s] Black ass”).

² *See id.* at 659–60 (recounting examples of the students’ discriminatory behavior toward Anthony). When Anthony first arrived at SMHS, one student aggressively ran toward Anthony yelling that he would beat him up, claiming that “we don’t want your kind here.” *Id.* at 659. During the following year, racist students placed a noose on a nearby tree to represent the lynching of Anthony. *Id.* at 660.

student discrimination.³ Anthony sued the school district, alleging that it was knowingly unresponsive to his harassment.⁴ A jury found the district liable under Title VI of the Civil Rights Act of 1964 (Title VI), awarding Anthony one million dollars in damages for his emotional distress.⁵

During the time that Fatima Larios was at Chadron State College, she experienced extreme dating violence, leading to noticeable bruising on her body and shrieks loud enough to disturb neighboring students.⁶ After teammates reported this to their softball coach, a Title IX Compliance Coordinator emailed Fatima.⁷ Fatima chose not to respond, and the Title IX Compliance Coordinator did not follow up.⁸ Resident assistants and the Director of Housing and Residence Life made little effort to help Fatima despite hearing frequent fights with her boyfriend.⁹ After six months of overheard arguments, Fatima committed suicide in her dorm room.¹⁰ Fatima's parents sued Chardon State College and the Nebraska State College System for violating Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex-based discrimination by educational institutions receiving federal funding.¹¹ The U.S. District Court for the District of Nebraska held that emotional distress damages were recoverable

³ See *id.* at 660–63 (describing how the district offered an optional training program for other students when Anthony was a senior, how it reorganized a club for “Students and Teachers Opposed to Prejudice,” and how it instituted “Project Wisdom,” which read a message relating to “civic and personal values” each morning). After Anthony’s mother first reported her worries to the principal, the principal advised her that “this is a small town and you don’t want to start burning bridges.” *Id.* at 659.

⁴ *Id.* at 659.

⁵ See *id.* at 659, 672 (upholding the jury’s award based on the sufficiency of trial evidence showing Anthony’s isolation, humiliation, and emotional anguish).

⁶ See *Roohbakhsh v. Bd. of Trs. of Neb. State Colls.*, 409 F. Supp. 3d 719, 724 (D. Neb. 2019) (describing the frequency with which students could hear Fatima and her boyfriend fight and the markings on Fatima’s arms and body).

⁷ See *id.* at 725–26 (stating that the coach contacted the Athletic Director, who then passed the information on to the Title IX Compliance Coordinator). The Title IX Compliance Coordinator’s email to Fatima attached Chadron State’s policy for dealing with sexual violence, stated the College’s intolerance to sexual violence, and asked Fatima to contact her if a violation of the policy may have occurred to her. *Id.* at 726. Fatima’s coaches later reached out to her, but she would not acknowledge the abuse she was experiencing. *Id.* at 727.

⁸ *Id.* at 727.

⁹ See *id.* at 728 (describing how Fatima’s resident assistants asked Fatima and her boyfriend to be quieter after hearing them fight and explaining how they eventually asked Fatima to speak with them but she wanted to stay in the room with her boyfriend). The resident assistant submitted an incident report outlining this occasion. *Id.* Upon reading the incident report, the Director of Housing and Residence Life acknowledged that Fatima’s boyfriend could have been punching her that evening. *Id.* at 728–29. Still, the Director of Housing and Residence Life did not take any further action, such as telling campus police of the potential battery. *Id.* at 729.

¹⁰ *Id.* at 730–31. The two students who found Fatima in her room attempted CPR and called 911, but Fatima could not be revived. *Id.* at 731.

¹¹ *Id.* at 722–23; see 20 U.S.C. § 1681(a) (stating that no individual in the United States can be treated differently on the basis of sex in an educational program that received federal funding).

under Title IX.¹² Ultimately, the parties settled, agreeing to pay Fatima's family nine-hundred thousand dollars for inadequately protecting their daughter.¹³

In the winter of 2005, M.L., a sixth grade student, was sexually harassed by another student at school in the Greater Johnstown School District.¹⁴ M.L., who suffered from social anxiety disorder and selective mutism, had difficulty making friends and speaking at school.¹⁵ M.L.'s parents found out that their daughter was in a relationship with A.M., an eighth grade student.¹⁶ Finding this relationship worrisome, M.L.'s parents notified the school, but school officials dismissed their concerns without looking into the matter.¹⁷ In the months that followed, M.L. admitted that A.M. was non-consensually touching her in the school bathroom.¹⁸ Upon hearing this, the school moved slowly to investigate the situation.¹⁹ M.L.'s parents brought suit under Title IX for the school's inappropriate response to A.M.'s sexual harassment.²⁰ The U.S. District Court for the Western District of Pennsylvania entered judgment in favor of M.L.'s parents for twenty-eight thousand dollars, with five thousand dollars for emotional distress damages.²¹

¹² See *Roohbaksh*, 409 F. Supp. 3d at 735 (citing *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1204 (11th Cir. 2007) (indicating that emotional distress damages are available when they are the appropriate remedy for the legal right invaded)).

¹³ Bill Kelly, *Chadron State College Promised to Honor a Student After Her Suicide. Her Family Says, 'They're Hiding It.'* NEB. PUB. MEDIA (Sept. 20, 2022), <https://nebraskapublicmedia.org/de/news/news-articles/chadron-state-college-promised-to-honor-a-student-after-her-suicide-her-family-says-theyre-hiding-it/> [<https://perma.cc/3V2J-X36E>]. The settlement included terms requiring Chadron State to build a campus memorial for Fatima, create a named scholarship, begin a training program for suicide prevention, and increase awareness for the college's policies on sexual harassment. *Id.*

¹⁴ *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 338–39 (W.D. Pa. 2008). The identity of M.L., a minor, has been kept private. *Id.*

¹⁵ See *id.* at 340 (describing how an elementary school teacher would make M.L. say “goodbye” to ensure that M.L. would speak at least once per class and explaining how M.L. had only made friends with one or two people). In addition to suffering from “social phobia, anxiety, selective mutism, and intellectual snobbery,” M.L. was evaluated for autism spectrum disorder (ASD), and her parents received counseling on how to handle a child who suffered from ASD. *Id.*

¹⁶ See *id.* at 340–43 (illustrating how the girls quickly became friends, how A.M. began non-consensually touching M.L. the summer before school began, and how M.L.'s parents found a series of communications between the girls that indicated the relationship).

¹⁷ See *id.* at 347 (explaining how the superintendent would not meet with M.L.'s parents and noting how the assistant superintendent only met with the parents once). Additionally, a district supervisor told M.L.'s parents that homeschooling may be the best option for M.L. and that the district was “new” to homosexual acts. *Id.* at 348.

¹⁸ See *id.* at 350 (quoting that during the police officer's interview with M.L., the parties determined that A.M. “would touch her in ways that weren't very comfortable”).

¹⁹ See *id.* at 351 (stating that the officer informed the school that criminal sexual encounters may have occurred in the school bathroom, and four weeks after the incident had been first reported, the principal interviewed A.M. about the incident). The vice principal crudely “joked” that there was “lesbian activity in the bathroom and . . . [he] missed it.” *Id.* at 352.

²⁰ 20 U.S.C. § 1681(a); *Dawn L.*, 586 F. Supp. 2d at 338.

²¹ See *Dawn L.*, 586 F. Supp. 2d at 385 (stating that emotional injury was established by M.L.'s depression and suicidal ideation that was caused by her removal from school and the school's failure

In each of these three cases, the victims suffered distinct harms that caused them severe emotional distress.²² All of the plaintiffs sued under anti-discrimination legislation that applies to recipients of federal funding through the Spending Clause of the Constitution.²³ Antidiscrimination Spending Clause legislation refers to federal statutes, such as Title IX, Title VI, and Section 504 of the Rehabilitation Act of 1973 (RA), that bar institutions that receive federal funding from discriminating.²⁴ The courts in these cases found that the plaintiffs could recover damages for emotional harm under these statutes because the damages helped restore them to their original position.²⁵ In addition to monetary compensation, plaintiffs who demand relief for their emotional distress desire validation and agency over their situations.²⁶

to investigate the situation). The court decided that emotional distress damages could be awarded because it is “fairly obvious” that individuals can experience emotional distress after their civil rights are infringed, so federal funding recipients are on notice of this remedy. *Id.* at 383 (quoting *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007)).

²² See *supra* notes 1–21 and accompanying text (describing the cases of three plaintiffs who were entitled to emotional distress damages).

²³ See U.S. CONST. art. I, § 8, cl. 1 (granting Congress the authority to levy and gather taxes to settle the nation’s debts and authorizing Congress to cater to the common defense and overall welfare of the United States); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 91 (2001) (illustrating how the Spending Clause gives Congress the power to allocate funds to any program that supports the country’s general welfare, so long as the program does not violate other sections of the Constitution).

²⁴ See *Kelly S. Terry, Franklin v. Gwinnett County Public Schools: Reviving the Presumption of Remedies Under Implied Rights of Action*, 46 ARK. L. REV. 715, 733–34 (1993) (explaining how Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Educational Amendments of 1972 (Title IX), and Section 504 of the Rehabilitation Act (RA) are patterned off of each other and writing that each statute prohibits federal funding recipients from discriminating against certain groups of people). For example, Title IX was modelled after Title VI: the statute replaces the phrase “race, color, or national origin” with “sex.” *Id.* These statutes are referred to as “sister statutes” due to their similar structure and policy objectives. *Id.* at 733.

²⁵ See *Dawn L.*, 586 F. Supp. 2d at 385 (stating that M.L.’s depression and suicidal ideation, which occurred because she had to be removed from school and the school failed to investigate her situation, established her emotional injury); *Roohbakhsh v. Bd. of Trs. of Neb. State Colls.*, 409 F. Supp. 3d 719, 735 (D. Neb. 2019) (citing *Sheely*, 505 F.3d at 1204 (indicating that emotional distress damages are available when they are the appropriate remedy for the legal right invaded)); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 672 (2d Cir. 2012) (stating that the evidence of Anthony’s isolation, humiliation, and emotional anguish shown at trial was enough for the court to uphold the jury’s award).

²⁶ See Kelsey Murrell, *SCOTUS Erodes Progress as Title IX Turns 50*, BLOOMBERG L. (June 22, 2022), <https://news.bloomberglaw.com/us-law-week/scotus-erodes-progress-as-title-ix-turns-50> [<https://perma.cc/N5YK-4JGM>] (reporting that emotional distress resulting from discrimination is the most common pain suffered by the author’s Title IX clients). Victims often share that the most harmful part of the process is how schools ignore their complaints; many individuals just want to hold schools accountable. *Id.* The author further states that every one of her clients suffered from some sort of emotional harm, such as “depression, anxiety, panic disorders, and suicidal ideation.” *Id.* Additionally, many students transferred schools or dropped out of college to remove themselves from their harassers and the unbearable environments their harassers created. *Id.*

Today, plaintiffs suing federal funding recipients under antidiscrimination Spending Clause legislation may not be able to receive damages for the emotional distress that the discrimination caused.²⁷ In 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the U.S. Supreme Court held that individuals cannot recover emotional distress damages in private actions brought under the anti-discrimination sections of the RA and the Affordable Care Act (ACA).²⁸ Because the ACA and the RA do not have implied rights of action, the Court needed to consider which remedies federal funding recipients were on notice for when they accepted funding.²⁹ The Court relied on an analogy to contract law that was first used in 1981, in *Pennhurst State School & Hospital v. Halderman*.³⁰ The contract law analogy equates the federal government and federal funding recipients to parties in a contract.³¹ Since *Pennhurst*, the contract law analogy has been used as a rhetorical tool in other Spending Clause cases to ensure that federal funding recipients are aware of the conditions attached to receiving certain funding.³²

In *Cummings*, the Court held that federal funding recipients are only on notice for traditional contract law remedies.³³ The Court found that emotional distress damages are not traditionally available as a remedy.³⁴ Therefore, funding recipients could not be on notice for emotional distress damages, so plain-

²⁷ See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 229 (2022) (holding that emotional distress damages are not recoverable under the Affordable Care Act (ACA) or RA); *Doe ex rel. Doe v. City of Pawtucket*, No. CV 17-365-JJM-LDA, 2022 WL 4551953, at *2 (D.R.I. Sept. 29, 2022) (stating that the *Cummings* holding applies to all Spending Clause legislation, including Title IX).

²⁸ *Cummings*, 596 U.S. at 229; see 29 U.S.C. § 794(a) (stating that no one with a disability can be discriminated against, rejected from participation, or denied benefits of a program that received funding from the federal government); 42 U.S.C. § 18116(a) (stating that a person must not be excluded from, be refused the benefits of, or be discriminated against in any health program that receives federal funds).

²⁹ See *Cummings*, 596 U.S. at 220–21 (stating that the Court had to consider implicit remedies because neither the ACA nor the RA state explicit remedies for discrimination); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393 (2008) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 5 (1981) (stating that the “weak contract theory” of the Spending Clause was first authored by then-Associate Justice Rehnquist in *Pennhurst*)).

³⁰ See *Pennhurst*, 451 U.S. at 17 (stating that Spending Clause legislation is contractual in nature); Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 447–48 (2008) (describing how the contract law analogy originated in *Pennhurst* and describing the analogy as “now-familiar”).

³¹ See Huberfeld, *supra* note 30, at 448 (describing how the contract law analogy is used by the Court).

³² See *id.* at 449 (describing how the *Pennhurst* decision is used by Justices in later decisions who push for clear notice of conditions in Spending Clause legislation).

³³ See *Cummings*, 596 U.S. at 230 (citing *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (holding that the Court must consider which remedies federal funding recipients are on notice of before accepting funds and ruling that recipients are on notice for traditional contract remedies)).

³⁴ *Id.*

tiffs could not seek this remedy under the ACA or the RA.³⁵ After *Cummings*, many lower courts have expanded the Court's holding to Spending Clause legislation beyond the ACA and RA.³⁶ Now, many individuals facing sex-based, race-based, and other forms of discrimination have no legal remedy for their emotional damages.³⁷

This Note argues that the Court stretched the contract law analogy beyond its initial use to improperly restrict the remedies available for parties suing under the antidiscrimination statutes found within Spending Clause programs.³⁸ Moreover, this Note contends that contract law principles are not the best source of notice in discrimination cases.³⁹ Part I of this Note outlines Congress's powers under the Spending Clause, Spending Clause legislation, and the Spending Clause case law that developed the contract law analogy and the

³⁵ See *id.* at 226 (rejecting the argument that recipients should be on notice for more robust contract law remedies rather than just the simple, traditional principles). Before the Court decided *Cummings*, more conservative thinkers argued that claims seeking only emotional distress damages are frivolous. Sarah Parshall Perry, *Out of Thin Air: Cummings v. Premier Rehab Keller and "Emotional Distress" Damages in Antidiscrimination Law*, FEDERALIST SOC'Y (Feb. 18, 2022), <https://fedsoc.org/commentary/fedsoc-blog/out-of-thin-air-cummings-v-premier-rehab-keller-and-emotional-distress-damages-in-antidiscrimination-law> [<https://perma.cc/YA7N-RBQH>]. These thinkers contended that emotional distress damages are impossible for institutions to anticipate, so allowing such damages could lead to a flood of flimsy claims. *Id.* Meanwhile, liberal legal writers saw the decision as an attack on marginalized groups who could no longer recover damages for the bigotry that they had faced. See Elie Mystal, *The Supreme Court Has Just Invented a New Way to Harass Vulnerable People*, THE NATION (Apr. 29, 2022), <https://www.thenation.com/article/society/supreme-court-cummings/> [<https://perma.cc/A95R-3US9>] (stating that individuals who face discrimination in health care facilities can no longer recover damages because the main harm they face *is* emotional distress).

³⁶ See, e.g., *Doe ex rel. Doe v. City of Pawtucket*, No. CV 17-365-JJM-LDA, 2022 WL 4551953, at *2 (D.R.I. Sept. 29, 2022) (stating that the *Cummings* holding applies to other pieces of antidiscrimination Spending Clause legislation, such as Title IX); *Doe I v. Curators of Univ. of Mo.*, No. 19-CV-04229-NKL, 2022 WL 3366765, at *3 (W.D. Mo. Aug. 15, 2022) (stating that the holding in *Cummings* applies to Title IX claims); *Montgomery v. D.C.*, No. CV 18-1928 (JDB), 2022 WL 1618741, at *24, *26 (D.D.C. May 23, 2022) (reasoning that the *Cummings* decision should apply to cases brought under Title II of the Americans with Disabilities Act (ADA) and explaining that the *Cummings* decision also prevents the plaintiff from recovering reputation damages). But see *Doe v. Purdue Univ.*, No. 18-CV-89-JEM, 2022 WL 2828238, at *4 (N.D. Ind. July 20, 2022) (stating that *Cummings* only applies to RA and ACA claims, not Title IX claims).

³⁷ See, e.g., *City of Pawtucket*, 2022 WL 4551953 at *2 (stating that plaintiffs cannot recover emotional damages under Title IX). Some scholars argue that if emotional distress damages are not available, laws like the RA are rendered ineffective for the millions of Americans who rely on them for protection. See Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. ONLINE 54, 66 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4125439 [<https://perma.cc/DHE5-DLNW>] (arguing that the Court's decision in *Cummings* has made the RA useless to millions of Americans). In many instances, such as where a defendant denies a plaintiff courthouse access, individuals are unlikely to seek any other form of damages besides emotional distress because of the one-time nature of the defendant's action. *Id.* Deprived of the option to seek such damages, these plaintiffs may lack grounds to pursue RA claims, even though the defendant's actions violate the law. *Id.*

³⁸ See *infra* notes 237–279 and accompanying text.

³⁹ See *infra* notes 237–279 and accompanying text.

clear notice requirement.⁴⁰ Part II discusses the advantages and disadvantages to the clear notice requirement and contract law analogy, and their relationship to antidiscrimination legislation.⁴¹ Finally, Part III argues that rather than using contract law principles, the Court should consider pre-acceptance and post-acceptance sources of notice in cases involving antidiscrimination Spending Clause legislation that rely on implied causes of action, as it would other pieces of legislation.⁴²

I. LIMITATIONS ON SPENDING CLAUSE LEGISLATION

Legal scholars have questioned the appropriate balance of power between the state and federal government since the founding of the United States.⁴³ One area where this argument arises is the scope of Congress's spending power.⁴⁴ Section A of this Part discusses the source and scope of Congress' spending power.⁴⁵ Section B of this Part describes Spending Clause programs and the role antidiscrimination statutes play within such programs.⁴⁶ Section C examines the Supreme Court's analysis of Spending Clause legislation during the Burger and Rehnquist eras, concentrating on seminal cases and cases involving available remedies in antidiscrimination statutes.⁴⁷ Section D discusses the Roberts Court's analysis of these cases.⁴⁸ Finally, Section E provides a summary of the facts and procedural history of *Cummings v. Premier Rehab Keller P.L.L.C.*⁴⁹

A. The Foundation of Congressional Spending Power

To understand modern Spending Clause jurisprudence, it is necessary to first examine the roots of congressional spending power.⁵⁰ The power to spend is implicitly granted to Congress in Article I, Section 8, Clause 1 of the Constitution, which gives Congress the ability to "pay the Debts and provide for the . . . general Welfare of the United States" so long as all actions are dispersed

⁴⁰ See *infra* notes 43–190 and accompanying text.

⁴¹ See *infra* notes 191–236 and accompanying text.

⁴² See *infra* notes 237–279 and accompanying text.

⁴³ See Chemerinsky, *supra* note 23, at 89 (stating that the issue of federalism was argued throughout the history of the United States and noting that there was a recent rise in Justices who seek to protect federalism).

⁴⁴ See *id.* (explaining that the Spending Clause is an area of the Constitution that states' rights advocates are targeting through court decisions and commentary); *United States v. Butler*, 297 U.S. 1, 65 (1936) (maintaining that since the formation of the United States, scholars have clashed over the proper reading of Article I, Section 8 of the U.S. Constitution).

⁴⁵ See *infra* notes 50–58 and accompanying text.

⁴⁶ See *infra* notes 59–73 and accompanying text.

⁴⁷ See *infra* notes 74–142 and accompanying text.

⁴⁸ See *infra* notes 143–160 and accompanying text.

⁴⁹ See *infra* notes 161–190 and accompanying text.

⁵⁰ See Chemerinsky, *supra* note 23, at 90–91 (alluding to the history of Congress's spending power before discussing the modern doctrine surrounding the Spending Clause).

evenly throughout the United States.⁵¹ James Madison and Alexander Hamilton famously clashed over the correct interpretation of the Spending Clause.⁵² Madison argued that the power is limited to funding Congress's enumerated powers.⁵³ Meanwhile, Hamilton contended that Congress has the power to spend broadly for the common good, so long as the spending does not violate other provisions of the Constitution.⁵⁴

Ultimately, Hamilton's view prevailed.⁵⁵ In 1936, in *United States v. Butler*, the Supreme Court, which previously favored states' rights and quashed many federal laws during the Roosevelt administration, agreed with Hamilton's view on the Spending Clause.⁵⁶ The Court held that the spending power is not limited to Congress's enumerated powers so long as Congress does not use its spending power to tacitly achieve ends that cannot be accomplished by enumerated powers.⁵⁷ Furthermore, in subsequent cases, the Court has held that Congress may place conditions on the receipt of federal funds.⁵⁸

⁵¹ U.S. CONST. art. I, § 8, cl. 1. In 2023, in *Health & Hospital Corp. of Marion County v. Talevski*, the dissent considered the limitations of congressional spending power. 599 U.S. 166, 196 (2023) (Thomas, J., dissenting). In his dissent, Justice Thomas noted that although Congress has the power to direct how federal funds are spent, the Constitution does not have an explicit "spending clause." *Id.* at 206. He noted that since the country's outset, some scholars have found that the spending power is granted by the General Welfare Clause, and the Supreme Court has taken this view in modern years. *Id.* Some scholars argue that the General Welfare Clause was not meant to give Congress the power to spend. See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003) (arguing that after analyzing the historical context of the General Welfare Clause, one can conclude that the Constitution does not grant spending power). In fact, some scholars argue that the General Welfare Clause was an "unqualified denial" of the power to spend. *Id.* at 55. Although people question whether referring to Article I, Section 8 of the Constitution as the Spending Clause is proper, Supreme Court precedent supports the assertion. See *id.* at 4 (conceding that the Supreme Court has interpreted the General Welfare Clause as giving Congress the power to spend for almost a century). Therefore, this Note refers to Article I, Section 8, Clause 1 of the Constitution, which gives Congress the implicit power to spend, as the Spending Clause. U.S. CONST. art. I, § 8, cl. 1.

⁵² See David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 500 (2007) (recounting Hamilton and Madison's feud over the correct interpretation of the Spending Clause). Interestingly, Justice Thomas quoted and referenced this Article multiple times in his recent dissent in *Health & Hospital Corp. of Marion County v. Talevski*. See 599 U.S. at 220 (Thomas, J., dissenting) (quoting Engdahl, *supra*, at 498 ("[T]he Justices in *Mellon* understood that Congress' power to spend money is not a legislative power.")).

⁵³ Engdahl, *supra* note 52.

⁵⁴ *Id.* Hamilton aptly stated that the broad power to appropriate money should not be used to carry out anything not allowed elsewhere in the Constitution. *Id.*

⁵⁵ See *id.* at 501–02 (stating that the Hamilton view became the accepted view of Congress's power to spend).

⁵⁶ See 297 U.S. 1, 66 (1936) (stating that Congress's power to spend is not limited to its other areas of legislative power); Chemerinsky, *supra* note 23 (stating that the Supreme Court championed states' rights during this time).

⁵⁷ *Butler*, 297 U.S. at 66. The issue in *Butler* was whether the Agricultural Adjustment Act of 1933, which created a tax to assist farmers during the Great Depression, was constitutional. *Id.* at 53. Ultimately, the Court held that Congress could not regulate agricultural activities indirectly through its power to tax and spend. See *id.* at 77–78 (stating that the spending power is restrained by the Constitu-

B. Spending Clause Programs

The federal government relies on Congress's expansive spending power and its ability to attach conditions to the receipt of funds in order to promote a vast array of programs.⁵⁹ A report published by the White House estimates that the federal government will spend 1.1 trillion dollars in disbursements to state, local, tribal, and territorial governments in 2024.⁶⁰ State and local governments rely on these federally funded programs to properly function, and the federal government uses this dependency to advance its regulatory schemes.⁶¹

These programs are created in a few ways.⁶² Some federal spending programs, such as programs under the Federal Housing Act (FHA), are expressly designed as contracts between the federal government and federal funding recipient.⁶³ For example, under the FHA, the Department of Housing and Urban

tion, as all spending provisions must be for the good of the country as a whole and ruling that the power cannot be used to coerce state and local governments to act rather than giving them a choice).

⁵⁸ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating that the Court recognized that Congress has possessed the power to place conditions on grants for many years). Since the mid-twentieth century, Congress has conditioned grants to promote policy objectives such as limiting discrimination based on race, sex, and disability. Engdahl, *supra* note 52, at 497.

⁵⁹ See Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2339 (2020) (stating that Congress may use federal funding to create policy programs that it would not otherwise be able to create or that it does not want to execute without state assistance). Most of the federal government's grants are given directly in cash, but the grants can also be in other forms, such as sharing federal assets and revenue with local and state governments. WHITE HOUSE, AID TO STATE AND LOCAL GOVERNMENTS 77 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/ap_8_state_and_local_fy2024.pdf. [<https://perma.cc/VR95-XZPW>].

⁶⁰ AID TO STATE AND LOCAL GOVERNMENTS, *supra* note 59. Fifty-five percent of expenditures are for health programs, with the majority being for Medicaid. *Id.* Additionally, fifteen percent of funds are for income security programs; nine percent of funds are for transportation programs; eight percent are for education and social services; and twelve percent for other purposes. *Id.* Federal funding allocated to state and local governments surged to a historic peak in 2021, constituting 5.5 percent of the gross domestic product. *Id.* This increase is largely due to the federal government's stimulus spending in response to the public health and economic turmoil caused by the COVID-19 pandemic. *Id.* Emergencies such as the COVID-19 pandemic, however, do not give the federal government more constitutional power. See Yanbai Andrea Wang & Justin Weinstein-Tull, *Pandemic Governance*, 63 B.C. L. REV. 1949, 1963 (2022) (explaining that although the Constitution does not grant specific powers to the federal government during emergencies such as pandemics, the Commerce Clause and Spending Clause grant Congress enough power to respond).

⁶¹ See Fahey, *supra* note 59 (describing how the federal government attaches conditions on the receipt of funds allocated to state and local governments); Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 882–83 (2008) (stating that the federal government uses Spending Clause programs to oversee states, local governments, and private entities). Moreover, federal funding can reach beyond state and local actors. Shariful Khan, *An Expansive View of "Federal Financial Assistance"*, 133 YALE L.J.F. 691, 695 (2024). For example, a private health insurance corporation that receives federal funding must follow the same conditions as a state-run Medicaid program relating to who can be refused coverage. *Id.*

⁶² See Fahey, *supra* note 59, at 2339–40 (describing the various types of Spending Clause programs).

⁶³ *Id.* at 2340; see 42 U.S.C. § 1437f(b)(1) (describing how the Secretary of Housing and Urban Development is authorized to enter annual contributions contracts with housing agencies). Similarly,

Development (HUD) forms “Annual Contribution Contracts” with local and state housing agencies.⁶⁴

Other programs, such as Medicaid, are not explicitly contractual.⁶⁵ Instead, Medicaid gives states a list of choices and compels them to propose their own plans that demonstrate how they will implement the program.⁶⁶ States must agree to comply with federal requirements and laws.⁶⁷ Although not expressly written as contracts, the Supreme Court still refers to these state plans as contracts.⁶⁸

Oftentimes, antidiscrimination provisions are enclosed within larger spending program agreements.⁶⁹ For example, when local governments accept federal grants, they must agree to comply with Title VI.⁷⁰ Likewise, before accepting federal funds, education programs must commit to complying with

the Clean Water Act permits the Environmental Protection Agency (EPA) to create contracts with local water treatment plants for projects that are considered contractual commitments. Fahey, *supra* note 59, at 2340; see 33 U.S.C. § 1283(a)(1) (stating that the Administrator of the EPA’s approval of plans triggers the federal government’s contractual obligation to pay its share of that project).

⁶⁴ Fahey, *supra* note 59, at 2340; see 42 U.S.C. § 1437f(b)(1) (outlining the process for the federal government to enter into annual contributions contracts with housing agencies).

⁶⁵ See Fahey, *supra* note 59, at 2340–41 (describing how Medicaid does not use contractual language and offering states a range of options instead that each state gets to pick from to fit the state’s specific needs).

⁶⁶ See *State Plan*, MACPAC <https://www.macpac.gov/subtopic/state-plan/> [<https://perma.cc/ZY4F-7YS4>] (stating that Medicaid laws require state programs to meet general requirements in areas like benefits and coverage for certain groups, and then states can make their own policy decisions about who is eligible and which services are covered by Medicaid).

⁶⁷ See *id.* (explaining that a state’s submission of state plan documents containing mandatory requirements signifies the state’s assurance of compliance). An approved state plan demonstrates to the Centers of Medicaid & Medicaid Services that the state will follow federal rules, describes which groups and services will be covered in that state, and indicates the state’s requirements for eligibility. *Id.* Justice Scalia labeled the state plan process as a “unilateral offer for contract.” Fahey, *supra* note 59, at 2341 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting)).

⁶⁸ Fahey, *supra* note 59, at 2341; see, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 676 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (arguing that the Medicaid program constitutes a contractual relationship because it is premised on the states’ choice “to accept or decline a federal aid package”).

⁶⁹ See Fahey, *supra* note 59, at 2432 (discussing how federal grant programs contain smaller contracts within them to meet specific goals of the federal government). Scholars have noted that it is difficult to define what constitutes federal funding. Khan, *supra* note 61, at 696. Supreme Court decisions, statutory language, and legislative history do not aid in defining federal assistance. *Id.* Without a clear definition, plaintiffs and defendants alike cannot be certain if a certain piece of antidiscrimination Spending Clause is applicable to their situation. *Id.* Given this uncertainty, some legal commentators have called for an expansive reading of federal assistance that includes all forms of federal aid. *Id.* at 714. Therefore, more people would be able to bring action under the antidiscrimination statutes, and the purpose of these statutes could be met. *Id.*

⁷⁰ See 42 U.S.C. § 2000d (declaring that no individuals shall be discriminated against based on race, religion, or national origin in programs that receive federal funding); Fahey, *supra* note 59, at 2432 (stating that Title VI of the Civil Rights Act is the most prominent statute often put into larger federal grant programs).

Title IX, which derives from Title VI and prohibits sex-based discrimination.⁷¹ In much of this antidiscrimination legislation, Congress failed to grant rights of action for affected third parties or to list available remedies.⁷² These legislative gaps have led the courts to consider whether implied rights of action and certain remedies should be available.⁷³

C. The Burger and Rehnquist Courts' Interpretation of Congressional Spending Power

Although Spending Clause jurisprudence has granted Congress considerable power to create large programs, this power is not unlimited.⁷⁴ The Burger and Rehnquist Courts sought to reign in the scope of Spending Clause legislation by developing the “unambiguous conditions” standard and the contract law analogy.⁷⁵ To many scholars, however, these limitations did little to curb Congress’s practice of conditional funding.⁷⁶

Two of the most seminal Spending Clause cases are *South Dakota v. Dole* and *Pennhurst State School & Hospitality v. Halderman*.⁷⁷ In 1987, in *South Dakota v. Dole*, the Court questioned the constitutionality of conditioning receipt of a certain percentage of federal highway funding on the enactment of a

⁷¹ See 20 U.S.C. § 1681(a) (dictating that an individual cannot be excluded from an activity or discriminated against due to sex in educational programs for which the federal government provides funding); Fahey, *supra* note 59, at 2342 (using Title IX as an example of a statute embedded within a larger Spending Clause statute); Terry, *supra* note 24, at 733 (illustrating how the language of Title IX was modelled after Title VI).

⁷² See, e.g., 20 U.S.C. § 1681(a) (granting that individuals cannot be excluded from an activity or discriminated against due to sex in federally funded educational programs but granting individuals no cause of action under which to bring a lawsuit).

⁷³ See, e.g., *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 71 (1992) (asking whether an implied right of action under Title IX exists despite the lack of explicit statutory language); see *infra* notes 105–109 and accompanying text (summarizing *Franklin*). Some scholars argue that civil rights legislation cannot have any legal effect without recipients of federal funding accepting these conditions. Engdahl, *supra* note 52, at 506. Moreover, antidiscrimination conditions result in benefits for third parties, who do not receive funding but are the individuals intended to benefit from these requirements. *Id.*

⁷⁴ See Galle, *supra* note 61, at 883 (stating that the Court indirectly limited the Spending Clause in cases involving conditional spending).

⁷⁵ See Huberfeld, *supra* note 30, at 444, 448 (stating that during the *Pennhurst* and *Dole* decisions, when Chief Justice Burger and Chief Justice Rehnquist held their roles, respectively, the Court pushed Congress to give funding recipients unambiguous conditions and began referencing contract law).

⁷⁶ See *id.* at 442 (stating that Spending Clause legislation was without many constraints during the 1990s and early 2000s).

⁷⁷ *South Dakota v. Dole*, 483 U.S. 203, 203 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 1 (1981); see Huberfeld, *supra* note 30, at 446 (noting that *Pennhurst* is frequently cited in subsequent cases); Galle, *supra* note 61, at 883 (describing *Dole* as an influential Spending Clause case).

state law raising the drinking age to twenty-one or older.⁷⁸ Writing for the majority, Chief Justice Rehnquist promulgated a set of factors that courts should consider when determining the constitutionality of a Spending Clause program.⁷⁹ The Court held that Congress must unambiguously express the funds' conditions so that states may be aware of them before agreeing to accept the funds.⁸⁰ Furthermore, the conditions must be reasonably connected to the objective of the spending.⁸¹ Here, the Court found that Congress was acting within constitutional bounds and that the conditions were reasonably related to the highway funds because the objective of the federal highway fund was safe interstate travel.⁸² Although *Dole* created the favored test for considering the constitutionality of spending legislation, the main issue for courts in Spending Clause cases is how to construe the terms of conditional grants.⁸³ To answer this question, courts turn to *Pennhurst* and the cases that followed.⁸⁴

In 1981, in *Pennhurst State School & Hospitality v. Halderman*, the Supreme Court asked whether Congress intended to create rights to suitable treatment in the "least restrictive" environment for the intellectually disabled through the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DD Act).⁸⁵ Penned by then-Associate Justice Rehnquist, the Court held

⁷⁸ *Dole*, 483 U.S. at 205; see Chemerinsky, *supra* note 23, at 94 (stating that *Dole* is the commonly cited authority for this principle, despite earlier cases illustrating the same principle). In *Dole*, the Court evaluated 23 U.S.C. § 158, a federal law that withheld five percent of federal highway funds from states that do not have a minimum drinking age of twenty-one. 483 U.S. at 205; see 23 U.S.C. § 158 (ordering the Secretary of Transportation to not give states that allow people under the age of twenty-one to buy alcohol a percentage of otherwise dispersible federal highway funds from states). South Dakota's previous minimum drinking age was nineteen. *Dole*, 483 U.S. at 205.

⁷⁹ See *Dole*, 483 U.S. at 207–08 (listing the general restrictions on Congress's power to spend); Chemerinsky, *supra* note 23, at 95 (noting that Chief Justice Rehnquist was a protector of states' rights and wrote important decisions on states' rights issues).

⁸⁰ *Dole*, 483 U.S. at 207 (citing *Pennhurst*, 451 U.S. at 17). The Court also held that funds must be used for the general welfare of the country. *Id.* The Court, however, stated that it would accept Congress's assessment of what funding aids in promoting the general welfare. See *id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (stating that Congress is tasked with drawing the line between general welfare and particular welfare and ruling that so long as Congress's discretion is not abused, the Court shall refrain from exercising judgment)).

⁸¹ *Id.*; 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, 161 (2004) (stating that the Court's reasonableness test is very favorable to Congress, like many areas of the Court's reviews of Congress's choices).

⁸² *Dole*, 483 U.S. at 208. A fifth limitation to conditional grants written in *dicta* states that Congress may not coerce states into accepting grants. *Id.* at 211.

⁸³ See Galle, *supra* note 61, at 883 (stating that in Spending Clause cases, the issue most courts grapple with is how to correctly interpret conditional grants).

⁸⁴ See *id.* (stating that in resolving the issue of interpreting conditional grants, courts consider *Pennhurst* and its progeny).

⁸⁵ Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. 94-103; see *Pennhurst*, 451 U.S. at 10 (stating that the petitioners allege that 42 U.S.C. § 6010 gives the intellectually disabled rights to "appropriate treatment" in the "least restrictive" environment). In this case, the residents of *Pennhurst State School and Hospitality*, a state-ran facility that housed mentally hand-

that the federal government may place conditions on funds if states were aware of the conditions and were able to reject the funds and their associated conditions.⁸⁶ Moreover, the Court held that Congress must express the conditions of the federal funds unambiguously so that states could be aware of the federal government's expectations.⁸⁷ Unlike other areas of legislation, Justice Rehnquist indicated that the relationship of states and the federal government to Spending Clause legislation is contractual.⁸⁸ The Court did not find that the law gave substantive rights to the mentally disabled, holding that Congress was encouraging states to give "appropriate treatment" in the "least restrictive" environment, not forcing states to implement such programs.⁸⁹ Because of the statute's ambiguity, the Court stated that law did not give "clear notice" to the states that accepted federal funding.⁹⁰ Due to the Court's reference to clear notice and its firm holding, the *Pennhurst* opinion is frequently cited by justices seeking to protect states' rights.⁹¹

icapped individuals, sued the institution, alleging that *Pennhurst* violated the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DD Act) by providing inhumane and filthy conditions. *Pennhurst*, 451 U.S. at 5–6. The DD Act was created pursuant to Congress's spending power. *Id.* at 10.

⁸⁶ See *Pennhurst*, 451 U.S. at 17 (stating that Congress must give each state the opportunity to understand the terms of a condition and the choice to either comply with the terms of the grant or refuse funding).

⁸⁷ See *id.* (ruling that a state cannot accept the conditions of federal funding if it is unaware of the existence of the conditions due to ambiguity); see also Galle, *supra* note 61, at 883 (noting that twenty-five years after the *Pennhurst* decision, the Court still had not held whether "unambiguous" conditions can be asserted in administrative regulations that further statutory initiatives). The Court held that the DD Act and its legislative history did not demonstrate that Congress conveyed certain rights to mentally handicapped citizens, so the Court did not want to read this requirement into the legislation. *Pennhurst*, 451 U.S. at 18.

⁸⁸ See *Pennhurst*, 451 U.S. at 17 (stating the contract law analogy). Some scholars describe the contract law analogy as familiar due to the frequency with which it is now cited. Huberfeld, *supra* note 30, at 448. Writing in partial dissent, Justice White criticized the majority for requiring the statute to contain explicit conditions that clearly explain the states' obligations. *Pennhurst*, 451 U.S. at 48 (White, J., dissenting). To Justice White, the statute's indication of "appropriate treatment" in the "least restrictive" environment as rights codified by Congress demonstrated Congress's intent for respectful treatment of the intellectually disabled in federally funded facilities. *Id.* Moreover, Justice White noted that the decisions the Court cited did not require Congress to condition funds with as much precision as is required with regular contracts. *Id.* at 48 & n.14.

⁸⁹ See *Pennhurst*, 451 U.S. at 27 (majority opinion) (holding that the appellate court failed to distinguish between Congress encouraging states to enact certain programs and Congress ordering states to enact certain programs).

⁹⁰ *Id.* at 25.

⁹¹ See Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 428 (2008) (stating that justices who embrace federalism are interested in the Court's analysis in *Pennhurst* when considering cases involving § 1983). The clear statement rule is a judicially-created rule used in statutory interpretation. See Galle, *supra* note 61, at 878 (stating that the clear statement rule is a tool used by courts to restrict the expansion of federal power). It requires conditions in federal legislation to be expressed unambiguously in legislation to be enforceable against states. *Id.* Commentators argue, however, that *Pennhurst* is not a simple application of the clear statement rule. Bagenstos, *supra* note 29, at 394. Instead, when considering conditional spending cases,

Two years later, in 1983, in *Guardians Association v. Civil Service Commission*, the Court asked whether compensatory damages are available to private parties claiming that a city unintentionally violated Title VI.⁹² In a 5–4 decision, Justice White, who announced the Court’s judgment but was only joined in reasoning by Justice Rehnquist, ruled that federal funding recipients should not be held accountable for paying compensatory damages.⁹³ Justice White argued that states, as parties to the contract with the federal government, would likely prefer to terminate the contract and lose federal funding than to be cast with the unforeseen, unclear burden of paying compensatory damages to third parties.⁹⁴ Justice White believed that the Court should recognize that the states’ ability to withdraw from these contracts was fundamental to upholding the consensual nature of the program.⁹⁵ The opinion relied on *Pennhurst* to argue that retrospective remedies may not be available under Spending Clause

courts use principles beyond the ordinary clear-statement principles by requiring forms of notice that limit certain federal spending conditions. *Id.*

⁹² See 463 U.S. 582, 584 (1983). The Guardians Association is a fraternal organization for Black police officers in the New York Police Department. Douglas Martin, *Robert Mangum, a City and Civil Rights Leader, Dies at 93*, N.Y. TIMES (Oct. 8, 2014), <https://www.nytimes.com/2014/10/09/nyregion/robert-j-mangum-a-pioneer-for-black-causes-dies-at-93.html> [<https://perma.cc/DY3J-VY2V>]. In *Guardians Ass’n*, the class members were Black and Hispanic police officers who alleged that the written entry examinations used by the New York City law enforcement agency were discriminatory under Title VI. 463 U.S. at 585. The District Court for the Southern District of New York found that the assessments had a disparate impact on the Black and Hispanic police officers, who received lower scores for reasons that were not related to the profession. *Id.* Each class member passed the written examination and was subsequently hired. *Id.* The hiring order, however, was based on individual’s scores, so the plaintiffs, who scored lower, were hired later than white officers, who received higher scores. *Id.* Moreover, officers with the lowest exam scores were laid off first because the police department had a “last-hired, first-fired” policy. *Id.* Consequently, the Black and Hispanic officers were cut more than white officers. *Id.*

⁹³ *Guardians Ass’n*, 463 U.S. at 598. Although the discrimination in this case was unintentional, some experts believe that the impact of unintentional discrimination is just as harmful as intentional discrimination. Eva Paterson (Opinion), *Unintentional Discrimination Is as Harmful as Real Bias*, N.Y. TIMES (Apr. 27, 2015), <https://www.nytimes.com/roomfordebate/2015/04/27/can-discrimination-exist-without-clear-intent/unintentional-discrimination-is-as-harmful-as-real-bias> [<https://perma.cc/2F5K-DHH7>]. Studies show that implicit bias has largely replaced instances of explicit discrimination and people still carry more prejudicial attitudes than they are inclined to admit. *Id.* These biases contribute to the continuation of racial seclusion and housing segregation throughout the United States. *Id.*

⁹⁴ See *Guardians Ass’n*, 463 U.S. at 598 (citing *Pennhurst*, 451 U.S. at 15 (indicating that remedies that make an individual whole are not usually suitable in private actions for violations of Spending Clause legislation)). Justice White, however, indicated that recipients were on notice for their obligations when individuals were intentionally discriminated against. *Id.* at 597. In these instances, Justice White found that individuals may be entitled to compensatory damages and prospective relief. *Id.*

⁹⁵ See *id.* at 596 (stating that the Court should not recognize additional obligations for the states to follow and should respect their ability to terminate this type of contract).

legislation and held that limited injunctive relief should be the only applicable remedy.⁹⁶

Writing in dissent, Justice Marshall argued that the majority incorrectly analyzed contract law to reach its decision.⁹⁷ To Justice Marshall, the contract analogy delineated in *Pennhurst* only strengthened the appropriateness of awarding retrospective relief.⁹⁸ Justice Marshall found that Title VI unambiguously imposed a condition on recipients to avoid discriminating on the basis of race and that this obligation attaches once recipients agree to receive federal funding.⁹⁹ Therefore, the principles of contract law required recipients of federal funding to be held to their side of the transaction.¹⁰⁰ Citing the Second Restatement of Contracts, Justice Marshall advocated for remedies that held recipients accountable for their discrimination and that protected the federal government's belief that the recipient would not discriminate.¹⁰¹ To remedy

⁹⁶ See *id.* at 602–03 (citing *Pennhurst*, 451 U.S. at 15 (relying on legislative history and *Pennhurst* to state that only injunctive relief should be available to private parties who were unintentionally discriminated against and who sued under legislation enacted under the spending power)).

⁹⁷ See *id.* at 632 (Marshall, J., dissenting) (arguing that Justice White's argument would allow states to violate contractual conditions disallowing discrimination until a court recognizes the breach and orders the recipient to perform its contractual duties). Justice Stevens, who was joined by Justice Brennan and Justice Blackmun, argued that Justice White misrepresented the *Pennhurst* decision. *Id.* at 637 (Stevens, J., dissenting). Justice Stevens argued that *Pennhurst* was not concerned with remedies and instead focused on statutory rights. *Id.* at 636–37. He further contended that Justice White's reference to the portion of *Pennhurst* dealing with appropriate relief was dicta that Justice White turned into a general principle of interpreting Spending Clause statutes. *Id.* (citing *Pennhurst*, 451 U.S. at 29–30).

⁹⁸ See *id.* at 630 (Marshall, J., dissenting) (stating that funding recipients must sign contracts where they consent to following Title VI, which is the consideration for receiving federal aid, and no recipient signing such a contract would believe that they would not be held accountable if they did not comply with the terms of the contract).

⁹⁹ *Id.* at 629–30. Justice Marshall distinguished the statute at issue in *Pennhurst*, the DD Act, from Title VI. *Id.* at 629. In *Pennhurst*, the Court focused on Section 6010 of the DD Act, which codifies the rights of people with developmental disabilities. *Id.* at 628–29 (citing *Pennhurst*, 451 U.S. at 13). This provision, however, does not contain any language that makes it seem like following Section 6010 is a condition for the receipt of federal funding. *Id.* (citing *Pennhurst*, 451 U.S. at 13). Meanwhile, Justice Marshall argued that recipients of federal funds are on notice for Title VI because applications for federal funding condition the grant on complying with Title IX and all requirements linked to the statute. *Id.* at 629–30. Federal funding recipients must sign these agreements before accepting the federal funds. *Id.* at 630.

¹⁰⁰ See *id.* at 630 (stating that federal funding recipients cannot rightfully argue that they did not anticipate having to comply with Title VI and the consequences of not complying with the provision before receiving federal funds because the United States always had a right to sue recipients to enforce its obligation). When the United States sued for enforcement, courts applied all traditional judicial remedies. *Id.* at 630–31.

¹⁰¹ See *id.* at 633 (citing RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. L. INST. 1981) (stating that when a court finds that a recipient broke the contract, the court should enforce the broken agreement by safeguarding the assumption that the funding recipient would not discriminate)). Comment a of Section 344 of the Restatement (Second) of Contracts states that contract law remedies should recognize that individuals control their own affairs when making binding contractual obligations. RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a. When a contract has been breached,

this breach, the dissent argued that private parties need to be put in the position that they would have been in had the contract been executed properly, entitling them to compensatory relief.¹⁰²

The Rehnquist Court did not consistently follow Justice White's opinion in *Guardians Association*.¹⁰³ In subsequent cases, the Court did not always hold that states must possess detailed notice of their responsibilities to be held liable for compensatory damages.¹⁰⁴ For example, in 1992, in *Franklin v. Gwinnett County Public Schools*, the plaintiff sought damages under Title IX after her school district intentionally disregarded her complaints of a teacher's sexual harassment.¹⁰⁵ The majority opinion held Spending Clause statutes do not need to give notice of monetary damages when a recipient intentionally violates the legislation, even if the legislation imposes conditions on the recipient.¹⁰⁶ The

courts usually find that the proper remedy is to protect the reasonable beliefs of the injured party. *Id.* Thus, courts seek to put the injured party in the position that they would have been in had the contract not been breached. *Id.*

¹⁰² *Guardians Ass'n*, 463 U.S. 582, 584 (1983). (stating that individuals can only be made whole by retrospective relief, which Justice White argues against in his opinion).

¹⁰³ See Bagenstos, *supra* note 29, at 399 (stating that not all decisions made by the Supreme Court dictate that states must have precise notice of the obligations they must follow).

¹⁰⁴ See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (holding that funding recipients are given adequate notice of potential liability if they failed to respond to the discriminatory acts of certain third-party members by the regulatory scheme surrounding Title IX); Bagenstos, *supra* note 29, at 399 (stating that other Supreme Court cases do not require states to be given detailed notice of the exact duties that they have).

¹⁰⁵ 503 U.S. 60, 62, 64 (1992). In *Franklin*, the student alleged her teacher sexually harassed her and that the school ignored all complaints that she made. *Id.* at 63–64. The student alleged that the teacher asked her questions about sexual experiences and whether she would ever have sexual intercourse with a man much older in age. *Id.* at 63. Moreover, the complaint alleges that during the student's junior year, he took her out of class three times and brought her to his office, where she was forced to have intercourse with him. *Id.* Importantly, the plaintiff alleged that despite knowing of the teacher's harassment, other teachers and school workers did not act. *Id.* at 63–64. Instead, they actively dissuaded the plaintiff from taking legal action against the teacher. *Id.* at 64; see also Terry, *supra* note 24, at 716 (stating that Gwinnett County School District stopped investigating the teacher once he agreed to resign from teaching if all matters awaiting decision against him stopped). The plaintiff argued that Title IX gave her a right to recover damages against the school system because it intentionally disregarded the sexual harassment. *Franklin*, 504 U.S. at 64.

¹⁰⁶ See *Franklin*, 504 U.S. at 74–75 (ruling that the issue of notice was not implicated because the discrimination was intentional). Writing for the majority, Justice White stated that clearly Congress did not want federal money to be spent in support of discriminatory actions that its legislation sought to avoid. *Id.* at 75. Rather than citing *Dole*, the Court relied on *Pennhurst* for its reasoning. See *id.* at 74–75 (using *Pennhurst* to analyze which remedies are available in Spending Clause cases); Huberfeld, *supra* note 75, at 454 n.55 (noting that the Court did not use *Dole* in its analysis). Concurring in judgment, Justice Scalia raised concern over implied rights of action. *Franklin*, 503 U.S. at 77 (Scalia, J., concurring). Justice Scalia argued that when the Court implies a right of action under Spending Clause legislation, the Court should also imply a limitation on a plaintiff's available remedies. *Id.* Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas are sometimes called the "states' rights five," but in cases involving the Spending Clause, they were called the "states' rights four" because Justice O'Connor voted with the Justices favoring individual

Court in *Franklin* did not rely on the analogy to contract law in its analysis.¹⁰⁷ To decide what type of relief should be granted to the plaintiff, the Court held that the correct inquiry is to consider whether monetary damages provide an acceptable remedy for the plaintiff's harm.¹⁰⁸ Therefore, the plaintiff, a third-party beneficiary to Title IX, was able to receive monetary relief.¹⁰⁹

In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held in a 5–4 decision that a school district can be liable for damages under Title IX for “student-on-student” sexual harassment, even though the statute does not explicitly state a cause of action.¹¹⁰ Authoring the majority opinion, Justice O’Connor stated that Spending Clause legislation such as Title IX must provide states with “adequate notice” of potential types of liability for a federal funding recipient to be held responsible under the statute.¹¹¹ The Court held that the Title IX regulatory scheme gave recipients notice of poten-

rights. Huberfeld, *supra* note, 30 at 454 n.55 (citing Lynn A. Baker, *The Future of Federalism?* *Pierce County v. Guillen as a Case Study*, 50 N.Y.L. SCH. L. REV. 699, 700 n.4 (2006)).

¹⁰⁷ See *Franklin*, 504 U.S. at 74–75 (stating that the issue of notice less relevant in intention discrimination cases); Engdahl, *supra* note 52, at 511 (stating that Justice White did not champion the contract law analogy in *Franklin*).

¹⁰⁸ See *Franklin*, 503 U.S. at 76 (stating that the Court should first consider whether monetary damages remedy the problem before looking at equitable relief). The *Franklin* decision reintroduced the presumption that remedies could be available in antidiscrimination Spending Clause cases if the statutes did not oppose them. Terry, *supra* note 24, at 726.

¹⁰⁹ *Franklin*, 503 U.S. at 76. A third-party beneficiary is defined as someone outside of the contracting parties who still benefits from the terms of the contract being performed. *Beneficiary*, BLACK’S LAW DICTIONARY (11th ed. 2019). At the time of the *Franklin* decision, many news outlets were stunned by how sweeping the *Franklin* decision seemed to be. See, e.g., Linda Greenhouse, *Court Opens Path for Student Suits in Sex-Bias Cases*, N.Y. TIMES (Feb. 27, 1992), <https://www.nytimes.com/1992/02/27/us/court-opens-path-for-student-suits-in-sex-bias-cases.html> [<https://perma.cc/B7EK-CWB8>] (stating that the 9–0 decision was “surprisingly broad”). The case came at a time where the Court had been curbing the breadth of civil rights laws. *Id.* After this decision, many women’s rights organizations believed that Title IX could be transformed into a powerful litigatory tool to fight against sex-based discrimination on school campuses. *Id.*

¹¹⁰ 526 U.S. 629, 653 (1999). In this case, the plaintiff alleged that her daughter, a fifth-grade student, was harassed by a classmate. *Id.* at 633. As these incidents occurred, the daughter and mother both informed the daughter’s classroom teacher and the principal, but the plaintiff alleges that the school did little to remedy the situation. *Id.* at 634. The harasser was criminally charged with sexual battery and pleaded guilty. *Id.* The plaintiff sued the school district under Title IX for its deliberate indifference to her daughter being sexually harassed. *Id.* at 635–36. The District Court for the Middle District of Georgia dismissed the claim, believing that the school district could not be held liable for student-on-student conduct, and the U.S. Court of Appeals for the Eleventh Circuit affirmed this decision. *Id.* at 633. In 1998, in *Gebser v. Lago Vista Independent School District*, the Court held that for cases where teachers were harassing students, school districts could not be vicariously liable under Title IX because they were not on notice of this standard of liability. 524 U.S. 274, 290–91 (1998). Under other enforcement schemes, school districts were protected by a deliberate indifference standard. *Id.*

¹¹¹ See *Davis*, 526 U.S. at 640 (stating that damages under private rights of action are only available when federal funding recipients were given adequate notice of potential liability for the recipient’s conduct). Notably, Justice O’Connor joined the liberal block of Justices consisting of Justices Stevens, Souter, Ginsburg, and Breyer to constitute the majority. Bagenstos, *supra* note 29, at 401.

tial liability if those recipients failed to respond to the prejudicial acts of specified third-party members.¹¹²

Justice Kennedy, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, wrote the dissent in *Davis*.¹¹³ The dissent argued for a stricter notice requirement for Spending Clause legislation than adequate notice.¹¹⁴ Justice Kennedy opened with a bleak warning about the future of federalism.¹¹⁵ He argued that under a broad reading of *Dole*, Congress would be able to use its spending power to carry out objectives beyond the scope of the powers enumerated in Article I of the Constitution.¹¹⁶ Justice Kennedy then used the *Pennhurst* decision to assert that Congress should communicate with a clear voice to protect federalism, not out of a theoretical sense of contractual fairness.¹¹⁷

The dissent also worried about implied rights of action because the Court needed to speculate about Congress's intent where Congress had not directly spoken.¹¹⁸ The dissent believed that the scope of damages liability was a significant factor for schools when considering whether to receive federal funds.¹¹⁹

¹¹² *Davis*, 526 U.S. at 643. The majority pointed to how the Department of Education compels federal funding recipients to oversee third parties for discrimination in certain situations. *Id.* at 643–44. In a similar case in 2005, in *Jackson v. Birmingham Board of Education*, the Court held that Title IX prohibits retaliation despite the statute only disallowing sex-based discrimination. 544 U.S. 167, 173 (2005) (quoting 20 U.S.C. § 1681(a) (2000)). Writing for the majority again, Justice O'Connor found that the school board should have been on notice of the prohibition of retaliation based on the Court's other decisions that interpreted Title IX to allow private rights of actions to challenge various forms of intentional sex-based discrimination. *Id.* at 183. The Court relied on (1) regulations that prohibited retaliation under Title IX that were in place for nearly thirty years and (2) the universality in which U.S. Courts of Appeals found that Title IX covered retaliation. *Id.* Writing in dissent, Justice Thomas asserted that sex-based discrimination does not clearly include retaliation, that no prior Supreme Court case held that retaliation was a form of intentional sex discrimination under Title IX, and that the regulation the majority referred to did not state that Title IX banned retaliation. *Id.* at 191–92 (Thomas, J., dissenting).

¹¹³ 526 U.S. at 654 (Kennedy, J., dissenting).

¹¹⁴ *See id.* at 655 (arguing that funding recipients needed clear notice of the conditions that they were obligated to adhere to before accepting funds); Huberfeld, *supra* note 30, at 453 (stating that the dissent in *Davis* shows the "states' rights" justices moving toward the clear notice requirement).

¹¹⁵ *See Davis*, 526 U.S. at 654–55 (Kennedy, J., dissenting) (arguing that a broad reading of *Dole* will give the federal government too much power).

¹¹⁶ *See id.* (arguing that Congress will be able to enact legislation that is usually reserved to the states). Justice Kennedy argued that the Spending Clause possesses the capacity to destroy the balance between national and local governments by allowing the federal government to reach into spheres that are traditionally controlled by local governments and that Congress would otherwise be unable to reach. *Id.*

¹¹⁷ *See id.* at 655 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (contending that the Court wants Congress to write clearly to protect federalism, not to protect contract rights)).

¹¹⁸ *See id.* at 656 (stating that what is most alarming about *Davis* is that Title IX does not explicitly give private parties a cause of action and that any right to sue under these statutes was inferred by courts).

¹¹⁹ *See id.* (arguing that potential liability is undoubtedly a controlling factor for schools considering accepting federal funds).

Justice Kennedy argued that the Court, therefore, should not imply a private cause of action unless it is certain that Congress purposely tried to create the implied cause of action, so states were clearly warned of their potential liability.¹²⁰ He believed that the adequate notice standard purported by the majority damaged the existing safeguard of clear notice.¹²¹ This dissent, however, was the first effort by members of the Court to construe *Pennhurst* as creating a clear notice requirement.¹²²

In 2002, in *Barnes v. Gorman*, the Supreme Court asked whether a third-party beneficiary to the RA and ADA could recover punitive damages.¹²³ Writing for a unanimous Court, Justice Scalia held that punitive damages are unavailable in private recovery under Title II of the ADA and Section 504 of the RA.¹²⁴ Justice Scalia did not reference the adequate notice standard developed

¹²⁰ *Id.* at 656–57.

¹²¹ *See id.* at 655 (stating aggressively that “[w]hile the majority purports to give effect to these principles, it eviscerates the clear-notice safeguard of our Spending Clause jurisprudence”). The dissent argued that the majority’s ruling could hold funding recipients accountable for peer-to-peer “teasing” under Title IX. *Id.* at 677–78. The majority put this fear to rest by acknowledging the strict limitations on a recipient’s potential liability under Title IX. *Id.* at 652 (majority opinion). In attempting to ridicule the majority’s opinion by claiming that teasing may bring about liability, the dissent diminishes the gravity of sexual harassment. *See id.* (“We trust that the dissent’s characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.”). Because of the increasing turmoil in the Middle East, college campuses have seen more instances of student-on-student harassment based on ideological differences than usual. *See* David French (Opinion), *The Laws of Campus Culture War*, N.Y. TIMES (Nov. 2, 2023), <https://www.nytimes.com/2023/11/02/opinion/columnists/campus-speech-culture-war.html> [https://perma.cc/M8EC-P7EY] (explaining how the death and chaos stemming from the crisis in the Middle East has caused many college campuses to be disrupted). Under the *Davis* decision, students can sue their schools for the unlawful harassment they have experienced, such as physical threats. *Id.* Columnists write that certain behavior, such as protestors banging on the locked doors of libraries to intimidate the students inside, may implicate Title VI. *Id.*

¹²² *See* Huberfeld, *supra* note 30, at 453 (stating that the *Davis* dissent seems to mark the first instance of states’ rights justices attempting to use *Pennhurst* to establish the clear notice standard). The *Davis* dissent is now the majority view in the Roberts Court. *Id.* at 454.

¹²³ 536 U.S. 181, 183 (2002). The plaintiff, Jeffrey Gorman, was paraplegic and confined to a wheelchair. *Id.* After being arrested for trespassing, he was placed into a police van that did not have the capacity to transfer him in his wheelchair. *Id.* He was injured during transportation due to the improper facilities of the van. *Id.* Upon suing the police station under Section 504 of the RA and the ADA, the jury awarded Gorman one million dollars in compensatory damages and \$1.2 million in punitive damages. *Id.* at 184. The question before the Supreme Court was whether the jury was able to award punitive damages to Gorman, a private individual, under Section 202 of the ADA or Section 504 of the RA. 42 U.S.C. § 12132; 29 U.S.C. § 794(a); *Barnes*, 536 U.S. at 184–85.

¹²⁴ *Barnes*, 536 U.S. at 189. Justice Scalia stated that the Court frequently applied the analogy to contract law developed in *Pennhurst* to Spending Clause statutes that forbid discrimination. *Id.* at 186 n.1 (citing *Davis*, 526 U.S. at 640); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998)). Although the ADA is not Spending Clause legislation, it incorporates Section 504 of the RA, which covers remedies and is based on Title VI. Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1087 (2010). Therefore, the Court employed the analysis it uses in Spending Clause decisions to decide *Barnes*. *Id.*

by Justice O'Connor.¹²⁵ Instead, he relied on the contract law analogy and considered whether Congress spoke in "clear terms."¹²⁶ The Court concluded that punitive damages cannot be recoverable under Spending Clause legislation because such damages are not available as traditional remedies for breach of contract.¹²⁷ The Court held that by accepting federal funds, recipients were not on notice of the risk of being liable for punitive damages.¹²⁸ The Court determined that states would not accept federal funding if they knew that they would be subjected to such a significant, unforeseeable amount of liability.¹²⁹

This decision marked the first time that the Court limited the available remedies under Spending Clause legislation to contract remedies.¹³⁰ Scholars noted that the Court's characterization of *Davis*, *Pennhurst*, and *Gebser* confused the notice requirement by not recognizing how these decisions relied on the statutory context and judicial decisions that gave recipients notice of possible liability.¹³¹ Instead, the Court concentrated on how the analogy to contract

¹²⁵ See *Barnes*, 536 U.S. at 187 (citing *Davis*, 526 U.S. at 642; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24–25 (1981) (referencing the need for "clear terms" and stating the contract law should relate to the scope of available remedies)).

¹²⁶ See *id.* (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74–75 (1992) (stating that the Court has utilized the contract law analogy when considering the availability of damages in Spending Clause cases)).

¹²⁷ See *id.* at 187–88 (first citing RESTATEMENT (SECOND) OF CONTRACTS § 355 (AM. L. INST. 1981; then citing 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 370 (8th ed. 1891) (holding that punitive damages, unlike injunctions and compensatory damages, are not traditionally available in breach of contract cases)).

¹²⁸ See *id.* at 188–89 (reasoning that recipients that violate the terms of Spending Clause legislation are only liable for the harm done that violates the terms of the contract with the federal government and stating "that wrong is 'made good' when the recipient *compensates* the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure"). The Court noted that its decision is consistent with the well-established principle that "'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'" *Id.* at 189 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

¹²⁹ *Id.* at 188; see also Huberfeld, *supra* note 91, at 436 (noting that the majority opinion also highlighted that the parties to the contract, the federal government and federal funding recipient, are "made whole" once the state satisfies its obligations).

¹³⁰ See *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 200, 312 (2002) (citing *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 287 (1998) (stating that Justice Scalia's claim that the Court was applying principles from *Gebser v. Lago Vista Independent School District* was inaccurate when considering the context of the Court's rationale in that decision)). In 1998, in *Gebser*, the Court stated in *dicta* that the contractual nature of Spending Clause legislation may restrict available remedies, but the *dicta*'s context shows that the Court was addressing the issue of the clear statement rule and its relation to monetary damages. 524 U.S. at 287; *Constitutional Law*, *supra*.

¹³¹ See *The Supreme Court, 2021 Term—Leading Case: Federal Statutes*, 136 HARV. L. REV. 440, 446 (2022) (arguing that the Court's use of these cases clouded the notice requirement by removing important context surrounding the Court's decisions).

law previously limited liability, rather than how the Court previously used the analogy.¹³²

Concurring in judgment, Justice Souter accepted that the analogy to contract law was applicable when considering the availability of punitive damages.¹³³ Justice Souter agreed that punitive damages can be unpredictable, immense, and unrelated to foreseeable compensable harm.¹³⁴ However, his concurrence raised concern about using the contract law analogy in other circumstances.¹³⁵ For example, he believed that the contract law analogy should not be applied to other areas of private recovery in Spending Clause cases.¹³⁶

Also concurring in judgment, Justice Stevens argued that the principles of contract law were not applicable to this case because the conduct of the police station was tortious.¹³⁷ Instead, Justice Stevens argued that the case should have been decided by applying the legislative history of Section 504 of the RA and Title II of the ADA, which both suggest that Congress did not intend to allow punitive damages as a remedy.¹³⁸ Moreover, he disapproved of the Court's broad reliance on the contract law analogy as a determinative tool.¹³⁹ The concurrence cautioned that using the contract law analogy as a principal factor in the *Barnes* holding may have widespread consequences in future cas-

¹³² See *id.* (arguing that the Court focused on the existence of the contract law analogy in previous cases rather than the application of that analogy to those cases).

¹³³ *Barnes*, 536 U.S. at 190 (Souter, J., concurring). Justice O'Connor joined Justice Souter in his concurring opinion. *Id.*

¹³⁴ *Id.* A study conducted by a group of experts found that punitive damages can be arbitrary and unpredictable at times because people struggle to plot normative judgments, like attitudes of disapproval, onto dollar amounts. Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2142 (1998).

¹³⁵ *Barnes*, 536 U.S. at 191.

¹³⁶ *Id.* Justice Souter argued that the contract law analogy may be irrelevant to determining the correct measure of compensatory damages. *Id.* In another case decided in 2002, in *Gonzaga University v. Doe*, the Court found that the Family Educational Rights and Privacy Act could not be enforced under Section 1983. 536 U.S. 273, 276 (2002); 42 U.S.C. § 1983. The Court used the *Pennhurst* decision that stated that the typical remedy for noncompliance with conditions is not a private cause of action but rather termination of funds. *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)). The Court also relied on *Pennhurst's* language that required Congress to speak with a clear voice and show an unambiguous intent to grant rights to third parties. *Id.* (quoting *Pennhurst*, 451 U.S. at 17). The Court held that the statute's language, which focused on prohibiting the Department of Education from funding institutions that would release education records, did not unambiguously give individuals the right to be free from the release of their records. *Id.* at 287–88.

¹³⁷ *Barnes*, 536 U.S. at 192 (Stevens, J., concurring). Justice Stevens was joined by Justice Ginsburg and Justice Breyer. *Id.* Justice Stevens argued that the Court of Appeals' decision could have been reversed under three distinct theories: (1) local governments are not exposed to punitive damages without clear congressional intent, (2) punitive damages were not available as a remedy under Section 504 of RA and Title II of ADA, or (3) using the *Pennhurst* decision to conclude that the available remedies for Spending Clause legislation should be defined by contract law, so third-party beneficiaries cannot recover punitive damages. *Id.*

¹³⁸ See *id.* at 191 (noting that the petitioners only argued under this theory and remarking that the legislative history of both statutes show that punitive damages were not available).

¹³⁹ *Id.* at 192–93.

es.¹⁴⁰ For example, prior to the *Barnes* decision, a lower court used the contract law analogy to incorrectly conclude that Spending Clause legislation is not the “supreme law of the land.”¹⁴¹

Ultimately, the Rehnquist Court interpreted Congress’s spending power broadly, but it limited the scope of Spending Clause legislation in holding that funding recipients cannot be held liable for punitive damages.¹⁴²

D. The Roberts Court’s Interpretation of Congress’s Spending Power

When John Roberts became the Chief Justice of the Supreme Court in 2005, many scholars speculated about how the Court would decide Spending Clause cases.¹⁴³ In 2006, in *Arlington Central School District Board of Education v. Murphy*, the Roberts Court narrowed Congress’s spending power.¹⁴⁴ The Court considered whether a family suing under the Individuals with Disabilities Education Act (IDEA) could recover fees for their expert witness.¹⁴⁵ IDEA did not explicitly authorize recovery of experts’ fees but did allow recovery of attorneys’ fees.¹⁴⁶ Justice Alito, who took Justice O’Connor’s seat, wrote for

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 193 n.2 (illustrating the dangers of the broad use of the contract law analogy by referencing a case where the U.S. District Court for the Eastern District of Michigan found that Spending Clause statutes are not the “supreme law of the land”). Ultimately, the U.S. Court of Appeals for the Sixth Circuit rejected the district court’s analysis. *Id.* (citing *Westside Mothers v. Haveman*, 289 F. 3d 852 (2002)).

¹⁴² *See id.* at 187–88 (majority opinion) (holding that punitive damages are not recoverable by private parties under Spending Clause legislation); Bagenstos, *supra* note 29, at 348 (stating that the Rehnquist Court never limited Congress’s spending power).

¹⁴³ *See, e.g.,* Bagenstos, *supra* note 29, at 348, 350 (arguing that the Rehnquist Court did not produce the federalist revolution that many hoped it would and predicting that the Roberts Court would restrict Congress’s spending power). Some scholars predicted that the Roberts Court would constrain the enforceability of Spending Clause legislation by distorting the interpretation of existing precedent. *Id.* at 350.

¹⁴⁴ *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293–94 (2006) (holding that Individuals with Disabilities Education Act (IDEA) does not give its recipients clear notice of potential liability that will require the recipients to pay expert’s fees, and thus, the defendants are not entitled to pay them). IDEA gives federal funding to support students with disabilities and gives students who do not receive proper resources and support from their public schools causes of action. 20 U.S.C. § 1415(i)(2)(A). Notably, the Court had not always analyzed IDEA under the principles of the Spending Clause. *See Arlington*, 548 U.S. at 316 (Breyer, J., dissenting) (stating that the Court regularly decides IDEA cases without referencing the Spending Clause).

¹⁴⁵ *See Arlington*, 548 U.S. at 295 (majority opinion) (stating that the question before the Court was whether Congress allowed parties to be compensated for experts’ fees under IDEA). The plaintiffs in this case were parents of a child with disabilities who hired a special education consultant during their lawsuit against Arlington Central School District. *Id.* at 294. The parents alleged that the school district violated IDEA and sought the cost of their son’s tuition. *Id.* The parents prevailed, and the District Court for the Southern District of New York awarded part of the \$29,350 in expert fees that the parents sought from the school district. *Id.*

¹⁴⁶ *See id.* at 297 (acknowledging that there is no provision in IDEA that states that plaintiffs may recover experts’ fees).

the majority.¹⁴⁷ Justice Alito used the contract law analogy to reason that federal funds recipients are effectively entering into a contract with the federal government, so all conditions attached to the funds must be defined.¹⁴⁸ Using the clear notice analysis, the majority held that the plain meaning of the statute's terms could only permit attorneys' fees, so the funds recipient was not accountable for paying the experts' fees.¹⁴⁹ Therefore, rather than relying on principles of contract law as sources of notice, the Court relied on the statutory language of IDEA.¹⁵⁰ Unlike Justice O'Connor's Title IX opinions, Justice Alito did not give weight to the legislative history surrounding the statute.¹⁵¹

Justice Ginsberg's concurrence and Justice Breyer's dissent in *Arlington* took aim at the clear notice requirement that the majority derived from *Pennhurst*.¹⁵² Justice Ginsburg argued that the Court took the clear notice language from *Pennhurst* out of context and inappropriately applied it to *Arlington*.¹⁵³ In *Pennhurst*, the Court was focused on the creation of a new, unex-

¹⁴⁷ *Id.* at 293.

¹⁴⁸ See *id.* at 296 (quoting *Pennhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1, 17 (1981) (utilizing the contract analogy in *Pennhurst* to consider the terms of IDEA from the viewpoint of the federal funding recipient)).

¹⁴⁹ See *id.* (stating that the Court would consider IDEA from the perspective of the state and that it would evaluate the text of IDEA to see if the clear notice standard was met). But see Galle, *supra* note 61, at 885–86 (stating that state representatives were aware that they may have to pay experts' fees under IDEA because they were a part of IDEA's drafting process and that very question arose during that process). The Court only considered the plain meaning of the legislation. *Arlington*, 548 U.S. at 296 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Some commentators believe that the *Arlington* decision restrains parents from bringing legal action against schools that do not follow their children's Individualized Education Programs (IEP). Leslie Reed, *Is a Free Appropriate Public Education Really Free? How the Denial of Expert Witness Fees Will Adversely Impact Children with Autism*, 45 SAN DIEGO L. REV. 251, 302 (2008). Most households, especially low-income families, cannot afford to pay these expert fees, and the *Arlington* holding forecloses the chance that these fees will be awarded to the family suing. *Id.* Therefore, important issues with IEPs now may go unremedied. See *id.* (stating that fewer parents may be able to afford filing suit under IDEA post-*Arlington*).

¹⁵⁰ See *Leading Case: Federal Statutes*, *supra* note 131 (arguing that the *Arlington* decision did not give more weight to the contract law analogy and instead relied on the statutory language of IDEA).

¹⁵¹ See Huberfeld, *supra* note 30, at 470 (analyzing how Justice Alito gave little weight to the legislative history surrounding the word "cost" in IDEA that potentially included more than attorneys' fees). Scholars argue that Justice Alito's long discussion of the clear notice requirement reflected his preference for a strict reading of *Pennhurst* and suggest that certain decisions may have been decided differently had Justice Alito joined the bench earlier. Bagenstos, *supra* note 29, at 401.

¹⁵² See *Arlington*, 548 U.S. at 304–05 (Ginsberg, J., concurring) (noting that the cases the majority relies on do not ask whether the Spending Clause legislation gives recipients clear notice of the terms of the program); *id.* at 317 (Breyer, J., dissenting) (arguing that the majority's use of the clear notice requirement is novel and does not follow precedent).

¹⁵³ See *id.* at 305 (Ginsberg, J., concurring) (stating that the *Pennhurst* Court was tasked with a more aggressive interpretation of a Spending Clause issue than the *Arlington* Court); see also Huberfeld, *supra* note 30, at 471 (stating how Justice Ginsberg was troubled by the "freshly articulated" clear notice requirement used by the majority).

pected condition for a program that was entirely unpredictable.¹⁵⁴ In contrast, in *Arlington*, the controversy only concerned the available remedies for a non-complying funding recipient.¹⁵⁵ Therefore, Justice Ginsberg found the clear notice requirement unfitting because funding recipients were less likely to be worried about this issue when accepting funding.¹⁵⁶ Instead of interpreting *Arlington* in terms of the Spending Clause, she argued that the Court should have reached its decision solely through interpreting the language of IDEA.¹⁵⁷

In his dissent, Justice Breyer noted that *Pennhurst* does not require every detail of Spending Clause legislation to be written out explicitly.¹⁵⁸ Instead, he stated that the basic question the Court should ask is whether states would have accepted federal funds if they knew the nature of the accompanying conditions.¹⁵⁹ Thus, his dissent interpreted *Pennhurst* as requiring Congress to give recipients notice of the legislation's purpose, rather than clear linguistic notice of every statutory condition.¹⁶⁰

¹⁵⁴ *Arlington*, 548 U.S. at 305 (Ginsberg, J., concurring) (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983)).

¹⁵⁵ See *id.* (arguing that the issue in *Arlington* does not concern the creation of a new program within IDEA, just the availability of damages).

¹⁵⁶ See *id.* (stating that the majority's use of the clear notice requirement is unconvincing given the issue at hand).

¹⁵⁷ See *id.* at 305–06 (citing 20 U.S.C. §§ 1415(i)(3)(B)–(G); 1415(d)(2) (arguing that the majority did not need to rely on the clear notice requirement because the provisions of the statute regarding attorneys' fees make no reference to educational experts)). Some commentators agree with Justice Ginsberg's argument that this decision could have been decided by statutory interpretation. Bagenstos, *supra* note 29, at 351. They argue that the majority strained itself to interpret the facts at hand under the clear notice requirement of the Spending Clause. *Id.*

¹⁵⁸ See *Arlington*, 548 U.S. at 317 (Breyer, J., dissenting) (maintaining that *Pennhurst*'s clear-statement requirement did not require spending legislation to be enacted with detailed precision). Justice Breyer's dissent focused on the meaning of "costs" in relation to the legislative history, purpose, and plain meaning of IDEA. *Id.* at 309–16. Based on this interpretation, Justice Breyer argued that Congress did not enact a statute to ensure educational equality that would not allow parents to hire education experts. *Id.* at 315–16; see also Huberfeld, *supra* note 30, at 472 (noting that Congress understood "costs" to comprise experts' fees and attorneys' fees and no member of Congress had fought that established conception of the term).

¹⁵⁹ *Arlington*, 548 U.S. at 317 (Breyer, J., dissenting).

¹⁶⁰ See *id.* at 318 (arguing that evaluating complex legislation through strict textual interpretation rather than legislative intent is ineffective). Ten years before the *Cummings* decision, the Roberts Court addressed another fundamental Spending Clause case that leaned on the *Pennhurst* decision. See Karen M. Tani, *The Pennhurst Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1206 (2022) (stating the importance of the *Pennhurst* case to *National Federation of Independent Business v. Sebelius*). In 2012, in *National Federation of Independent Business v. Sebelius*, the Supreme Court held that a Medicaid expansion provision of the ACA, which compelled states to expand Medicaid programs to all low-income Americans under the age of sixty-five or jeopardize losing existing Medicaid funding, was prohibited under the Spending Clause. See 567 U.S. 519, 580 (2012) (stating conditions that threaten material grants are not allowed under the Spending Clause). Chief Justice Roberts, Justice Rehnquist's former clerk during the *Pennhurst* decision, relied on *Pennhurst* to assert that the spending power does not allow the federal government to surprise states with retroactive conditions. *Id.* at 584; see Tani, *supra*, at 1205 (stating that Chief Justice Roberts clerked for Chief Justice Rehnquist). Chief Justice Roberts found that the Medicaid expansion

E. Factual History of Cummings v. Premier Rehab Keller, P.L.L.C.

Given the conservative composition of the Roberts Court and the Court's current emphasis on states' rights, today's Court has the ability to limit the breadth of Spending Clause legislation.¹⁶¹ In 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Supreme Court showed that it intends to do so.¹⁶² In 2016, Plaintiff Jane Cummings, who is legally blind and deaf, went to Defendant Premier Rehab Keller, P.L.L.C. (Premier) to schedule a physical therapy appointment.¹⁶³ Cummings asked Premier to provide her with an American Sign Language (ASL) interpreter during her physical therapy sessions.¹⁶⁴ Premier refused, stating that Cummings should provide her own interpreter or communicate with her physical therapist through lipreading, handwriting notes, and motioning.¹⁶⁵ After Cummings explained that her visual impairment made those options unavailable, Premier denied her an interpreter again.¹⁶⁶

In 2018, Cummings sued Premier in the U.S. District Court for the Northern District of Texas, claiming discrimination based on her disability and seeking relief under the ADA,¹⁶⁷ the RA,¹⁶⁸ the ACA,¹⁶⁹ and the Texas Human Re-

undermined state sovereignty and that the provision was coercive. *Sebelius*, 567 U.S. at 584. In her concurrence and partial dissent, Justice Ginsburg noted that Chief Justice Roberts used the logic of *Pennhurst* to hold that states must be able to anticipate changes that Congress may later make to Medicaid when they accept federal funding. *Id.* at 637 (Ginsburg, J., dissenting). Justice Ginsburg emphasized that the *Pennhurst* decision was the only case Chief Justice Roberts cited in support of this seemingly novel holding. *Id.* at 637–38.

¹⁶¹ See, e.g., Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [https://perma.cc/EMQ4-V49Q] (stating that during the 2021–2022 term, the Supreme Court produced more conservative holdings than in any other term since 1931; in sixty-two percent of decisions, the opinions of the conservative Justices prevailed). Moreover, in the 2021–2022 term, more cases were split 6–3 than any other year in the Court's modern history. *Id.* “Liberal” justices wrote more dissenting opinions during this term than they had during any other term of their careers, and there were fewer cases decided with unanimous opinions than usual. *Id.*

¹⁶² See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230 (2022) (holding that emotional distress damages are not recoverable under the RA or ACA). Premier Rehab Keller, P.L.L.C. (Premier) is subject to the RA and the ACA, which require that funding recipients not discriminate when providing services, because the entity receives federal reimbursements from Medicare and Medicaid for some of its services. *Id.* at 217.

¹⁶³ *Cummings v. Premier Rehab, P.L.L.C.*, No. 4:18-CV-649-A, 2019 WL 227411 at *1 (N.D. Tex. Jan. 16, 2019), *aff'd sub nom. Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673 (5th Cir. 2020), *aff'd*, 142 S. Ct. 1562 (2022). Cummings uses American Sign Language (ASL) as her predominant mode of communication and struggles to write, talk, and read in English. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 674 (5th Cir. 2020), *aff'd*, 212 L. Ed. 2d 552, 142 S. Ct. 1562 (2022).

¹⁶⁴ *Cummings*, 948 F.3d at 674.

¹⁶⁵ *Cummings*, 2019 WL 227411 at *1.

¹⁶⁶ *Id.* Cummings went to another provider for physical therapy but received below-standard care. *Id.* Despite Cummings's frustration and distress following her engagement with Premier, she still wanted to receive treatment at their facilities. *Id.*

¹⁶⁷ See 42 U.S.C. § 12182(a) (dictating that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, ad-

sources Code¹⁷⁰ (THRC).¹⁷¹ Cummings alleged that Premier's refusal to give her an ASL interpreter caused her embarrassment, disturbance, and emotional distress.¹⁷² The district court dismissed Cummings's claims, asserting that damages are not recoverable under Title III of the ADA and that emotional distress damages are not available under Section 504 of the RA or Section 1557 of the ACA.¹⁷³ The U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal of Cummings's claims.¹⁷⁴

In a 6–3 decision, the Supreme Court affirmed the Fifth Circuit's holding.¹⁷⁵ Chief Justice Roberts, who once clerked for Chief Justice Rehnquist, wrote the Court's opinion and dutifully cited *Pennhurst* as the first authority.¹⁷⁶ The Court maintained that the use of contract law was solely for the purpose of analogizing, yet then relied on contract law treatises, Restatement provisions, and scholarship throughout the decision.¹⁷⁷ Further, the Court applied contract

vantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation”).

¹⁶⁸ See 29 U.S.C. § 794(a) (stating that no one with a disability can be discriminated against, rejected from participation, or denied benefits of a program that received funding from the federal government).

¹⁶⁹ See 42 U.S.C. § 18116(a) (dictating that a person must not be denied access to, be refused the benefits of, or be discriminated against in any health program that receives federal funds).

¹⁷⁰ See TEX. HUM. RES. CODE ANN. § 121.003 (West 2015) (stating that individuals with disabilities must have the same rights as individuals without disabilities in public facilities in Texas). Cummings voluntarily withdrew her claim under the Texas Human Resources Code. *Cummings*, 2019 WL 227411 at *1.

¹⁷¹ *Cummings*, 948 F.3d at 674–75.

¹⁷² *Cummings*, 2019 WL 227411 at *4.

¹⁷³ *Id.*; 42 U.S.C. § 12182(a); 29 U.S.C. § 794(a); 42 U.S.C. § 18116(a). The United States District Court for the Western District of Texas equated emotional distress damages to punitive damages and determined that emotional distress damages do not compensate plaintiffs for their suffering but rather punish defendants for their actions. *Cummings*, 2019 WL 227411 at *4 (citing *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, 652 F. Supp. 2d 1211, 1224–25 (D.N.M. 2008)); cf. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198–99 (11th Cir. 2007) (finding that emotional distress damages are both foreseeable results of intentional discrimination and are designed to restore plaintiffs to original position, and holding that foreseeability is an established principle of contract law). Because punitive damages were held to be unavailable in *Barnes v. Gorman*, the district court held that emotional distress damages are similarly barred. *Cummings*, 2019 WL 227411 at *4 (citing *Barnes v. Gorman*, 536 U.S. 181, 187–89 (2002)).

¹⁷⁴ *Cummings*, 948 F.3d at 680. Relying on the analogy to contract law, the Fifth Circuit reasoned that federal-funding recipients could not be on notice for emotional distress damages when a recipient engages in intentional discrimination because emotional distress damages are rarely available in breach of contract claims. *Id.* at 678.

¹⁷⁵ *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230 (2022).

¹⁷⁶ *Id.* at 216 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); see Tani, *supra* note 160, at 1205. Scholars have emphasized that in *Barnes v. Gorman*, Justice Stevens warned that the contract law analogy should not be given too much weight in the context of antidiscrimination Spending Clause decisions. *Id.*; *Barnes*, 536 at 192 (Stevens, J., concurring).

¹⁷⁷ *Cummings*, 596 U.S. at 225. The Court pushed back heavily on the plaintiff's argument that recipients should be on notice for lesser-known rules found in contract law, such as the ability to recover for emotional distress damages. *Id.* at 225–26. Chief Justice Roberts purported that “such a

law to consider whether prospective recipients anticipated facing liability for emotional distress damages when deciding whether to accept funding.¹⁷⁸ Citing *Barnes* and *Pennhurst*, Chief Justice Roberts found that the Court did not need to consider scholarship nor survey case precedent because hornbook contract law determined which remedies were available.¹⁷⁹ The Court's use of contract law was limited to general contract law principles, rather than any lesser-known contract law provisions that favored the availability of emotional distress damages.¹⁸⁰ The Court held that recipients are only on notice for traditional contract law remedies, so emotional distress damages are not available to plaintiffs.¹⁸¹

In a short, two-paragraph concurrence written by Justice Kavanaugh and joined by Justice Gorsuch, the Justices showed their disdain toward the contract law analogy.¹⁸² Rather than relying on contract law to determine which remedies are available, the Justices suggested a separation of powers approach.¹⁸³ The Justices seemed interested in limiting implicit remedies, which individuals rely on when suing under pieces of antidiscrimination that do not have explicit causes of action.¹⁸⁴ The concurrence, therefore, suggests a broader restriction of liability than the majority.¹⁸⁵

diluted conception of knowledge has no place in our Spending Clause jurisprudence.” *Id.* at 226. In its amicus curiae brief, the United States argued that unlike punitive damages, which were so unpredictable that federal funding recipients would not willingly accept federal funding had they known punitive damages attached, states continually accepted federal funding even after exposure to emotional distress damages. Brief for the United States as Amicus Curiae at 9, *Cummings v. Premier Rehab Keller*, P.L.L.C., 142 S. Ct. 1562 (2022) (No. 20-219).

¹⁷⁸ See *Cummings*, 596 U.S. at 220 (stating that the Court needed to consider implicit remedies because neither the ACA nor the RA state explicit remedies for discrimination). Commentators have noted that in the oral argument transcript, the word contract was spoken “ninety-seven times in the eighty-nine-page transcript.” Tani, *supra* note 160, at 1205 n.354.

¹⁷⁹ See *Cummings*, 596 U.S. at 225 (stating that the Court does not need to consider treatises or look to how states have interpreted Spending Clause legislation). Despite referencing the contract law analogy throughout the decision, Chief Justice Roberts stated that the Court did not need to draw on theoretical analogies to work out which remedies are available in the case. *Id.*

¹⁸⁰ See *id.* at 225–26 (stating that the case law surrounding the contract law analogy does not support using all areas of contract law, but merely general principles of contract law).

¹⁸¹ See *id.* at 223 (citing *Barnes*, 536 U.S. at 187 (emphasizing that less common remedies available in contract law are not applicable to Spending Clause cases)). The Court relied on *Barnes*, which held that punitive damages, despite being periodically awarded to parties in typical contract cases, were unavailable to individuals suing under antidiscrimination Spending Clause legislation. *Id.* at 220 (citing *Barnes*, 536 U.S. at 187). The Court stated that compensatory damages and injunctions are traditionally available under contract law. *Id.* at 221 (citing *Barnes*, 536 U.S. at 187).

¹⁸² See *id.* at 230–31 (Kavanaugh, J., concurring) (arguing that the contract law analogy is the wrong way to determine remedies and rights of action in cases involving implied causes of action).

¹⁸³ See *id.* (arguing that the Court must focus on separation of power principles and leave questions of rights of actions to the legislature).

¹⁸⁴ *Leading Case: Federal Statutes*, *supra* note 131, at 448–49.

¹⁸⁵ See *id.* at 449 (arguing that the concurrence is seeking a more restrictive view of remedies).

Writing in dissent, Justice Breyer endorsed the contract law analogy but rejected the majority's application of it.¹⁸⁶ The dissent argued that prospective recipients are on notice for emotional damages because the remedy is available for contract breaches that are prone to causing emotional harm.¹⁸⁷ Justice Breyer contended that the purpose of antidiscrimination statutes such as Section 1557 of the ACA is to prevent emotional injuries, so emotional damages should be an available remedy.¹⁸⁸ The dissent concluded by noting how the majority's holding is inconsistent with other antidiscrimination statutes that allow emotional distress damages as a remedy.¹⁸⁹

Through *Cummings*, the Roberts Court significantly limited the relief available in antidiscrimination Spending Clause cases and narrowed the sources that put funding recipients on notice of their obligations.¹⁹⁰

II. THE PURPOSE OF NOTICE IN SPENDING CLAUSE LEGISLATION

In 1981, in *Pennhurst State School & Hospital v. Halderman*, the U.S. Supreme Court provided a limited set of principles for statutory interpretation for Spending Clause legislation.¹⁹¹ The cases that followed limited congressional spending power and the available recovery under antidiscrimination legislation with implied rights of action.¹⁹² Section A of this Part discusses the

¹⁸⁶ *Cummings*, 596 U.S. at 231 (Breyer, J., dissenting). Justice Sotomayor and Justice Kagan joined Justice Breyer in dissent. *Id.* For most of his time on the Supreme Court, Justice Breyer did not promote the contract law analogy. *See, e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 317 (2006) (Breyer, J., dissenting) (quoting *Barnes*, 536 U.S. at 188–89 n.2 (arguing that the Court rejected holding that “suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to *all* issues that they raise”)). In *Arlington*, rather than solely relying on the explicit conditions that states agreed to, Justice Breyer looked at the legislative intent and the purpose behind IDEA. *See Arlington*, 548 U.S. at 318 (Breyer, J., dissenting) (analyzing IDEA as written and the legislative intent).

¹⁸⁷ *See Cummings*, 596 U.S. at 234–35 (Breyer, J., dissenting) (utilizing contract law treatises to show that emotional distress damages are available when that sort of loss can be predicted to occur under the contract).

¹⁸⁸ *Id.* at 235.

¹⁸⁹ *Id.* at 240; *see* 42 U.S.C. § 1981a(b)(3) (allowing compensatory damages for “emotional pain, suffering” and “mental anguish” under Title VII of the Civil Rights Act).

¹⁹⁰ *See Warden*, *supra* note 37 (arguing that the *Cummings* decision has made relief impossible for millions of Americans). In light of *Cummings*, scholars argue that plaintiffs should assert they have suffered physical pain as a result of a funding recipient's discrimination. Laura L. Dunn, *Much Ado About Cummings: The Curtailment of Civil Rights Enforcement and Its Impact on Title IX*, 56 CREIGHTON L. REV. 277, 296 (2023) (quoting *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 587 n.22 (1983)). Because it can be difficult to discern the line between physical and emotional pain, courts have struggled to make this distinction. *Id.*

¹⁹¹ *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (stating that conditions for federal funds must be stated unambiguously and that states must have the ability to reject terms and funds).

¹⁹² *See Tani*, *supra* note 160, at 1207 (asserting that the *Pennhurst* opinion, although seemingly narrow in application, led to a series of decisions that have constrained Congress's spending power).

scholarly debates around the purpose of the clear notice requirement and the contract law analogy.¹⁹³ Section B demonstrates how the contract law analogy has played an increasing role in the Supreme Court's jurisprudence, and the arguments for and against this increased role.¹⁹⁴ Section C outlines possible sources of notice for states and local government that agree to spending programs that require antidiscrimination conditions.¹⁹⁵

A. The Purpose of the Clear Notice Requirement and the Contract Law Analogy

The Supreme Court in *Pennhurst* used the phrase “clear notice” to reiterate that ambiguous Spending Clause legislation should be interpreted consistently with Congress's intent and with federal funding recipients' reasonable expectations.¹⁹⁶ Furthermore, by analogizing the federal and state governments to parties in a contract, the Court focused on whether funding recipients consented to certain conditions rather than more complex issues involving states' rights.¹⁹⁷ Since this fundamental decision, scholars justified these requirements on the grounds of basic fairness, the importance of notice, and the need to protect states from overreach by the federal government.¹⁹⁸

Based on these justifications, some commentators have pushed for stricter interpretations of the clear notice requirement and contract law analogy.¹⁹⁹ Proponents of rigorous states' rights argue that some federal grants are so important to state functioning that states cannot refuse their terms.²⁰⁰ Because

Scholars believe that the cases that followed *Pennhurst* illustrate how the U.S. Supreme Court can effectively limit the impact of legislation in a gradual manner. *Id.* at 1210.

¹⁹³ See *infra* notes 196–207 and accompanying text.

¹⁹⁴ See *infra* notes 208–227 and accompanying text.

¹⁹⁵ See *infra* notes 228–236 and accompanying text.

¹⁹⁶ See *Pennhurst*, 451 U.S. at 17, 25 (stating that federal funding objectives must be unambiguous and that in the case at hand, states did not have clear notice of the conditions attached to receiving funding); Seligmann, *supra* note 124, at 1114 (citing *Pennhurst*, 451 U.S. at 17 (arguing that *Pennhurst* was concerned with ensuring that states understood their obligations before accepting federal funding). Some legal experts contend that the Court's notice requirement used in Spending Clause cases is a recharacterization of the clear statement rule. *Id.* at 1070. The clear statement rule is not concerned with what conditions the federal government require states to follow. Bagenstos, *supra* note 29, at 406–07. Instead, the clear statement rule wants to ensure that Congress deliberates before changing the balance of constitutional powers. *Id.* at 407.

¹⁹⁷ See Seligmann, *supra* note 124, at 1114 (stating that the contract law analogy allowed courts to focus on states' assent to terms, not whether a program invaded states' sovereignty). Because state and local governments can theoretically refuse to contract with the federal government, spending clause programs circumvent issues of federal government overreach. *Id.*

¹⁹⁸ See *id.* at 1113 (listing the different rationales for imposing a clear statement rule). Commentators question the need for such a rule and push for a more robust rule that favors states. *Id.*

¹⁹⁹ See *id.* (stating that scholars used these theories to push for greater restrictions on the spending power).

²⁰⁰ See *id.* at 1115 (stating that state sovereignty needs protection because the federal government locked states into certain programs over time and that states cannot easily remove themselves from

states heavily rely on these programs yet have little influence over them, advocates argue that Congress's power should be curbed by the strongest possible reading of the clear notice requirement.²⁰¹

As time progressed, the Court shifted from an adequate notice standard to a clear notice standard and began using the contract law analogy more frequently.²⁰² Initially, the Court used the notice requirement to inspect a program's fundamental obligations and to ensure that these obligations were more than just aspirational statements.²⁰³ As the Court changed composition, decisions began to require notice of the specific available remedies for breach of statutory obligations.²⁰⁴ The requirement seems to demand Congress have ample foresight and

such programs); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1936 (1995) (arguing that because spending programs give states so much needed assistance that they cannot receive from any other source, states are reliant on these programs to function properly).

²⁰¹ See Seligmann, *supra* note 124, at 1115 (explaining a central theory for limiting federal power).

²⁰² See Huberfeld, *supra* note 30, at 454–55 (stating that the clear notice requirement proposed in the *Davis* dissent required clear notice of the conditions at the time funds were received, but the adequate notice requirement did not necessitate specification). Some commentators question if these principles are the best way to decide Spending Clause cases. See, e.g., Bagenstos, *supra* note 29, at 403–08 (arguing that the Court's analysis of Spending Clause cases needs to change). Scholars have asserted that there is no reason for the Court to use the clear notice requirement. *Id.* at 404. They argue that the clear notice requirement mixes together the clear statement rule and the doctrine of *contra proferentem*. *Id.* Courts rely on the clear statement rule to ensure that the federal government is not breaching states' constitutional rights. *Id.* The doctrine of *contra proferentem* states that ambiguous contractual provisions should be interpreted against the contract drafters. *Id.* Despite having no issues with the clear statement rule or the doctrine of *contra proferentem*, scholars do not believe that the clear notice requirement has a place in Spending Clause jurisprudence. *Id.* They argue that these principles unjustly necessitate notice of (1) the cumulative legal consequences of a certain condition, and (2) the consequences that will occur once a condition is applied to certain scenarios. *Id.* at 404–05. Scholars argue that in notice-of-remedy cases, the Court's decisions follow the same constrictive jurisprudence it uses to decide the availability and scope of private rights of action broadly. *Id.* at 406. Moreover, they find that the clear notice requirement is barely more than a rhetorical function in holdings of cases such as *Pennhurst*, *Barnes*, and *Arlington*. *Id.* at 404. Instead, to protect federalism, the Court should apply the ordinary clear statement rule, which does not require the heightened clarity the clear notice requirement necessitates when certain Spending Clause legislation poses abnormally large dangers to federalism. *Id.* at 406. Some commentators, however, think that a recipient can be liable for violating a federal spending condition even if it is not immediately obvious which type of conduct will violate the condition. *Id.* at 407.

²⁰³ See Seligmann, *supra* note 124, at 1113 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 27 (1981) (using *Pennhurst* to show that the clear notice requirement was originally intended to ensure that conditions were intended to obligate federal funding recipients)). Commentators suggest that notice was central to the Title IX opinions authored by Justice O'Connor. *Id.*

²⁰⁴ See *id.* at 1118 (stating that although the Court usually examines legislative history in Spending Clause cases, the Court refused to do so in *Arlington*). For example, in 2006, in *Arlington Central School District Board of Education v. Murphy*, the majority wanted states to be on notice for potential liability, including the specific remedies available to third parties, at the time of enrollment. *Id.* at 1113; *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Scholars have noted that the Court used the clear statement rule more as it became more bounded in its ways of statutory interpretation. Seligmann, *supra* note 124, at 1121.

strong drafting skills.²⁰⁵ Some commentators argue that these requirements are neither attainable nor appropriate because detailed legislation can still fail to predict important issues and errors cannot be as easily remedied by judicial interpretation.²⁰⁶ Now, the clear notice requirement and the contract law analogy limit courts' ability to interpret the intent of certain civil rights statutes.²⁰⁷

B. The Contract Law Analogy's Impact on the Court's Interpretation of Spending Clause Legislation

When examining antidiscrimination Spending Clause legislation, the Supreme Court has used general means of statutory interpretation more frequently than principles of contract law.²⁰⁸ In some cases, the Court did not reference contract law, and in other cases, the Court used the contract law analogy sparingly to reinforce the importance of clear notice.²⁰⁹ Usually, the Court has used the analogy to promote federalism and to ensure that Congress considered state autonomy.²¹⁰ Many scholars believe that the Court used the contract law analogy to guarantee that Congress did not regulate states' behavior directly and sidestep limitations on its constitutionally granted powers.²¹¹

In 2002, in *Barnes v. Gorman* and in 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, however, the Court directly employed contract law as a basis for its holdings.²¹² In these decisions, the Court used the contract law

²⁰⁵ See Galle, *supra* note 81, at 166–67 (arguing that the legislator can never perfectly predict how legislation will relate to other policies or impact certain circumstances).

²⁰⁶ See, e.g., *id.* at 167 (arguing that Spending Clause legislation would be worse if it was written in a detailed manner because it would make later interpretation more difficult). Some scholars note that states seem to understand that when they accept grants under the RA, they open themselves up to common law liability, even though the statute does not explicitly state this. *Id.* at 176.

²⁰⁷ See Dunn, *supra* note 190, at 289–90 (stating that Congress must now unambiguously give funding recipients notice about which types of damages individuals seeking remedies for violations of their civil rights may seek, or the only damages available to plaintiffs are traditional contract law remedies).

²⁰⁸ See Seligmann, *supra* note 124, at 1121 (stating that the Court does not reference the contract law analogy in every Spending Clause case nor limits the use of such an analogy). Some commentators warn that if the Court starts interpreting statutes in a way that undermines Congress's intent and Congress begins to amend such laws to make its intent clearer, then the Court will undermine its own legitimacy as an accurate source of interpretation. *Id.* at 1122.

²⁰⁹ See Engdahl, *supra* note 52, at 529–31 (listing and describing cases where the Court has not invoked the contract law analogy or the principles of notice in Spending Clause cases).

²¹⁰ See *Leading Cases*, *supra* note 130, at 320 (stating that the best reason for promoting the clear notice requirement and the contract analogy is to protect state autonomy).

²¹¹ See *id.* at 319–20 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting) (stating that the analogy is not based on concepts of contractual fairness and that it is instead intended to protect states from the federal government overreaching)).

²¹² *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 223 (2022); *Barnes v. Gorman*, 536 U.S. 181, 187–89 (2002); see *Leading Case: Federal Statutes*, *supra* note 131, at 440 (stating that *Cummings* builds upon the reasoning in *Barnes* to limit remedies and that these cases twist the meaning of the notice principle).

analogy to find that sources of notice must align with contract law.²¹³ By ruling in such a way, the Court merged notice and contract law principles, and made contract law itself become a source of law.²¹⁴ Still, the use of contract law seemed to be limited to principles of notice rather than to determining the meaning of Spending Clause legislation.²¹⁵ By using contract law as a placeholder for notice, the Court created a different conception of the analogy.²¹⁶ In *Barnes* and *Cummings*, the Court assumed that funding recipients can only be put on notice by explicit statutory language and traditional contract law principles.²¹⁷

Some constitutional law experts believe that the contract law analogy is a helpful rhetorical tool that should do little to impact substantively future Spending Clause cases.²¹⁸ In their view, the analogy should have natural limits because the Court is considering legislation, not a typical commercial transaction.²¹⁹ Because legislation is more intentionally ambiguous than buy-sell transactions, scholars argue that contract law standards should not replace established methods of statutory interpretation and the well-known expectations for drafting legislation.²²⁰

²¹³ See *Leading Case: Federal Statutes*, *supra* note 131, at 446–47 (arguing that *Cummings* made the principle of notice unrecognizable to prior holdings by ruling that states are only on notice for remedies that are found in general contract law).

²¹⁴ See *Leading Cases*, *supra* note 130, at 321 (stating that contract law served as more than a mere analogy in *Barnes* and that the Court used contract law principles as a source of notice).

²¹⁵ *Id.* The application of contract law principles in *Barnes* could have been more expansive than it was: the Court did not hold conditions on federal funding that were explicitly stated in legislation could be overridden by principles of contract law. *Id.* Instead, the Court held that if Congress wants remedies to be available to third parties, then it must explicitly include the remedies within the legislation rather than make courts infer their existence. *Id.*

²¹⁶ See *Leading Case: Federal Statutes*, *supra* note 131 (stating that *Cummings* distorts the idea of notice with contract law principles).

²¹⁷ See *Leading Cases*, *supra* note 130, at 320 (stating that the Court in *Barnes* limited the sources of notice of remedies to explicit statutory provisions and contract law principles). Some commentators argue that even assuming that Spending Clause cases should be decided under contract law principles, the Court wrongly decided *Cummings*. See Warden, *supra* note 37, at 67 (contending that even if one concedes that the majority's use of contract law was the correct way to decide the case, the decision should have had a different result). These legal scholars agree with Justice Breyer's dissent in *Cummings*, noting that emotional distress damages are recoverable in contractual suits where such harms are likely to occur. *Id.* Because violations of antidiscrimination legislation fall into this category and courts have historically awarded individuals emotional distress damages, funding recipients are naturally put on notice of their existence. *Id.* Scholars note that civil rights statutes should be interpreted broadly so that their purposes could be accurately achieved. *Id.* The Court in *Cummings*, however, ignored this general understanding and undermined the usefulness of the RA and other pieces of anti-discrimination legislation. *Id.*

²¹⁸ See Bagenstos, *supra* note 29, at 404 (arguing that the clear notice requirement should not be used in cases where it impacts decisions).

²¹⁹ Seligmann, *supra* note 124, at 1120.

²²⁰ See *id.* at 1120–21 (stating that Congress tends to keep statutes intentionally ambiguous because there are so many interests and groups involved in the political process).

Moreover, some scholars fail to see the purpose of applying the contract law analogy to Spending Clause legislation altogether.²²¹ They argue that ordinary laws are often ambiguous, and because most pieces of antidiscrimination Spending Clause legislation are similarly vague, antidiscrimination Spending Clause legislation should be interpreted in the same manner as ordinary laws.²²² Furthermore, these scholars suggest that Spending Clause legislation that attempts to predict every possibility is undesirable because courts and parties should be able to amend previous errors once the program is in effect.²²³ Although textualists argue that Spending Clause legislation and contracts alike should be preserved as written, others believe that parties to Spending Clause legislation and ordinary contracts prefer having flexibility and a neutral authority to solve unanticipated issues.²²⁴ Under modern contract theory, parties can even agree to contracts that have open terms.²²⁵ Commentators have built on this argument, contending that Congress gives states clear notice when granting federal funds that clearly subject states to an amorphous standard of liability.²²⁶

The Court's decision in *Cummings* suggests that the contract law analogy will remain a part of the Court's analysis when deciding whether recipients are

²²¹ Galle, *supra* note 81, at 166.

²²² See *id.* (stating that the Court never established why Spending Clause legislation should be treated any differently from ordinary legislation). But see Engdahl, *supra* note 52, at 500 (arguing that Spending Clause legislation is different from other statutory provisions because unlike ordinary legislation, Spending Clause legislation does not take effect until states accept federal funding and the attached conditions).

²²³ See Galle, *supra* note 81, at 166–67 (contending that if the law was perfectly clear, the judiciary would not be needed, and Congress would still not be able to predict the manner in which one statute would interact with other programs or how each statute would relate to specific sets of facts).

²²⁴ See *id.* at 167 (arguing that having a neutral arbitrator decide these cases is important, especially when considering how many third parties, who do not agree to the original legislation, use this legislation to bring action against alleged infringers). The United States' brief as amicus curiae in *Cummings* noted that courts follow a universal rule when awarding damages in contractual disputes: the damage award should put plaintiffs should into the position that they would have been if the defendants had performed their contractual obligations. Brief of the United States as Amicus Curiae at 13, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (No. 20-219) (citing 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1338, at 2392 (Baker, Voorhis & Co., 1st ed. 1920)).

²²⁵ See Galle, *supra* note 81, at 170–71 (describing the ambiguity of many modern contracts, such as the frequent use of terms like “good faith” and “best efforts” in modern contracts); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1625 n.208 (2001) (stating that traditional contract law does not require parties to state the conditions of the deal clearly).

²²⁶ See Bagenstos, *supra* note 29, at 407 (arguing that states should be held liable when they knowingly agree to “open-textured” standard of liability). A party that accepts an “open-textured” standard of liability agrees that the legislation is vague and allows courts to determine the possible forms of liability under such legislation. *Id.* Some scholars assert that courts should apply the same exception to the *contra proferentem* doctrine used in cases where the contractual obligation is “patent” at the time the parties entered into it to cases involving Spending Clause legislation. *Id.* A patent ambiguity exists when parties have clearly omitted an important term to a contract. *Oenga v. United States*, 109 Fed. Cl. 108, 141 (2010).

on notice for damages in cases brought under antidiscrimination Spending Clause legislation.²²⁷

C. Sources of Notice in Antidiscrimination Contexts

Commentators have frequently questioned what sources can put funding recipients on notice to their obligations.²²⁸ Some have determined that states accept federal funding under the impression that the administrative process, the legislative history, and the judiciary's decisions will help interpret the legislative requirements.²²⁹ This stands in stark contrast to the states' rights proponents, who argue that states would not have accepted federal funding had they known that the scope of potential liability may shift after acceptance.²³⁰

Although the Court has not expressly stated that any of these sources fail to put recipients on notice, the Roberts Court has routinely refrained from using administrative interpretations and legislative history to interpret Spending Clause legislation for notice purposes.²³¹ Some of these sources of notice, such as judicial interpretation and administrative decisions, are unavailable to states when they initially accept federal funding with new conditions attached to funding.²³² A strict clear notice rule could entirely ignore these sources of in-

²²⁷ See Dunn, *supra* note 190, at 289 (discussing that remedies in intentional violations of antidiscrimination statutes will be limited to contract law remedies unless Congress clearly states such remedies in the pieces of legislation).

²²⁸ See Seligmann, *supra* note 124, at 1117 (stating that an important issue to consider is where notice can come from).

²²⁹ See *id.* (explaining that although the statute should be the primary source of notice, other sources of notice such as the administrative process and legislative history have been used by recipients to be put on notice of the extent of certain conditions).

²³⁰ See, e.g., *Davis v. Monroe Bd of Educ.*, 526 U.S. 629, 656 (1992) (Kennedy, J., dissenting) (arguing that the scope of damages liability was a significant factor for schools when considering whether to receive federal funds).

²³¹ See Seligmann, *supra* note 124, at 1118 (stating that although no sources have been deemed "off-limits," the Court refrained from referencing administrative interpretations in *Arlington*). Moreover, the Court in *Barnes* refused to consider that recipients may become on notice of liability from sources like decisions by lower courts. *Leading Cases*, *supra* note 130, at 320. If the Court had considered that case law could be a source of notice, then it would have seen that most lower courts allowed a wide range of remedies, including punitive damages, and that recipients had come to expect that they may be liable for punitive damages. *Id.* at 320; see, e.g., *Gorman v. Easley*, 257 F.3d 738, 747 (8th Cir. 2001) (allowing the plaintiff to recover punitive damages under Title VI). Furthermore, in *Cummings*, the Court refrained from looking at any other sources of notice besides the statutory text and hornbook contract law. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 221–22 (2022).

²³² See Seligmann, *supra* note 124, at 1118 (noting how some sources of notice are not available at the time that states accept conditional grants). Some scholars have asked if this issue should prohibit the *Chevron* deference to administrative interpretations from Spending Clause legislation. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

terpretation or refrain from using them until funding recipients renew their contractual obligations with the federal government.²³³

In *Cummings*, the Court made it clear that federal funding recipients only need to know the general rules of contract law to understand the remedies they are responsible for under Spending Clause programs.²³⁴ In doing so, the Court relied on basic principles of contract law without considering legislative history or the administrative policies surrounding the programs at issue.²³⁵ Through this analysis, the Court assumed that federal funding recipients would receive more notice of available remedies from general principles of contract law rather than considering the consequences of failing to uphold antidiscrimination statutes.²³⁶

III. NOTICE SHOULD NOT BE ASCERTAINED FROM ONLY CONTRACT LAW PRINCIPLES AND STATUTORY LANGUAGE

Spending Clause antidiscrimination statutes are critical in the fight against prejudice.²³⁷ Under the Roberts Court's conception of the notice requirement, federal funding recipients must have clear notice of the conditions attached to the funding that they receive.²³⁸ Additionally, the U.S. Supreme Court seems to limit sources of notice to statutory language and, in the context of remedies, to general principles of contract law.²³⁹ Due to these restricted

²³³ See *id.* (stating that a strict use of the clear notice rule would limit the use of regulations and interpretations). Some commentators have noted that recipients do not need a time-sensitive clear notice requirement because they are naturally on notice in the form of following cases and administrative regulations that will shed light on the obligations of each condition. *Id.* at 1118–19.

²³⁴ See *Cummings*, 596 U.S. at 225 (stating that federal-funding recipients should not be required to understand all principles of contract law, just the general principles); *Leading Case: Federal Statutes*, *supra* note 131, at 447 (stating that the Court used a high level of generality to find if recipients were on notice for emotional distress damages).

²³⁵ See *Cummings*, 596 U.S. at 225 (stating that the Court did not need to examine court cases or legal treatises to reach its decision).

²³⁶ See *id.* at 236 (Breyer, J., dissenting) (stating that it is inconceivable for a funding recipient to not be aware that intentional discrimination may cause them to be liable for emotional distress damages); *Leading Case: Federal Statutes*, *supra* note 131, at 447 (arguing that the Court indirectly determined where federal funding recipients received notice).

²³⁷ See Tani, *supra* note 160, at 1205–06 (asserting that these pieces of legislation have been paramount to individuals who seek recourse for discrimination).

²³⁸ See *Cummings*, 596 U.S. at 220 (stating that because both the ADA and the RA do not explicitly consider remedies, it is uncertain if federal funding recipients have clear notice of any obligation to reward third parties who sue under these statutes).

²³⁹ See *id.* at 220–21 (stating that the statutes do not mention remedies and that general principles of contract law should be analyzed to determine for which remedies federal funding recipients are notice); see also *Leading Case: Federal Statutes*, *supra* note 131, at 446–47 (arguing that the U.S. Supreme Court's decision in *Cummings v. Premier Rehab Keller, P.L.L.C.* did not consider statutory language, legislative history, or the parties' expectations and instead only considered which damages are available in general contract law); Dunn, *supra* note 190, at 295 (noting that the *Cummings* Court found that federal-funding recipients could only be on notice for remedies that appeared in general contract breaches).

sources of notice, the Roberts Court allows alleged violators of antidiscrimination laws to escape responsibility, or at the very least, drastically lower the cost of discriminating against parties.²⁴⁰ Section A of this Part argues that under the Robert Court's analysis, the Court unreasonably limits sources of notice and requires Congress to write with a level of detail that is likely unobtainable.²⁴¹ Section B uses the facts of *Cummings v. Premier Rehab Keller, P.L.L.C.*, to contend that the Court should consider pre-acceptance and post-acceptance sources of notice in cases evaluating the available remedies in antidiscrimination Spending Clause legislation.²⁴²

A. The Clear Notice Requirement Removes Important Context from the Analysis of Antidiscrimination Spending Clause Cases

In 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the Court altered the notice inquiry, incorrectly assuming that recipients only receive notice of available remedies from traditional contract law and the statutes themselves.²⁴³ Although the Court's desire for Congress to speak with utmost clarity when drafting legislation has many merits, it also has the potential to undermine Congress's original intent by having the sole sources of notice be the statutory text and the principles of contract law.²⁴⁴ In *Cummings*, the ACA's and RA's policies against discrimination served as better sources of notice of federal funding recipients' duties to pay emotional distress damages than general principles of contract law.²⁴⁵ Moreover, Congress and courts not only recognize that discrimination leads to emotional distress, but also acknowledge that emotional distress damages often can be a significant source of a victim's compensatory damages.²⁴⁶

²⁴⁰ See Tani, *supra* note 160, at 1206 (arguing that the Court's decision in *Cummings* is difficult to reconcile with the purposes of the underlying statutes, which are to prohibit discrimination).

²⁴¹ See *infra* notes 243–257 and accompanying text.

²⁴² See *infra* notes 258–279 and accompanying text.

²⁴³ See *Cummings*, 596 U.S. at 229–30 (stating that because emotional distress damages are unavailable in traditional contract law, they cannot be available as a remedy in antidiscrimination cases brought under Spending Clause legislation); Seligmann, *supra* note 124, at 1117 (arguing that statutory language is not the only source of notice for funding recipients).

²⁴⁴ See Seligmann, *supra* note 124, at 1123 (contending that the Court's desire for clarity is not objectionable, but that stringently applying this rule undermines the purpose of many pieces of legislation).

²⁴⁵ See *Cummings*, 596 U.S. at 234–35 (arguing that funding recipients are on notice for emotional distress damages because in contract breaches that are prone to causing emotional harm, that remedy is available); *Leading Case: Federal Statutes*, *supra* note 131, at 448 (arguing that the Court indirectly determined where federal funding recipients received notice).

²⁴⁶ See, e.g., 42 U.S.C. § 1981a(b)(3) (recognizing emotional distress damages as a source of compensation); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198–99 (11th Cir. 2007) (finding that emotional distress damages are an appropriate remedy for someone who has experience discrimination). Moreover, the *Cummings* Court did not consider the doctrine of *in pari materia* that holds that laws covering the same topics should be interpreted in the same manner. Warden, *supra*

By concluding that Congress must amend antidiscrimination legislation to clearly state available remedies, the Court refused to address the impracticality of amending key pieces of antidiscrimination legislation.²⁴⁷ For example, critical sections of Title VI have never been amended.²⁴⁸ Furthermore, other pieces of antidiscrimination Spending Clause legislation incorporate Title VI or are modelled off of Title VI to prohibit discrimination in other circumstances.²⁴⁹ Because these antidiscrimination Spending Clause statutes are interwoven and replicate each other, their language is consistently broad and, at times, imprecise.²⁵⁰ The programs and history that surround the legislation, however, provide federal funding recipients with missing context.²⁵¹ By contending that the general statutory language carries more weight than antidiscrimination Spending Clause statutes' context and history, the Court foolishly rejects systematic realities.²⁵²

note 37, at 67. Scholars argue that because other civil rights laws and other provisions of the RA allow for emotional distress damages, the Court should have found that emotional distress damages were available in *Cummings*. *Id.* Furthermore, emotional distress damages are similar to other forms of compensatory damages because juries must undergo a similar determination when deciding other forms of redress. Brief of Law Professors as Amicus Curiae at 25, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022) (No. 20-219). Scholars argue that mental harm is just as difficult and vague to estimate as physical suffering. *Id.* (citing WILLIAM HALE, HANDBOOK ON THE LAW OF DAMAGES §§ 39–41, at 141 (2nd ed. 1920)).

²⁴⁷ See Seligmann, *supra* note 124, at 1122–23 (stating that the Court is placing great burdens on Congress by claiming that if the legislature does not like a certain holding, then it should just amend the original statutes). Some experts note that the busy, endless job of Congress requires it to split its time among various important programs and initiatives. *Id.* at 1122. They also argue that oftentimes, the original democratic will behind the enactment of legislation may not exist at the time an amendment is needed. *Id.* at 1123. Therefore, later congressional sessions could amend antidiscrimination statutes to narrow rights in ways out of line with Congress's original intent and the people's intent would stay "on the books." *Id.*

²⁴⁸ See 42 U.S.C. §§ 2000d–2000d-4 (stating various civil rights, giving the federal government the power to make these civil rights a condition of grants, and giving courts judicial review of any action taken by a department pursuant to the statute). Because it is a judicial opinion, Congress could overturn the ultimate decision by amending the RA and other pieces of antidiscrimination Spending Clause legislation. Warden, *supra* note 37, at 67–68. If Congress expressly nullified the Court's opinion through amendments to the pieces of legislation, then many individuals' rights could once again have a remedy. *Id.*

²⁴⁹ See, e.g., 42 U.S.C. § 18116 (using Title VI Civil Rights Act of 1964 (42 U.S.C. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681–1688), the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101–6107) to prohibit discrimination in places that rely on federal funding through the ACA). Because statutes such as Title IX, Title VI, and § 504 of the RA share a similar structure, courts have found that they should be analyzed and interpreted in the same way. Terry, *supra* note 24, at 734.

²⁵⁰ See Terry, *supra* note 24, at 734 (explaining how important pieces of antidiscrimination legislation are similar to each other).

²⁵¹ See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (using the Title IX administrative scheme to find that federal-funding recipients that receive funding under Title IX are on notice for "student on student" harassment).

²⁵² See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 220–21 (2022) (finding that because the legislation does not consider remedies, the Court should turn general principles of con-

Legislators can neither foresee all future issues nor draft perfect laws, and the Court should not reprimand Congress at the expense of individuals who use such legislation to sue for discrimination.²⁵³ Moreover, many recipients of federal funding are fully aware that their potential liability will be shaped by administrative regulations and case law that come into play after their original acceptance.²⁵⁴ Even with this awareness, recipients still agree to accept funds—suggesting that a narrow view of notice is not necessary.²⁵⁵

Therefore, by not recognizing the context and experience surrounding pieces of antidiscrimination legislation, the Court has muddled the notice requirement.²⁵⁶ As a direct result, essential pieces of legislation that protect individuals' rights are less functional and do not live up to their original intent.²⁵⁷

B. The Court Should Consider Pre-Acceptance and Post-Acceptance Sources of Notice in Spending Clause Cases

In *Cummings*, the Court situated the contract law analogy as something more than just a rhetorical tool.²⁵⁸ Now, the Court appears to expect notice for potential liability to come from one of two sources: the statute itself or principles of contract law.²⁵⁹ This Note argues that, when examining intentionally vague statutes, the Court should also consider pre-acceptance sources of notice and post-acceptance sources of notice because both shape statutes' mean-

tract law to determine for which remedies federal funding recipients are notice); Seligmann, *supra* note 124, at 1123 (finding that a strict interpretation of the clear statement rule should not be applied because it undermines the purpose of many pieces of legislation).

²⁵³ See Seligmann, *supra* note 124, at 1123 (pointing out that drafters are humans, and that Congress is unable to foresee every possible detail before enacting a piece of legislation).

²⁵⁴ See *id.* at 1117–18 (stating that administrative clarifications are a natural part of interpreting Spending Clause legislation and that their role plays a part in the timing of notice); see also U.S. Dep't of Just., Title VI Legal Manual Pt. IX.A.2, at 4–5 (2017) (stating that emotional distress damages are available under Title VI and that after the *Barnes* and *Franklin* decisions, courts allowed plaintiffs to recover emotional distress damages).

²⁵⁵ See Seligmann, *supra* note 124, at 1117 (arguing that states accept federal funds knowing that the legislation will be clarified by the administrative process).

²⁵⁶ See *Leading Case: Federal Statutes*, *supra* note 131, at 445 (stating that the Court in *Cummings* decontextualized the notice requirement, removing principles such as legislative history from the inquiry).

²⁵⁷ See *Warden*, *supra* note 37 (arguing that the Court's holding in *Cummings* has made relief much more difficult for millions of Americans who can no longer receive remedies for their emotional distress).

²⁵⁸ See *Leading Case: Federal Statutes*, *supra* note 131, at 440 (arguing that the Court in *Cummings* distorted the analogy from its intended purpose to remove an importance source of damages used by many individuals who sue under antidiscrimination Spending Clause legislation).

²⁵⁹ See *Constitutional Law*, *supra* note 130, at 320 (stating that the Court in *Barnes* effectively limited the sources of notice to explicit statutory provisions and contract law principles).

ings.²⁶⁰ Pre-acceptance sources of notice include previous cases and legislative history, and post-acceptance sources include administrative records and subsequent cases.²⁶¹

If the Court had considered these sources of notice in *Cummings*, then the Court would have likely reached a different outcome.²⁶² For example, when Title VI was enacted in 1964, in interpreting the statute, state courts across the country held that plaintiffs could receive remedies for emotional damages when a contract that was not concerned with pecuniary gain was breached.²⁶³ This set of case law serves as pre-acceptance notice for states that accept federal funding that is conditioned on following Title VI.²⁶⁴

After their enactment, administrative records and Supreme Court decisions have historically crystallized the notion that emotional distress damages are available for breaches of other statutes.²⁶⁵ First, the Court has considered administrative schemes as sources of notice in other antidiscrimination Spending Clause cases.²⁶⁶ For example, in 1999, in *Davis v. Monroe County Board of Education*, the Court found that the Title IX administrative regulatory scheme gave funding recipients notice to liability for damages for “student-on-student” harassment.²⁶⁷ Moreover, the federal government stated in administrative records that emotional distress damages should be available in these sorts of cases.²⁶⁸ The Department of Justice’s Title VI Legal Manual states that funding recipients should be subject to compensatory damages available to both pecuniary and nonpecuniary injuries.²⁶⁹ In this case, administrative records were a

²⁶⁰ See Brief of the United States, *supra* note 224, at 17 (arguing for the Court to allow plaintiffs to seek emotional distress damages due to the existing case law and administrative records that allowed plaintiffs to do so).

²⁶¹ See *id.* (arguing that emotional distress damages should be available to plaintiffs because case law and administrative records state emotional distress damages are available as remedies).

²⁶² See *Leading Case: Federal Statutes*, *supra* note 131, at 448 (arguing that by failing to consider other forms of notice in *Cummings*, the Court eliminated a powerful way that plaintiffs in antidiscrimination lawsuits to receive relief).

²⁶³ See Brief of the United States, *supra* note 224, at 17 (citing *Stewart v. Rudner*, 84 N.W.2d 816, 823–25 (Mich. 1957) (stating that the law was settled by the time Title IX was enacted to include emotional distress damages)).

²⁶⁴ See *id.* (arguing that states were aware that they would be held liable for emotional distress damages due to prior case law).

²⁶⁵ See *infra* notes 268–274 and accompanying text.

²⁶⁶ See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (holding that Title IX funding recipients are on notice for “student on student” harassment because the Title IX regulatory scheme states that recipients should ensure that third-party discrimination does not occur).

²⁶⁷ *Id.*

²⁶⁸ Brief of the United States, *supra* note 224, at 22–23.

²⁶⁹ *Id.* (citing Title VI Legal Manual, *supra* note 254, at 4–5). The Department of Justice’s Title VI Legal Manual also notes that the courts that applied *Barnes* and *Franklin* usually interpreted the Court’s holdings to allow emotional distress damages. *Id.* (citing Title VI Legal Manual, *supra* note 254, at 5). Since 1994, the DOJ recognized that emotional distress damages are available under Title

powerful source of practical notice for funding recipients and guided the Court in its subsequent ruling.²⁷⁰

Furthermore, the Court has considered cases where a plaintiff sought emotional distress damages under antidiscrimination legislation.²⁷¹ For example, in 1992, in *Franklin v. Gwinnett County Public Schools*, the plaintiffs sought damages for emotional distress, yet the Court never implied that these damages should be unavailable.²⁷² Instead, the Court held that courts should allow monetary damages if they provide an acceptable remedy for a plaintiff's harm.²⁷³ Therefore, funding recipients were likely aware of their need to pay emotional distress damages if they breached the statutes in question.²⁷⁴

In future cases where third parties bring suit under antidiscrimination Spending Clause legislation, the Court should not turn a blind eye to these sources of notice.²⁷⁵ When considering their obligations, federal funding recipients are more likely to consider how each antidiscrimination statute's general purpose shapes liability than how traditional contract law structures their duties.²⁷⁶

For decades, plaintiffs such as Anthony Zeno, Fatima Larios, and M.L. received emotional distress damages because the defendants, all recipients of federal funding, were on notice for this type of damages.²⁷⁷ After the ruling in *Cummings*, future plaintiffs likely do not have this source of relief.²⁷⁸ Given the

II of the ADA. *Id.* (citing U.S. Dep't of Justice, The Americans with Disabilities Act: Title II Tech. Assistance Manual § II-9.2000 (1994)).

²⁷⁰ See *infra* notes 267–268 and accompanying text.

²⁷¹ See Brief of the United States, *supra* note 224, at 20–21 (stating that when *Barnes* was decided, the Court had never affirmed nor awarded punitive damages to a plaintiff seeking damages under antidiscrimination Spending Clause litigation but instead, the Court had considered cases where the plaintiff sought emotional distress damages). Moreover, in 2017, in *Fry v. Napoleon Community Schools*, the Court unanimously found that a plaintiff seeking damages under § 504 and Title II of the ADA did not need to exhaust administrative remedies in a case where the plaintiff was seeking emotional distress damages. 580 U.S. 154, 168 n.8 (2017).

²⁷² *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992); see Brief of the United States, *supra* note 224, at 20–21 (citing Pet. Br. at 20, *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 61 (1992)); Brief of the United States as Amicus Curiae at 13 n.3, *Barnes v. Gorman*, 536 U.S. 181, 187–89 (2002)) (exemplifying how the Court reviewed cases where the plaintiff sought emotional distress damages as a form of relief).

²⁷³ *Franklin*, 503 U.S. at 62, 64.

²⁷⁴ See Brief of the United States, *supra* note 224, at 32 (arguing that the petitioner was on notice for emotional distress damages).

²⁷⁵ See *supra* notes 258–274 and accompanying text.

²⁷⁶ See *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1299 (11th Cir. 2007) (stating that “as a matter of common sense and case law, emotional distress is a predictable, and thus foreseeable consequence of discrimination”); *Leading Case: Federal Statutes*, *supra* note 131, at 445 (stating that the *Cummings* decision ignores common sense sources of notice).

²⁷⁷ See *supra* notes 1–21 and accompanying text.

²⁷⁸ See *Murrell*, *supra* note 26 (stating that emotional distress will not be available to plaintiffs in Title IX cases post-*Cummings*).

Court's current composition, it may use this framework to further limit rights of action and available remedies to individuals impacted by discrimination.²⁷⁹

CONCLUSION

In 2022, in *Cummings v. Premier Rehab Keller, P.L.L.C.*, the U.S. Supreme Court found that individuals cannot recover emotional distress damages in private actions brought under the antidiscrimination sections of the RA and the ACA. Since this holding, lower courts have applied this ruling to other Spending Clause legislation, such as Title IX and Title VI. The decision has left many individuals facing sex-based, race-based, and other forms of discrimination without a remedy for the emotional harms done to them. To reach this decision, the Court relied upon the clear notice requirement and the contract law analogy. Although initially helpful rhetorical tools, the Court's interpretation of the clear notice requirement and the contract law analogy now twist the meaning and purpose behind many pieces of Spending Clause legislation. Rather than considering only contract law and the statutory text in making its decisions, the Court should also interpret the availability of remedies through legislative history, administrative records, and lower courts decisions, as it would in interpreting many other pieces of legislation. The current Court, however, is unlikely to reign in the contract law analogy when considering the available remedies in private rights of action for intentional violations of civil rights. This Note warns that other aspects of antidiscrimination Spending Clause legislation may be narrowed, and that third parties may be unable to seek recovery or receive necessary remedies.

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²⁷⁹ See *Leading Case: Federal Statutes*, *supra* note 131, at 449 (contending that it is worrisome to consider how much further the Court may narrow private rights of action under Spending Clause legislation through the narrower approach that arose in *Cummings*). Notably, in 2023, in *Health & Hospital Corp. v. Talevski*, the Supreme Court did not broaden the context in which it uses the contract law analogy. 599 U.S. 166, 178–79 (2023). Here, the Court considered whether individuals can bring private rights of action under 42 U.S.C. § 1983 for suits examining rights granted under Spending Clause legislation. *Id.* at 172. The petitioners invoked the contract law analogy in hopes of eliminating a plaintiff's ability to use 42 U.S.C. § 1983 to vindicate rights created under Spending Clause legislation. *Id.* at 177–78. The majority rejected this theory, finding that § 1983 cases follow common law principles and that actions brought under § 1983 are tort claims. *Id.* at 178–79. Scholars note that the majority could have used this case as an opportunity to broaden the use of the contract law analogy beyond implied rights of actions brought under Spending Clause legislation. *The Supreme Court, 2022 Term—Leading Case: Federal Statutes*, 137 HARV. L. REV. 380, 384 (2023). Instead, the Court dismissed the theory completely. *Id.* at 385. Commentators note that decades of scholarship were set aside in six paragraphs of the Court's decision. *Id.*

