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Essay

Pennhurst, Chevron, and the Spending Power

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Federalism, it seems, is ours once again.[1] Although not everyone is quite ready to observe the "new etiquette" of federalism,[2] in recent years the Court has restricted Congress's affirmative powers to legislate. The Court has revived limits on both the scope of Congress's power to regulate interstate commerce[3] and the means by which Congress may do so;[4] on Congress's power to enforce the Reconstruction Amendments;[5] and on Congress's authority to empower private parties to enforce federal rights against recalcitrant states.[6]

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1. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (invoking "Our Federalism" to justify refusal to enjoin pending state court proceedings).

2. Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71 (quoting the "etiquette of federalism" language from *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring)). Justices Stevens, Souter, Ginsburg, and Breyer have regularly dissented from the Court's recent federalism decisions. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 814 (Souter, J., dissenting) ("I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.").

3. *See Lopez*, 514 U.S. 549.

4. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991).

5. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

6. *See Kimel*, 528 U.S. 62; *Alden*, 527 U.S. 706; Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); *Fla. Prepaid v. Coll. Sav. Bank*, 527 U.S. 627; Seminole Tribe v. Florida, 517 U.S. 44 (1996).

In contrast, although the Court has articulated a number of "general restrictions"[7] on Congress's spending power,[8] that power remains, at least at present, an effective source of congressional authority. One of those "general restrictions" is that Congress may impose binding conditions on states that accept federal funds only if, as the Court explained in *Pennhurst State School & Hospital v. Halderman*,[9] the conditions are expressed "unambiguously."[10] Because that requirement, at least at first blush, is not particularly restrictive—and because the Court has limited Congress's other sources of authority—the federal government increasingly has turned to the power of the purse as a means of advancing its agenda,[11] while advocates of a more limited federal role have begun to seek more trenchant limits on that power.[12] The spending power is a particularly effective tool when one considers that most federal spending programs are administered by federal agencies, whose interpretations of federal statutory provisions are, under the rule of *Chevron U.S.A. v. Natural Resources Defense Council*,[13] entitled to judicial deference. Indeed, the Court has, despite occasional rumblings to the contrary,[14] validated the administrative state by continuing to defer to administrative agencies' reasonable interpretations of statutory regulatory schemes.[15] When Congress legislates within its affirmative powers, it accordingly may delegate to agencies the authority to determine how its relatively broad statutory statements of policy should apply in particular circumstances.

Both the *Pennhurst* doctrine and the *Chevron* inquiry turn, at least in part, on congressional clarity—or, as the tests typically are expressed, on congressional ambiguity. Under *Pennhurst*, a court may conclude that Congress has imposed a condition on the grant of federal funds to a state recipient only if Congress unambiguously expressed its intent to do so;

7. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

8. *See* U.S. CONST. art. I, § 8, cl. 1.

9. 451 U.S. 1 (1981).

10. *Id.* at 17.

11. *See, e.g.*, Adler & Kreimer, *supra* note 2, at 106; Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1914 (1995).

12. *See, e.g.*, Baker, *supra* note 11; Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397 (1997); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

13. 467 U.S. 837 (1984).

14. *See* Christensen v. Harris County, 120 S. Ct. 1655, 1662 (2000) (holding that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"); *cf.* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (holding that the EPA's construction of the Clean Air Act effected an unconstitutional delegation of legislative power), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001).

15. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); *Chevron*, 467 U.S. at 843-44. Under *Chevron*, a court reviewing an agency's interpretation of a statute defers to the agency's interpretation if the "statute is silent or ambiguous with respect to the specific issue" and if "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

under *Chevron*, the existence of statutory ambiguity with respect to a particular issue requires the reviewing court to defer to a reasonable agency interpretation of the ambiguous statutory language. What, then, should a court do when the terms of a federal-state grant program's condition are not fully elaborated in the statute and when the agency charged with enforcing the statute has issued regulations that purport to define the terms of the condition? Does congressional ambiguity in defining the terms of the condition foreclose, under the *Pennhurst* doctrine, the court from considering the agency's interpretation? Or should the court apply traditional canons of statutory construction—including deference to agency interpretations of ambiguous statutory provisions—to determine if the agency's interpretation can bind the state grant recipient?

Suppose, for example, that the statute creating a federal-state grant program designed to promote strong science education provides that, as a condition of receiving funds, the state recipient must "assure that all public school students have reasonably individualized access to technology education." Educational experts in the state believe that the best means to accomplish the program's goal is to purchase enough computers to ensure a five-to-one student-to-computer ratio. The Department of Education, however, has issued a regulation that interprets the condition to require one science teacher for every ten students. The statutory provision is ambiguous, and both interpretations of the condition are reasonable; it is clear that, evaluated under *Chevron*'s approach, the agency's interpretation is valid. If the state follows its own interpretation, can a student who wants smaller classes sue to enforce the condition? Can the Department of Education withhold funds until the state complies with the agency's interpretation?

Such controversies arise at the crossroads of administrative law and federalism principles. They raise the question whether *Chevron* deference, which is appropriate only when a statute is ambiguous, ever is warranted when the statutory provision at issue attaches a condition to a state's receipt of funds—a provision that must, in order to be effective under *Pennhurst*, attach the condition *un*ambiguously. This Essay considers whether the usual principles of *Chevron* deference govern the interpretation of ambiguous statutory provisions in federal-state grant programs. Ordinarily, Congress provides a blueprint that outlines its objectives, and then relies on agencies—administrators in a co-equal branch—to implement those objectives in concrete circumstances. Phrased another way, then, the question here is whether Congress can continue to rely on agencies when it legislates pursuant to the spending power.

Resolution of this question depends principally on how one characterizes *Pennhurst*'s clear-statement rule. The first approach, which I call the "accountability model," views *Pennhurst* through the lens of

the later-decided case of *Garcia v. San Antonio Metropolitan Transit Authority*.[16] *Garcia* held that federalism-based limits on Congress's power to regulate the states inhere largely in the structure of the federal government itself, in which the interests of states are represented.[17] The accountability model treats *Pennhurst*'s rule as a structural mechanism to ensure congressional accountability when Congress imposes burdens on the states. Under this framework, Congress (which, at least theoretically, represents the interests of the states), in contradistinction to administrative agencies (which do not), must unambiguously decide whether to impose a particular burden on the states. The accountability model thus expresses a concern about delegation: Congress, and not agencies, should make important decisions of policy, including whether to alter the federal-state balance, because only Congress is electorally accountable for such decisions. Accordingly, under the accountability model, reasonable agency interpretations of statutory grant conditions are not entitled to deference, even though Congress, by most conventional canons of statutory construction, can be thought to have delegated to the agency the authority to fill in gaps in the statute's application.

The second approach, which I call the "state choice model," views *Pennhurst*'s rule as a means to ensure notice—and thus fairness—to the states when a federal grant program imposes a burden on the state recipients. Under this account, the question of which federal actor (that is, Congress or the agency) has imposed a condition on the state is not determinative; the inquiry focuses instead on whether, in light of the information available when the state accepted federal funds, the state can fairly be said to have understood the nature of the bargain, and thus had the opportunity "freely" to "choose" whether to accept the funds. Because a state can just as readily "ascertain what is expected of it"[18] from an agency regulation as from the statutory text itself, the state choice model accords *Chevron* deference to reasonable agency interpretations of statutory grant conditions.

This Essay argues that the accountability model upsets the delicate balance that *Pennhurst* achieved between federal and state interests and undermines the important values advanced by the Court's decision in *Chevron*. By requiring an unrealistic standard of congressional precision, the accountability model effectively converts *Pennhurst*'s rule from an interpretive tool to a substantive limitation on Congress's power to regulate through the spending power. The state choice model, on the other hand, accommodates the values advanced by *Chevron* and limits *Pennhurst*'s

16. 469 U.S. 528 (1985).
17. *Id.* at 550-54.
18. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

application to those cases that involve obvious unfairness to the states. An agency regulation provides a state with notice of its federal obligations just as effectively as a statute does, and states accordingly should be bound if the administering agency has issued an interpretation of the statutory grant condition before the state accepts funds.

This Essay pays particular attention to the most difficult case for *Chevron* deference: when the agency issues its interpretation of the statutory grant condition *after* the state accepts funds under the grant program. Because the accountability model categorically precludes *Chevron* deference for agency interpretations of statutory grant conditions, it a fortiori prohibits deference in such cases. The state choice model, on the other hand, draws a temporal line for determining the federal government's power to bind the states with grant conditions. Because the state choice model turns on notice—and because a state can hardly be said to have received notice of an agency interpretation that did not exist when the state accepted funds—application of that model leads to the conclusion that agency views cannot retroactively bind state recipients of federal funds. Although there is an obvious appeal to this approach—and although I ultimately think that it is the correct approach—there are strong countervailing (narrative) arguments that the interests served by *Chevron* deference are sufficiently weighty to justify application of deference even to agency interpretations that postdate a state's receipt of funds. This Essay therefore considers not only the state choice model, but also other possible judicial approaches to such cases: (1) entitling the court to interpret de novo the statute's application to the particular circumstances at issue, without any preference for the agency's or the state's view; (2) binding the state recipient to "interpretive rules," but not to "substantive rules"; and (3) applying a reformulated nondelegation doctrine. These approaches are arguably incompatible with *Pennhurst*'s rule, but I discuss them to illustrate the limits (and the value) of that rule.

Although such cases of retroactive rulemaking have no perfect solution, I am largely persuaded that *Chevron* deference should not apply to agency interpretations issued after the state accepts funds under the grant program. The potential unfairness to state recipients—especially in cases in which the state already has, in good faith reliance on its own reasonable interpretation of the grant condition, spent the grant funds when the agency issues its view, or in cases in which the agency reverses its prior view, on which the state has relied in allocating funds—strongly suggests that the state choice model is appropriate for resolving this question of retroactivity, and thus that such retroactive rules should not bind the state—at least not until the state again agrees to accept funds under the program.

In Part I, I outline the background principles—mainly *Pennhurst*'s clear-statement rule and *Chevron*'s rule of deference—implicated by the

questions addressed in this Essay. Next, in Part II, I discuss the basic analytic frameworks for determining whether agency interpretations of statutory grant conditions can bind state recipients of federal funds. Finally, in Part III, I focus on the difficult cases in which the agency issues its interpretation of the grant condition—or reverses its position—after the state receives funds under the grant program.

I. FRAMING THE QUESTION

A. *Agency Interpretations of Federal Statutes: The General Rule of* Chevron *Deference*

When Congress legislates, it typically paints with a broad brush, identifying its objectives but leaving more particularized questions of the application of the statute to the law's administrators in (usually) the executive branch. Because Congress cannot possibly legislate with a specificity that addresses all conceivable circumstances that may arise under its statutes, agencies regularly promulgate regulations that construe the federal statutes that they are charged with administering. In a now-familiar formulation, the Court, in *Chevron U.S.A. v. Natural Resources Defense Council*,[19] explained how courts should review an agency's construction of the statute that it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[20]

The Court's two-part test is premised on the view that, although the "judiciary is the final authority on issues of statutory construction,"[21] the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"[22]

19. 467 U.S. 837.
20. *Id.* at 842-43.
21. *Id.* at 843 n.9.
22. *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

The Court rested *Chevron*'s principle of deference to reasonable agency interpretations of ambiguous statutory provisions on at least two grounds. First, the Court recognized that agencies have specialized expertise. The Court explained that the "decision as to the meaning or reach of a statute" often involves "'reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'"[23] Judges, on the other hand, "are not experts in the field."[24]

Second, the Court's decision was informed by the principle of separation of powers. The Court recognized that Congress cannot legislate with a "level of specificity" that would ensure that all eventualities are resolved by simple reference to the terms of the statute.[25] The Court noted, moreover, that agency decisionmaking often involves balancing and accommodating competing policy goals. Judges not only "are not experts," but also "are not part of either political branch of the Government."[26] Although agencies "are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices."[27] *Chevron* therefore "establishes a presumption that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency."[28]

The Court concluded by fusing these two bases for the principle of deference to agency interpretations:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public

23. *Id.* at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).
24. *Id.* at 865.
25. *Id.*
26. *Id.*
27. *Id.*
28. Christensen v. Harris County, 120 S. Ct. 1655, 1664 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment). In Justice Breyer's view, the Court before *Chevron* already valued the agencies' "'specialized experience'" by looking to agency views "'for guidance.'" *Id.* at 1667 (Breyer, J., dissenting) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139, 140 (1944)). *Chevron* "made no relevant change" but merely "focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations." *Id.* at 1667-68.

> interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[29]

The Court's decision in *Chevron* has spawned a voluminous literature,[30] and commentators have divided over the virtues of the decision.[31] The correctness of the Court's approach in *Chevron*, however, is beyond the scope of this Essay. Instead, I focus here on *Chevron*'s requirement that courts defer to reasonable agency interpretations of ambiguous statutory language—and specifically on how this requirement applies when agencies interpret statutes governing conditional federal grants to states. To understand fully how *Chevron* should apply in that context, it is useful to consider the values advanced—and the values diminished—by *Chevron*'s approach.

Chevron's framework for deference was an attempt to accommodate various concerns regarding separation of powers and regulatory efficiency. Among others, those concerns include: (1) maintaining Congress's legislative supremacy; (2) preserving the judiciary's authority to "say what the law is"; (3) enabling executive agencies to decide in the first instance how best to enforce the law; (4) ensuring that agencies can apply their

29. *Chevron*, 467 U.S. at 866 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

30. One commentator has quipped that "[t]he loss of forests necessary to make the paper to print all of the articles written on the proper standard of review in interpreting statutes following [*Chevron*] might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion." Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 229 n.116 (1994).

31. Cass Sunstein, for example, has argued that

> *Chevron* is best understood and defended as a frank recognition that sometimes interpretation is not simply a matter of uncovering legislative will, but also involves extratextual considerations of various kinds, including judgments about how a statute is best or most sensibly implemented. *Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.

Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2087-88 (1990). Peter Strauss has praised *Chevron* for a different reason. He noted that

> [t]he Supreme Court's practical inability in most cases to give its own precise renditions of statutory meaning virtually assures that circuit readings will be diverse. By removing the responsibility for precision from the courts of appeals, the *Chevron* rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws.

Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (citation omitted).

On the other hand, Cynthia Farina has criticized *Chevron* on the ground that it conflicts with the rationale for the delegation doctrine: "'Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits.'" Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring)); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) (discussing the "draconian implications of the [*Chevron*] doctrine for the balance of power among the branches").

particularized expertise in enforcing the law; and (5) providing a judicial check on the power of electorally unaccountable agencies to usurp Congress's legislative function.

By leaving to the agency the authority to issue binding interpretations of statutory provisions even when the Court, if confronted independently with the meaning of the provision, would construe its meaning differently,[32] the Court necessarily undermined to some degree the second interest above—the judiciary's role as final arbiter of the meaning of federal law. The decision in *Chevron* recognized, however, that deference does not simply amount to judicial abdication, because Congress often has intended to leave some matters of enforcement policy to agencies; deference thus respects that intent.[33] With *Chevron* as a background rule of construction, moreover, Congress knows when it legislates that ambiguous legislative statements and broad delegations of policymaking authority will result in judicial approval of reasonable agency interpretations; the decision to do so, given *Chevron*'s rule, can be taken as tacit approval of reasonable agency enforcement policies. Indeed, Congress can limit agency authority simply by filling some of the gaps in its enactments with definitive legislative statements. The decision thus does not irreparably undermine the first two interests noted above. For many of the same reasons, the decision in *Chevron* does no significant harm to the fifth concern above—providing a judicial check on the power of electorally unaccountable agencies to usurp Congress's legislative function—because agency interpretations that are inconsistent with Congress's legislative scheme are impermissible, even under *Chevron*.[34] Finally, *Chevron* plainly promotes the development of agency expertise and entitles agencies to apply that expertise to matters of governance.[35] Judges, the Court explained, "are not experts,"[36] and enforcing federal law often requires "'a full understanding of the force of the statutory policy in the given situation[, which generally] has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'"[37]

In addition, by requiring judicial deference to reasonable agency interpretations of ambiguous statutory provisions, the decision in *Chevron* recognizes the realities of executive enforcement. Given limited resources,

32. *See Chevron*, 467 U.S. at 843 n.11.

33. *Id.* at 843 ("'The power of an administrative agency to administer a congressionally . . . created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))). *But see* Merrill, *supra* note 31, at 979 ("Yet how do we know that Congress, the ultimate democratic trump card, wants ambiguities and gaps to be resolved by agencies rather than by courts?").

34. *See Chevron*, 467 U.S. at 842-43.

35. Sunstein, *supra* note 31, at 2088-89.

36. *Chevron*, 467 U.S. at 865.

37. *Id.* at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

the executive branch must make difficult decisions about how best to carry out statutory mandates. Because the agencies are electorally accountable derivatively through the President, "it is entirely appropriate for this political branch of the Government to make such policy choices."[38] More important for this discussion, *Chevron*'s recognition of the need for executive enforcement discretion reflects an understanding of the inherent malleability of language. Even the best-intentioned Congress, one that strives to answer all difficult policy questions in its legislation, cannot anticipate every conceivable set of circumstances that might arise. Indeed, it is the art of the lawyer to find ambiguity in even the clearest of statutory provisions, and no amount of legislative dedication can produce laws at such a level of specificity that all eventualities can be resolved by simple reference to the terms of the statute. As discussed below, virtually every statutory definition raises a new host of interpretive difficulties. It is far from clear, moreover, that such legislative precision is desirable; thoroughness often is the enemy of simplicity, and statutes that strive to anticipate any eventuality risk sacrificing clarity to complexity. By deferring to reasonable agency interpretations, *Chevron* credits the reality that Congress cannot (and perhaps should not) attempt to answer every policy-based question raised by a regulatory initiative.

B. *Congress's Power Under the Spending Clause*

1. *General Principles*

This Essay asks whether the usual principles of *Chevron* deference should apply when Congress has enacted the statutory provision at issue pursuant to the spending power. Although the Constitution does not speak specifically of Congress's power to "spend," the Court has long interpreted Article I, Section 8, Clause 1, which empowers Congress to "provide for the common Defence and general Welfare of the United States,"[39] as authorization for Congress to spend funds to further national interests.[40] The Court, moreover, has left largely to Congress the determination of what promotes the "general welfare."[41] And "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the

38. *Id.* at 865.

39. U.S. CONST. art. I, § 8, cl.1.

40. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206-07 (1987); United States v. Butler, 297 U.S. 1, 65 (1936). *See generally* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (providing an overview of the spending power and of misconceptions about its scope).

41. *See* Helvering v. Davis, 301 U.S. 619, 640 (1937) ("The line must still be drawn between one welfare and another, between particular and general. . . . The discretion, however, is not confined to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.").

direct grants of legislative power found in the Constitution."[42] In addition, Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[43] Therefore, "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[44] States, of course, are frequent recipients of such federal grants with strings attached.

Although the Court has not invalidated a congressional spending clause enactment since 1936,[45] it has identified a number of (at least theoretical) limits on that power. First, as the language of the constitutional grant of authority makes clear, "the exercise of the spending power must be in pursuit of 'the general welfare,'"[46] although, as noted above, the Court generally defers to Congress's view of the meaning of that term. Second, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[47] Third, the spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional."[48] Fourth, the financial inducement offered by Congress must not "be so coercive as to pass the point at which 'pressure turns into compulsion.'"[49] Finally—and most important, for purposes of this Essay—if Congress desires to place a

42. *Butler*, 297 U.S. at 66.

43. Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

44. *Dole*, 483 U.S. at 207 (quoting *Butler*, 297 U.S. at 65). For a provocative article about the difference between congressional ends and means in the Spending Clause context, see Engdahl, *supra* note 40.

45. *See Butler*, 297 U.S. at 68-78 (invalidating various provisions of the Agricultural Adjustment Act of 1933 because they "invade[d] the reserved rights of the states" and because they had a "coercive purpose and intent"). The Court sharply changed direction one year later in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937), which upheld a tax imposed on employers by the Social Security Act and conditional grants under that statute, and rejected the claim that the Act "involv[ed] the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."

46. *Dole*, 483 U.S. at 207 (quoting U.S. CONST. art. I, § 8, cl. 1 and citing *Helvering*, 301 U.S. at 640-41, and *Butler*, 297 U.S. at 65).

47. *Id*. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). This limitation is often referred to as a "germaneness" or "relatedness" limitation. *See id*. at 208 n.3.

48. *Id*. at 210. The Court has referred to this limitation as the "independent constitutional bar" limitation. *Id*.

49. *Id.* at 211 (quoting *Steward Mach. Co.*, 301 U.S. at 590). Notwithstanding this limit on the spending power, the Court has suggested that "[i]f Congress enact[s a statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). Such a view of state choice, however, presumably would apply regardless of how tempting the offer is. Nevertheless, the Court continues to articulate the "coercion" limitation on the spending power, and at least some members of the judiciary have indicated a willingness to take that limitation seriously. *See* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569-70 (4th Cir. 1997) (en banc) (opinion of Luttig, J.).

condition on the States' receipt of federal funds, "it must do so unambiguously."[50]

2. *The* Pennhurst *Doctrine*

The Court announced the requirement of congressional clarity in establishing conditions on federal grants in *Pennhurst State School & Hospital v. Halderman*.[51] In *Pennhurst*, the Court addressed the meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975,[52] a "federal-state grant program whereby the Federal Government provides financial assistance to participating States to aid them in creating programs to care for and treat the developmentally disabled."[53] Under the Act, states "are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding."[54] Pennsylvania had accepted funds under the Act, and it was undisputed (in light of the district court's findings) that conditions at the Pennhurst State School and Hospital were "not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded."[55] The question presented was whether conditions at the hospital violated the obligations that the Act imposed on recipient states.

Specifically, residents of the hospital claimed that their treatment violated 42 U.S.C. § 6010, the "bill of rights" provision of the Act, which generally stated Congress's "findings" with respect to the "rights" of persons with developmental disabilities.[56] The "enabling" provisions of the Act, in contrast, required that "any State desiring financial assistance submit an overall plan satisfactory to the Secretary of HHS," and that the Secretary could approve the plan only if it complied "with several specific conditions set forth in [42 U.S.C.] § 6063."[57]

50. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). *See generally* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 189 ("Of these four conditions, only the [clear-statement rule] has any effect on structuring spending power.").

51. 451 U.S. 1.

52. 89 Stat. 486 (codified as amended at 42 U.S.C.S. § 15001 (Law. Co-op., LEXIS through 2000 legislation)).

53. *Pennhurst*, 451 U.S. at 11.

54. *Id.*

55. *Id.* at 7.

56. The provision states, in relevant part, that (1) "[p]ersons with developmental disabilities have a right to appropriate treatment"; (2) such treatment "should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty"; and (3) the "Federal Government and the States both have an obligation to assure that public funds are not provided to any institutio[n] . . . that—(A) does not provide treatment . . . which is appropriate to the needs of such person; or (B) does not meet the following minimum standards." *Id.* at 13 (quoting 42 U.S.C. § 6010 (1976)).

57. *Id*. at 13-14.

The Court first noted that

> legislation enacted pursuant to the spending clause is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."[58]

Ostensibly applying contract principles—and drawing from its Eleventh Amendment jurisprudence—the Court concluded that "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."[59] Accordingly, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[60] The Court reasoned that "[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."[61]

Applying these principles, the Court concluded that "the 'findings' in § 6010, when viewed in the context of the more specific provisions of the Act, represent general statements of federal policy, not newly created legal duties."[62] The Court noted that when "Congress intended to impose conditions on the grant of federal funds, as in [other sections of the Act], it proved capable of doing so in clear terms."[63] Viewed in that context, the "absence of conditional language in § 6010" led the Court to conclude that the enumerated "rights" were mere precatory statements by Congress.[64] The Court found those rights to be "largely indeterminate"; as a result, "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010."[65]

As this discussion makes clear, the Court in *Pennhurst* was faced principally with the interpretive task of determining whether a particular provision of a grant statute expressed a mere hortatory statement of federal

58. *Id.* at 17.

59. *Id.* (citing Edelman v. Jordan, 415 U.S. 651 (1974); Employees v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973)).

60. *Id.*

61. *Id.* at 17.

62. *Id.* at 22-23.

63. *Id.* at 23.

64. *Id.* at 23-27 (noting the "well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States," and stating that Congress "understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it").

65. *Id.* at 24-25. The Court also rejected the suggestion that Congress passed the Act pursuant to its power to enforce the Fourteenth Amendment and that, in doing so, Congress intended to create rights enforceable against the states. *See id.* at 18-22.

policy, or rather was intended to bind state recipients of funds under the program. The decision, however, can also be read—especially when considered in light of later-decided federalism cases—as an attempt to balance a number of federalism-based concerns. Those concerns include: (1) protecting state autonomy and maximizing state voluntary choice; (2) limiting Congress's authority to accomplish indirectly what it could not accomplish directly through exercise of its affirmative legislative powers; (3) promoting transparency in legislation and increasing the chance that Congress considers the interests of the states when it imposes burdens on them; (4) ensuring state compliance with obligations fairly imposed by federal law; and (5) enabling Congress to address problems of national importance through its chosen means.

To be sure, *Pennhurst* is susceptible to criticism for undervaluing the latter two interests and overvaluing the first two. For example, *Pennhurst*'s rule of construction may in some cases defeat congressional intent that has not been expressed with the talismanic precision required by the Court. This is especially likely when the Court applies the rule to statutory provisions enacted before the Court decided *Pennhurst* and thus for which Congress did not have the benefit of knowing the Court's expectations of clarity.[66] And, as the Court's recent Eleventh Amendment jurisprudence demonstrates, zealous judicial protection of state autonomy risks undermining assurances that states will abide limitations validly imposed by federal law.[67] Insisting on particular legislative formulations no doubt diminishes the likelihood that statutory provisions will be interpreted to impose binding conditions on states, and thus frees states from the obligation to comply with what are at times costly burdens suggested by federal law; but doing so also decreases, by some incalculable amount, the likelihood that states will conform their conduct to the limits that Congress actually intended to impose. Similarly, although some commentators (and members of the Court) have expressed concern about the "back door" of the spending clause[68]—that is, the opportunity that the spending power provides Congress to accomplish ends that it could not address through its direct regulatory authority—all modern authorities (including the Court's

66. *But cf.* Lessig, *supra* note 50, at 188 ("If the Court's job were simply to find Congress's meaning, then it would have no right to impose on Congress anything like a clear statement rule. But the Court is not simply the handmaiden of Congress. Its duty is also to the Constitution. The question is how best it can satisfy that duty.").

67. Under current doctrine, Congress may validly impose binding requirements, such as minimum wages and antidiscrimination mandates, on states, *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); EEOC v. Wyoming, 460 U.S. 226 (1983), but may not authorize private suits to enforce those rights unless Congress acts to enforce the Fourteenth Amendment, *see* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999).

68. *E.g.*, Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

decisions) agree that Congress *may*, by invoking its spending power, exert influence over affairs otherwise outside of the scope of federal authority.[69]

The first and third interests described above also serve as the seeds of the competing frameworks for analyzing the question presented in this Essay. The Court's concern for state voluntary choice underscores the importance of notice to the states of the conditions that they will assume in accepting federal funds; the Court's insistence on congressional clarity represents the Court's attempt to ensure that Congress (and Congress alone) decides whether to impose a burden on the states. The latter concern forms the basis of the accountability model, and the former forms the basis of the state choice model. I discuss these models of interpreting *Pennhurst* below in Part II.

This brief discussion of *Pennhurst*—like the discussion above of *Chevron*—is not intended to suggest that the decision perfectly accommodated the identified interests, or even that all of those interests require judicial protection. My personal opinion is that *Pennhurst*'s rule is unnecessary and that *Chevron*'s is ultimately desirable. But, at least as long as *Pennhurst* and *Chevron* are the governing precedents, the interests advanced by these decisions inform the proper approach to deciding whether *Chevron* deference should apply to agency interpretations of ambiguous statutory grant conditions.

In light of the values advanced by these decisions, how does one answer this question? One could view this as an administrative law question, and of course in some sense it is. Indeed, the question is whether to defer to an entire class of agency interpretations: those that construe conditions in federal-state grant programs. But it is also a federalism question, and it requires the weighing of interests that are not easily quantified: state autonomy and voluntary choice, on the one hand, and uniformity of federal law, congressional flexibility, executive enforcement discretion, and agency expertise, on the other. I turn now to the principal approaches, with an eye towards balancing these competing interests.

II. RECONCILING *PENNHURST* AND *CHEVRON*: COMPETING FRAMEWORKS

A. *The Case for the Accountability Model*

Return for a moment to the hypothetical science education grant program, under which a state receiving funds must "assure that all public school students have reasonably individualized access to technology education." Recall that the state believes that the best way to satisfy the

69. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); United States v. Butler, 297 U.S. 1 (1936); Baker, *supra* note 11, at 1916.

requirement is to use the funds to purchase enough computers to ensure a five-to-one student-to-computer ratio, but that the Department of Education has decided that the condition requires school districts to hire enough teachers to maintain a ten-to-one student-to-teacher ratio in all science classes. It is instructive to consider this conflict—and the potential balancing of *Chevron*'s and *Pennhurst*'s values—from the perspective of a federalist, or one who is solicitous of states' rights.

First, the state arguably has no choice but to accept the funds.[70] Second, by limiting the states' discretion in addressing educational issues, the hypothetical grant program seeks to compel the states to take action in an area that is thought to be quintessentially local.[71] Third, the agency's view, although reasonable, is in no sense compelled by the statute's text.

Moreover, as suggested above, *Pennhurst*'s clear-statement rule can be seen as ensuring that the structural protections for the states function effectively. Specifically, the rule increases the chance that Congress will consider the interests of the states when it imposes burdens on them. In so doing, the rule helps to ensure that Congress's decision to impose such burdens is made plain to voters, who can decide whether their states should bear such burdens, and to states, which certainly will inform their voters of the burdens imposed by Congress. Although the Court decided *Pennhurst* four years before it decided *Garcia v. San Antonio Metropolitan Transit Authority*,[72] *Pennhurst*'s rule takes on new importance in light of the later decision in *Garcia*. That decision left protection for state autonomy primarily to the federalist structure.[73] Because representation in Congress is state-based, state constituencies have a voice in Congress through their elected federal representatives, whom the voters may remove from office if they fail adequately to respect state prerogatives.[74] The theory, of course, is that Congress will consider the states' interests in maintaining local autonomy when it decides how expansive federal regulation should be (or, to state it the other way, how much power to devolve, or leave, to the states).

70. Professor Lynn Baker, for example, has argued that because the federal government has "a monopoly power over the various sources of state revenue," states (at least, that is, states that would not, if given a completely free choice, accept the conditions attached) must acquiesce in the federal conditions in order to secure a "return" of the state's "own" money. Baker, *supra* note 11, at 1935-36; *see also id.* at 1973-74 (discussing coercion). I briefly respond to this argument *infra* notes 117-120 and accompanying text.

71. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566 (1995).

72. 469 U.S. 528.

73. *Id.* at 550-54.

74. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 839-45 (1995) (Kennedy, J., concurring); *Garcia*, 469 U.S. at 551; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

Pennhurst's clear-statement rule forces Congress to confront the question whether states should be required to comply with (what often are) costly provisions of federal law, and thus ensures that the structural protections on which the Court relied in *Garcia* operate properly.[75] Allowing *agencies* in effect to impose conditions on the states' receipt of federal funds risks undermining these protections, and creates the potential that agencies will impose conditions that were not within Congress's contemplation.[76] This is the premise of the accountability model, through which the federalist views *Pennhurst* to resolve whether agency interpretations of grant conditions can bind state recipients.[77]

The accountability model thus treats as paramount *Pennhurst*'s structural protections. A court applying the accountability model to determine what obligations a state has assumed in accepting federal funds focuses on the grant statute as enacted by Congress. Because the model's premise is that Congress—and Congress alone—should decide, with full transparency, what burdens the states should bear in accepting federal funds, it categorically precludes consideration of agency interpretations to discern the meaning of statutory provisions that, by most conventional

75. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 856 (3d ed. 2000); Lessig, *supra* note 50, at 207.

76. Of course, there may be little reason to doubt the efficacy of these structural protections even absent *Pennhurst*'s clear-statement rule. Because states rarely are eager to assume costly obligations imposed by federal law, state officials are likely to protest—loudly, publicly, and often—whenever the federal government contends that federal law requires the state to take (or refrain from taking) action that the state would not take (or refrain from taking) if federal law did not so require. Indeed, this same criticism applies to the Court's decision in *New York v. United States*, 505 U.S. 144 (1992), which prohibits Congress from directing state legislative action largely on the grounds that when Congress orders the states to take regulatory action, the political accountability of federal officials is undermined. *See generally* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (critiquing the formalism of the Court's anticommandeering decisions); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (critiquing the Court's categorical prohibition of executive commandeering, and proposing a more nuanced approach to judicial enforcement of federalism limits).

More importantly, before the Court's decision in *Pennhurst*, the courts determined whether Congress had attached conditions to the grant of federal funds according to traditional canons of statutory construction. *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 688 (1979) (holding, after "carefully analyz[ing] the four factors that *Cort* [*v. Ash*, 422 U.S. 66 (1975),] identifies as indicative of" congressional intent, that Title IX authorizes a private right of action against a recipient of federal funds); Rosado v. Wyman, 397 U.S. 397, 407-15 (1970) (holding, after examining the language and legislative history of the Aid to Families with Dependent Children program, as well as "basic axiom[s]" of statutory construction, that the statute required state recipients to reevaluate equations for determining need). At bottom, then, even in the pre-*Pennhurst* regime, courts concluded that state recipients of federal funds were bound by a particular statutory provision only when Congress so intended. And because states presumably were aware of how courts divined congressional intent, a court's conclusion that Congress intended to attach a particular string to a federal grant would not (at least in theory) come as a surprise to the state.

77. *See* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 561-72 (4th Cir. 1997) (en banc) (adopting the dissenting panel opinion of Luttig, J., originally at 86 F.3d 1337, 1347 (4th Cir. 1996) (panel opinion) (Luttig, J., dissenting), as the majority opinion after a brief per curiam opinion).

canons of interpretation, can be thought to have delegated to an agency the authority to fill in gaps in the statute's application. Under the accountability model, therefore, *Chevron* deference is categorically inappropriate.[78]

In this sense, the accountability model expresses a concern about delegation. As Professor Sunstein recently observed, clear-statement rules can be understood as "nondelegation canons," because they are rules that "forbid administrative agencies from making decisions on their own."[79] According to this account, the traditional nondelegation doctrine, which has proved to be difficult to administer, has been replaced by "a series of more specific and smaller" nondelegation doctrines that "represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree."[80] These canons, typically expressed as clear-statement rules similar to *Pennhurst*'s, are an effort to link "important interests" with "appropriate institutional design."[81] The interest served by *Pennhurst*'s rule, of course, is state autonomy, which (on this account) finds its protection principally in the institutional structure of Congress. In the science education hypothetical, for example, there is no obvious indication that Congress was concerned about class size; allowing the agency in effect to override the state's judgment as to the best means to accomplish Congress's broadly stated goal not only creates the potential that the agency has attempted to impose a condition that was not within Congress's contemplation, but also risks doing so at the expense of important values of federalism.[82]

A related (and specifically federalism-based) theoretical justification for the accountability model is that to bind the state to the agency's view

78. Note also that application of the accountability model often will result in different standards and obligations depending on whether a recipient of federal funds is a state or private entity. *Pennhurst*'s rule applies only to state recipients of federal funds. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."). When Congress imposes conditions on private recipients of federal funds, the same federalism concerns are not present. Application of the accountability model to grant programs that provide funds to both private and state entities therefore creates the possibility that an agency interpretation of an ambiguous condition will, under *Chevron*, bind the private recipients but not the state ones. Under the accountability model, therefore, the same statutory grant provision can have different meanings, depending on the status of the party that accepts funds.

79. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

80. *Id.* at 316-17.

81. *Id.* at 317.

82. There is, however, a significant limitation in treating *Pennhurst*'s rule according to this account. The other nondelegation canons that Professor Sunstein discusses do not substantially impair an entire source of Congress's affirmative authority. Treating *Pennhurst*'s clear-statement rule as a nondelegation canon (that is, viewing *Pennhurst* through the accountability model) arguably imposes more than a minor procedural obstacle to Congress's ability to legislate pursuant to the spending power, instead converting that rule into a substantive limitation on Congress's power to spend with strings attached. It is perhaps for this reason that Professor Sunstein does not include *Pennhurst*'s rule in his discussion of the nondelegation canons.

would diminish the efficacy of a "second-best" rule.[83] In the federalism context, an advocate of state autonomy might consider the ideal rule to be a direct limit on Congress's authority to accomplish through the spending power what it could not accomplish through its other affirmative powers. Such rules, however, often in practice have not been sustainable.[84] As a result, advocates of vigorous limits on federal authority have settled for procedural or interpretive rules that create an obstacle, however small, to Congress's ability to alter the federal-state balance.[85] *Pennhurst*'s clear-statement rule is a classic second-best federalism rule: It does not prevent Congress from invoking its spending power to impose requirements on the states, but instead only heightens Congress's burden in so doing. Allowing agencies effectively to impose conditions takes away at least some of the bite of *Pennhurst*'s rule and thus weakens one of the only viable mechanisms that exist to protect the states.

As I explain below,[86] however, the accountability model has not been the majority approach to answering whether *Pennhurst*'s second-best rule forecloses *Chevron* deference for agency interpretations of statutory grant conditions that are ambiguous as applied to particular circumstances.[87]

83. *See, e.g.*, Lessig, *supra* note 50, at 131.

84. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); Hammer v. Dagenhart, 247 U.S. 251 (1918).

85. Gregory v. Ashcroft, 501 U.S. 452 (1991).

86. *See infra* notes 124-136 and accompanying text.

87. Indeed, the Court in *Pennhurst* itself suggested that agency interpretations of grant conditions could, under appropriate circumstances, bind a state recipient. As explained above, *Pennhurst* concerned whether a provision of a federal statute that stated generalized congressional aspirations created rights enforceable by individuals whom the statute was designed to benefit. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 8-9 (1981). The Court's decision turned on Congress's failure to indicate clearly that the provision stated a binding condition on the states' receipt of funds under the Act. The Court did not address, however, the degree of specificity required once Congress unambiguously imposes *some* condition on the receipt of funds. If anything, the Court's decision in *Pennhurst* supports the view that agency interpretations of statutory grant conditions can, in appropriate circumstances, bind state recipients of federal funds. Because the Court concluded that in the Act's "bill of rights" provision, 42 U.S.C. § 6010 (1976), Congress did not unambiguously create a condition for the receipt of federal funds under the Act, the Court had no occasion to consider the precise contours of any condition imposed by the Act. In reaching its conclusion that Congress did not clearly intend the provision to be a condition, however, the Court relied in part on the fact that the Secretary of Health and Human Services, the agency charged with enforcing the Act, had concluded that "[n]o authority was included in the Act to allow the Department to withhold funds from States on the basis of failure to meet the findings" of the bill of rights provision. *Pennhurst*, 451 U.S. at 23 (quoting Developmental Disabilities Program, 45 Fed. Reg. 31,006 (May 9, 1980)). The Court reasoned that "it strains credulity to argue that participating States should have known of their 'obligations' under § 6010 when the Secretary of HHS . . . has never understood § 6010 to impose conditions on participating States." *Id.* at 25. In considering the agency's interpretation of the relevant statutory provision, the Court did not purport to apply any form of (pre-*Chevron*) deference; indeed, the Court suggested that the Secretary's position merely confirmed that the Act did not clearly impose any condition. Nevertheless, by referring to the Secretary's published view in determining whether states "should have known of their 'obligations'" under the Act, the Court implied that an agency's interpretation of a statutorily expressed condition might suffice to give

Nevertheless, the basic approach has informed some recent judicial decisions. Most notable is the Fourth Circuit's en banc decision in *Virginia Department of Education v. Riley*,[88] which involved an ambiguous condition imposed by the Individuals with Disabilities Act (IDEA).[89] Rejecting the Department of Education's interpretation of the provision, the court held that *Chevron* deference was inappropriate[90] because it is "axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted."[91] The Court therefore invoked what I have described here as the accountability model.[92]

states adequate notice of the conditions with which they must comply upon accepting federal funds.

88. 106 F.3d 559 (4th Cir. 1997) (en banc).

89. 20 U.S.C. §§ 1411-1420 (1994) (§ 1420 was repealed in 1997). Section 1412(1) provided that all state recipients must "have in effect a policy that assures all children with disabilities the right to a free appropriate public education." *See id.* § 1412(1) (repealed in 1997).

90. *Riley*, 106 F.3d at 561-72 (reproducing Judge Luttig's dissent in the panel opinion after a brief per curiam opinion by the majority). Six members of the court (including Judge Luttig) adopted as their own without change Judge Luttig's dissent from the panel decision. *See id.* at 560 (opinion of Luttig, J., joined by Wilkinson, C.J., and Russell, Widener, Wilkins, and Williams, JJ.). Three other judges concurred in the judgment and expressly concurred in Part I of Judge Luttig's opinion, which contained Judge Luttig's conclusion that Congress had not spoken with the requisite clarity and included his conclusion that *Chevron* deference would be inappropriate. Judge Niemeyer wrote a separate opinion concurring "in part I of the opinion adopted by the majority and in the judgment of the court." *Id.* at 572 (Niemeyer, J., concurring in part). Judge Hamilton, joined by Judge Ervin, wrote a separate opinion, stating: "Because Part I of the majority opinion, with which I am in complete accord, adequately disposes of the matter, I would not reach the Tenth Amendment analysis. Accordingly, I concur in Part I of the majority opinion and in the judgment of the court." *Id.* (Hamilton, J., concurring in the judgment). Two judges concurred in the judgment. Judge Michael wrote a separate opinion, stating: "Because I agree with the point in the majority's adopted opinion that the right here can be forfeited, I concur in the judgment." *Id.* (Michael, J., concurring in the judgment). Judge Motz filed a separate opinion, stating:

> For many of the reasons explained in Part I of Judge Luttig's dissent from the opinion of the panel majority, I do not believe Congress has unambiguously required the states to provide educational services to disabled children who have been suspended or expelled for misconduct unrelated to their disabilities. Accordingly, I join the court's judgment.

Id. (Motz, J., concurring in the judgment). Therefore, at least nine judges (and possibly ten) agreed that the *Pennhurst* doctrine prevents application of *Chevron* deference to an agency regulation that construes a statutory condition on the grant of federal funds to the states.

91. *Id.* at 567. Indeed, the court reasoned that because *Garcia* "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise." *Id.* at 567 (quoting Gregory v. Ashcroft, 501 U.S. 452, 464 (1991)). Judge Murnaghan dissented, reiterating his belief, expressed in his opinion for the panel majority, that the statute was unambiguous in its requirement that states provide educational services. *Id*. at 579 (Murnaghan, J., dissenting). Judge Hall filed a separate dissent. He agreed with the majority that the provision of IDEA at issue "is arguably not an unambiguous expression of Congressional intent that such services be provided," but "disagree[d] with the majority's view that 'the deference that we ordinarily afford agency interpretations of ambiguous statutes is inapplicable in a case such as this.'" *Id*. at 580 (Hall, J., dissenting) (quoting Va. Dep't of Educ. v. Riley, 86 F.3d 1337, 1351 n.4 (4th Cir. 1996) (Luttig, J., dissenting)). In Judge Hall's view, the issue was "whether we will require that Congress itself define in unmistakable statutory terms each and every string that is or may ever be attached to a

State's receipt of funds under a cooperative funding program," or instead will "defer to a reasonable interpretation made by the federal agency to which Congress has delegated the job of operating the program." *Id*. He argued that in "choosing the former, the majority eviscerates the rule of *Chevron* and establishes a 'clear-statement rule' that is as unprecedented as it is unworkable." *Id.*

Judge Hall also pointed out an anomaly created by the court's decision. The Fourth Circuit in recent years has applied *Chevron* deference (or recognized the applicability of *Chevron*'s framework) to administrative interpretations of ambiguous statutory provisions in federal-state grant programs when the agency interpretation favors, as opposed to burdens, the state. As a result, the current state of the law in the Fourth Circuit, in light of *Riley*, is that when a private party has a dispute with a state about the proper interpretation of a condition in a federal grant program, the court applies *Chevron* if the state agrees with the agency's interpretation. When, on the other hand, the state disagrees with the agency's interpretation of an ambiguous-condition-creating statutory provision, the court refuses to apply *Chevron* and resolves the dispute in favor of the state. *See* Rehab. Ass'n v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994) (recognizing the applicability of *Chevron*'s framework to the question of whether a spending enactment imposes a burden on states); Mowbray v. Kozlowski, 914 F.2d 593, 600-01 (4th Cir. 1990) (applying *Chevron* deference to an agency interpretation of a Spending Clause enactment that benefited a state).

The Seventh Circuit followed *Riley* in *Doe v. Board of Education*, 115 F.3d 1273 (7th Cir. 1997), but did not discuss the *Chevron* issue. *Cf.* Cefalu v. E. Baton Rouge Parish Sch. Bd., 103 F.3d 393, 404 (5th Cir. 1997) (Barksdale, J., dissenting) ("The IDEA does not unambiguously condition the State's receipt of federal funds on its proving the infeasibility of providing services to disabled students attending private school voluntarily."). A district court in Arizona, on the other hand, disagreed with *Riley*, concluding that IDEA clearly imposed a duty to provide educational services to students disciplined for non-disability-related reasons, and that, in any event, the Department of Education's interpretation is entitled to deference. Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1436-40 (D. Ariz. 1997). The court did not discuss the *Pennhurst* issue. Less than four months after the Fourth Circuit's decision in *Riley* (and one month after the Seventh Circuit's decision in *Doe*), Congress amended IDEA to ensure that states provide educational services even to disabled children expelled from school for misconduct unrelated to their disabilities. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 612(a)(1)(A), 111 Stat. 37, 60 (codified at 20 U.S.C.A. § 1412(a)(1)(A) (West 2000)). The Senate Report stated that the amendment was a "clarification[]." S. REP. NO. 105-17, at 11 (1997); *see also* Amos v. Md. Dep't of Pub. Safety and Corr. Servs., 126 F.3d 589, 614-15 n.* (4th Cir. 1997) (Murnaghan, J., dissenting in part) (calling the majority's reliance on *Riley* "questionable" in light of the IDEA amendment).

92. As a doctrinal matter, the Fourth Circuit's decision seems clearly incorrect. In *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), and *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), the Supreme Court deferred to regulations of the Department of Education in deciding that IDEA (and its predecessor, the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1401(19), 1414(a)(5)) imposed specific conditions on state grant recipients. *See Garret F.*, 526 U.S. at 68-69 (holding that IDEA "requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours"); *Tatro*, 468 U.S. at 895 (holding that EHA required grant recipients to provide disabled students with certain catheterization services during school hours); *see also* Honig v. Doe, 484 U.S. 305, 325 n.8 (1988) (holding that the Department of Education's definition of the phrase "change in placement," which Congress stated in IDEA but did not define with specificity, is entitled to *Chevron* deference). Indeed, the Court in *Tatro* noted that "[t]he obligation to provide special education and related services is expressly phrased as a 'conditio[n]' for a state to receive funds under the Act," 20 U.S.C. § 1412, and thus that application of those requirements did not violate *Pennhurst*. 468 U.S. at 891 n.8.

In addition, the Supreme Court has made clear in Spending Clause cases decided after *Gregory* that *Pennhurst*'s clear-statement principle does not require Congress unambiguously to explain how a generalized prescription will apply in every conceivable particularized application. *See*, *e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649-53 (1999) ("Congress need not 'specifically identify and proscribe' each condition in the legislation." (quoting Bennett v. Ky. Dep't. of Educ., 470 U.S. 656, 665-66 (1985))); *see also* Bell v. New Jersey, 461 U.S. 773, 790

B. *Congressional Ambiguity and Interpretive Difficulties: Levels of Generality and the Error of the Accountability Model*

The federalist thus can construct a coherent defense of the accountability model. But what if the question—whether agency interpretations of statutory grant conditions are entitled to deference—is viewed from the perspective of Congress? When Congress legislates, it generally relies on administrative agencies—parts of a co-equal branch of government—to implement its broad mandates. The accountability model, however, requires Congress to legislate at an impossible level of specificity; it simply is not feasible for Congress to anticipate every eventuality that may arise under one of its programs. As discussed above, when applied only to the inquiry of whether Congress has imposed some burden on the states, *Pennhurst* promotes transparency in congressional lawmaking, encourages Congress to confront squarely whether it should alter the federal-state balance, but does not significantly impair Congress's power to impose binding obligations on the states. So interpreted, *Pennhurst*'s rule is, at bottom, merely an interpretive tool that Congress can realistically satisfy; it surely is not burdensome to the legislative process to identify a particular provision of a statute as an express condition on the grant of funds.

To interpret *Pennhurst*, as does the accountability model, as a broader rule of construction for any particularized application of a statutory condition, however, effectively turns the rule from an interpretive tool into a substantive limitation on Congress's authority to regulate through Spending Clause legislation. In so doing, the accountability model's view of the clear-statement rule undermines a number of the values served by *Chevron* and *Pennhurst* with no significant corresponding benefit. The problem with the accountability model becomes apparent when one considers the following hypothetical situations.

First, consider the statutory provision at issue in *Riley*. There was no dispute that IDEA imposed on the states, as a condition on the receipt of funds through the program, the obligation to "assure[] all children with disabilities the right to a free appropriate public education."[93] The court

n.17 (1983) (holding that *Pennhurst* applies to determine when Congress has imposed a condition, not to determine the remedies available against a noncomplying state). Justice Kennedy, however, has, in dissent, indicated a willingness to apply the model. *See Davis*, 526 U.S. at 669 (Kennedy, J., dissenting) (arguing that agency regulations neither "could [n]or did provide states the notice required by our Spending Clause principles"). Justice Kennedy's dissent was, to be sure, couched in terms of notice. But in suggesting that agency interpretations of ambiguous statutory grant conditions categorically cannot give the states adequate notice, Justice Kennedy effectively argued that Congress, and Congress alone, must make clear a particularized application of a grant condition. He thus in effect argued for application of the accountability model.

93. 20 U.S.C. § 1412(1).

concluded that this generally phrased duty could not bind the state to provide educational services to students who had been suspended or expelled for reasons wholly unrelated to their disabilities.[94] The court first concluded that the statutory reference to a "right" to educational services clearly incorporated a notion that rights may be forfeited.[95] The court then rejected the United States's argument that, if the court concluded that the provision were ambiguous in its application to Virginia's disciplinary policy, the court should defer to the Department of Education's construction of the provision.[96]

To be sure, IDEA's provision is phrased in such general terms that it could reasonably be read to sweep in any number of specific obligations. But interpretive problems would not disappear even if Congress had drafted a more precise statutory condition. Imagine instead a statutory grant condition that provides: "A state shall be entitled to funds under this program only on the condition that it provides to disabled students who have been suspended or expelled educational services comparable to those provided in the classroom to nondisciplined students." Although this provision obviously would have eliminated much of the debate in *Riley*, it nevertheless would pose its own problems of construction. First, even if this provision incorporated IDEA's definition of children with disabilities,[97] questions could arise whether, for example, a student with attention deficit disorder has a "serious emotional disturbance" within the meaning of the Act,[98] or whether students with temporary disabilities are entitled to the protected services.[99] Second, because the provision does not define "comparable," the question inevitably would arise whether, for example, thrice-weekly yet individualized tutoring is sufficient, or whether providing noncertified instructors satisfies the obligation. What, then, would the court do if posed with these questions? The accountability model would appear to require the court to conclude, even if the Department of Education had

94. *Riley*, 106 F.3d at 566.

95. *Id*. at 563. Of course, if the court were correct in this conclusion, then the agency's interpretation of the provision categorically to require educational services to "all children with disabilities" arguably would not be reasonable and thus would fail under *Chevron*'s step two. But the court's interpretation of the word "right" begs the question of who gets to decide, in the first instance, what the statute requires.

96. *Id*. at 567.

97. The Act defines "child with a disability" to mean "a child . . . (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance[,] . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C.A. § 1401(3) (West 2000).

98. *See id*. (defining "child with a disability" to include a child with a "serious emotional disturbance").

99. *See id.* (defining "child with a disability" to include a child with "other health impairments"); *cf.* Murphy v. United Parcel Serv., 527 U.S. 516 (1999) (holding that the decision whether an employee's impairment "substantially limits" one or more major life activities under ADA is made with reference to the mitigating measures he employs).

regulations that define the ambiguous terms, that the hypothetical statute cannot obligate the state to provide services not clearly contemplated in the statute, or to provide services to individuals not clearly covered by the statute.

It is possible, of course, that, if faced with this hypothetical statute and one of these hypothetical questions, a court following the accountability model would conclude that the statute is sufficiently clear to bind the state. But this statute, although considerably more precise than the actual provision of IDEA at issue in *Riley*, contains its own ambiguities; the difference is one of degree, not of kind. In either case, the state can claim that Congress has not specified the particular burden sought to be imposed, and it matters not to the state, the federal government, or the private party seeking to enforce the obligation that the burden is a product of interpretive difficulties at a different level of generality. And if *Chevron* deference is, as the accountability model holds, inappropriate to define the obligations that a grant condition imposes on state recipients under a generally ambiguous statutory condition, then it likewise must be inappropriate to define obligations imposed by an ambiguous provision of a more tightly drawn statutory condition. By confining *Pennhurst* to the question whether a provision of a statute functions as a condition on the acceptance of funds, as opposed to a mere expression of congressional aspiration, courts can avoid the problem of distinguishing between provisions that are particularly ambiguous and those that are only somewhat so.

Consider, as another example, Title IX's prohibition on discrimination "on the basis of sex . . . under any education program or activity receiving Federal financial assistance."[100] This provision (which the Supreme Court has made clear satisfies *Pennhurst*'s notice requirement) leaves many important questions unanswered. Do facially neutral policies with a disparate impact on women discriminate against women?[101] Does sexual harassment count as discrimination?[102] Is same-sex harassment discrimination on the basis of sex?[103] Does a university's sex-based firing of a female employee count as discrimination "under any education program or activity"?[104] Suppose that Congress attempted to address some of the ambiguities raised by this general prohibition by providing explicitly that "discrimination" includes teacher-on-student harassment and student-on-student harassment if the school had notice of the harassment. A school

100. 20 U.S.C. § 1681(a) (1994).

101. *Cf.* Lau v. Nichols, 414 U.S. 563 (1974) (considering whether the Civil Rights Act of 1964 prohibits policies with a disparate impact).

102. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

103. *Cf.* Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) (holding that same-sex harassment may violate Title VII of the Civil Rights Act of 1964).

104. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982).

district plausibly could still argue that, because of Congress's silence, mere constructive notice of harassment cannot render the district liable, or that any remedial action defeats a suit for damages. And even if Congress amends the statute to say that "reasonable remedial action shall be a complete defense to liability under this provision," a school district can claim that, because Congress did not specifically define how much remedial action is adequate, the Department of Education's interpretation that the school must discipline the offender cannot bind the state.[105]

By effectively resolving any textual ambiguity against the federal government, the accountability model dramatically alters the balances that *Pennhurst* and *Chevron* struck among the competing values described above. Recall that *Pennhurst* sought, by promoting transparency in legislation and increasing the chance that Congress considers the interests of the states when it imposes burdens on them, to protect state autonomy and voluntary choice without unduly burdening Congress's ability to impose binding obligations on the states.[106] Because Congress could never legislate at the level of specificity required by the accountability model—and because it is, for reasons discussed above,[107] arguably undesirable for Congress to create such dense statutory schemes—that approach effectively gives recalcitrant states a trump card against grant conditions that they deem, notwithstanding their acceptance of conditional federal funds, unduly burdensome. The accountability model essentially treats state autonomy as the only end while undermining state accountability and imposing an impossible burden on Congress. And by thus diminishing Congress's power to achieve its goals noncoercively through the spending power, application of the model makes it less likely that Congress will seek to regulate states in cooperative federal-state programs, which ultimately are more respectful of state prerogatives than is direct federal regulation of state conduct.[108]

The accountability model likewise upsets *Chevron*'s accommodation of competing interests. As discussed above, *Chevron* balanced the interests in ensuring that Congress retains legislative supremacy and that the judiciary retains its role as ultimate arbiter of federal law, on the one hand, with the interests in promoting expertise in governance and preserving the executive branch's discretion in enforcing federal law, on the other.[109] The

105. As discussed *infra* notes 179-196 and accompanying text, the Title IX hypothetical raises difficult questions about timing and notice to states.

106. *See supra* notes 66-69 and accompanying text.

107. *See supra* note 38 and accompanying text.

108. It also is not clear, as a descriptive matter, that the states' interests are better accommodated in Congress than by agencies. There are substantial constraints on agencies' ability to issue regulations, *see, e.g.*, Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that an agency must justify a regulation by examining data and articulating a rationale), and states, like private parties, can comment on agencies' proposed rules.

109. *See supra* notes 32-38 and accompanying text.

accountability model, however, cannot accommodate all of these interests. Because the model imposes an unrealistic burden of legislative specificity on Congress, it limits Congress's power to bind states. Similarly, because application of the model entitles states to defeat statutory conditions by claiming ambiguity in particularized applications, the courts' power to conduct a traditional inquiry into legislative meaning is diminished. And by refusing to permit executive interpretations of grant conditions to bind states, the accountability model limits the ability of agencies to bring their expertise to bear on problems that they are charged with addressing, and it curtails the executive's traditional enforcement discretion. Indeed, under the accountability model, Congress cannot bind states with *any* condition that is susceptible to more than one reasonable reading, regardless of whether the agency has interpreted the provision. As long as the state could claim that the statutory condition is ambiguous in its application to the particular controversy at issue, the state's own (reasonable) interpretation of the provision would control. Under the accountability model, agency action simply is irrelevant; ambiguity—even ambiguity at a high level of specificity—defeats the federal government's attempt to impose a burden on the state as a condition of its receipt of federal funds.

When Congress makes clear its objectives, moreover, it has reason to expect that its requirements will be applied uniformly. But if a state could defeat application of a federal requirement simply by pointing out that it is susceptible to more than one reasonable interpretation, then federal law would cease to apply uniformly. In addition, under the accountability model, federal requirements could vary not only from state to state, but also between state and private recipients of federal funds. If the ambiguous condition were part of a grant program that supplied funds to both state and private entities, application of the accountability model would result in conflicting statutory interpretations; the state would not be bound by any condition, but the private party would be bound by the agency's (reasonable) interpretation of the provision. But a statute either imposes (in light of background principles of statutory interpretation, including clear-statement rules and principles of deference to agency views) a condition or it does not; the accountability model undermines this uniformity in statutory meaning.[110]

110. The Fourth Circuit added another anomaly to the accountability model: that the court does accord *Chevron* deference to agency interpretations of ambiguous grant conditions when the interpretation is favorable to the state. As discussed *supra* note 91, the court in *Riley* did not purport to overrule its decisions that hold that when a private party has a dispute with a state about the proper interpretation of an ambiguously expressed condition in a federal grant program, the court will apply *Chevron* if the state *agrees* with the agency's interpretation. But *Chevron*'s balance of the interests discussed above should not—indeed, by definition does not—turn on the substance of the agency's interpretation of an ambiguous statutory provision, as long as that interpretation is reasonable. *Chevron* deference is warranted because (1) executive enforcement

In light of *Garcia*, there is, to be sure, value in maintaining the incentive for Congress to make difficult legislative decisions and not pass the resolution of controversial questions to the agencies. Indeed, *Garcia* is premised on the structural protections for states that inhere in the representative system in Congress; if Congress punts on policy questions, then some of those structural protections may be lost. But this argument suggests only that Congress should be required to make the essential choice—in the case of conditioned spending, whether to impose a condition on state recipients. As explained above, it is not feasible for Congress to legislate with a level of specificity that would preordain the statute's application to all conceivable sets of circumstances. *Garcia*, which enhanced federal power with respect to the states, should not be read effectively to eviscerate Congress's authority to bind states with conditions on grants of federal funds. *Chevron* is not inherently in tension with *Garcia*, and *Garcia* itself suggests no limit on the availability of deference to agency interpretations of conditioned spending programs, even when those interpretations impose burdens on the states.

The accountability model's failure to accord *Chevron* deference to agency constructions of grant conditions that are ambiguous in their application to particular circumstances thus defeats the careful balancing of competing interests that *Chevron* and *Pennhurst* represent. Because even the most attentive and forward-looking Congress could not anticipate every conceivable set of circumstances that might arise under a grant program, the accountability model's categorical rule against *Chevron* deference imposes an impossible burden on Congress. The model also ignores the interests, central to the decision in *Chevron*, of promoting agency expertise and executive enforcement discretion. The accountability model is not the only sensible interpretation of *Pennhurst*'s clear-statement rule.

necessarily involves a degree of policymaking discretion; (2) Congress often intends to vest such discretion in agencies; and (3) agencies have expertise in the substantive fields that they regulate. These justifications for deference are as applicable when the agency's interpretation imposes a relatively large burden on the states as when the agency adopts an alternative, equally reasonable interpretation that is less burdensome.

Similarly, even under the accountability model's unduly expansive reading of *Pennhurst*—which requires Congress unambiguously to define the precise contours of any conditional burden that it intends to impose on the states—*Chevron* deference should never apply to agency interpretations, including those that benefit the state. Because this view imposes on Congress, and Congress alone, the obligation to define the terms of conditional grants of federal funds, agency interpretations that in any sense alter the congressionally defined terms would not be binding. In order to achieve the proper balance among the interests described above, *Chevron* deference must apply either to all reasonable interpretations of ambiguous statutory provision or to none. It cannot, as the Fourth Circuit appears to have concluded, apply only to some subset of reasonable interpretations defined wholly without reference to the interests that *Chevron* deference is designed to serve.

C. *The State Choice Model*

In light of this critique of the accountability model, one could conclude that *Pennhurst*'s rule is merely a device to distinguish statutory conditions on the receipt of federal funds from mere hortatory statements of policy by Congress. Indeed, that distinction was the basic question to be decided in *Pennhurst*.[111] Subsequent applications of the clear-statement principle, however, have suggested another theoretical justification for the rule.

The state choice model holds that notice is the linchpin of *Pennhurst*'s clear-statement rule. Recall that in *Pennhurst*, the Court analogized Spending Clause legislation to contractual agreements between the federal government and the states; "in return for federal funds, the States agree to comply with federally imposed conditions."[112] Under this view, as with any contract, the "legitimacy" of the offer (in other words, the "legitimacy of Congress' power to legislate under the spending power"[113]) turns on whether the grantee (that is, the state) "voluntarily and knowingly accepts the terms of the 'contract.'"[114] And "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."[115]

As a preliminary matter, there is room for debate over whether, in light of the vast financial resources of the federal government, states truly may *voluntarily* acquiesce in stringent conditions on grants of federal funds;[116] indeed, a number of commentators have contended that conditioned grants are inherently coercive because the states have no realistic choice but to accept. Professor Lynn Baker, for example, has argued that because the "federal government has a monopoly power over the various sources of state revenue,"[117] states (at least, that is, states that would not, if given a completely free choice, accept the conditions attached) must acquiesce to the federal conditions in order to secure a "return" of the state's own

111. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 22-23 (1981).

112. *Id.* at 17.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Compare* South Dakota v. Dole, 483 U.S. 203, 217 (1986) (O'Connor, J., dissenting) ("If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'"), *and* Rosenthal, *supra* note 68, at 1135 ("[T]he dependence of the states or local government upon federal funds may have become so great as to destroy the possibility of an effective choice."), *with* Massachusetts v. Mellon, 262 U.S. 447, 482 (1923) ("If Congress enact[s a statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.").

117. Baker, *supra* note 11, at 1935.

money.[118] This argument, however, tends to undervalue the decisions of the national polity[119] and would diminish Congress's ability to accomplish national goals through cooperative federal-state programs that allow states to continue to exercise a large degree of control over matters of local importance.[120] In addition, to suggest that states need judicial protection because they risk having their wills overborne by federal coercion unduly anthropomorphizes states; although there is reason to protect individuals' decisionmaking from the coercive power of the state,[121] states are not people, with dignity and the capacity for sentience, and thus arguably should not be treated as such.[122] More fundamentally, one might dispute

118. *Id.* at 1937; *see also id.* at 1973-74 (discussing coercion). In Professor Baker's words:

> A conditional offer of federal funds to the states implicitly divides them into two groups: (1) states that already comply, or without financial inducement would happily comply, with the funding condition(s), and for which the offer of federal money therefore poses no real choice; and, (2) states that find the funding condition(s) unattractive and therefore face the choice of foregoing the federal funds in order to avoid complying with the condition(s), or submitting to undesirable federal regulation in order to receive the offered funds.
>
> When the federal government makes a conditional offer of funds, states in the second group are severely constrained in their decisionmaking by the lack of equivalent, alternative sources of revenue.

Id. at 1935-36. In effect, in Professor Baker's view, a minority of states are likely to be forced to cede to the will of the majority of states. As a result, she proposes that courts presume invalid any conditional offer of federal funds to the states that would, if accepted, regulate the states in ways that Congress could not directly mandate; the presumption would be rebutted if the spending simply states the purpose for which the states should spend the funds and "reimburses," in whole or in part, expenditures for that purpose. *Id.* at 1962-63.

119. Indeed, the fundamental flaw in Professor Baker's argument is that it is, at bottom, antimajoritarian. The argument ignores the fact that in any representative democracy—including the United States (in contrast to the individual states of the Union)—the will of the minority (here, the states that have a majority of citizens who disagree with federal policy) must be, absent some independent antimajoritarian limitation (such as the First Amendment), subordinate to the will of the majority. Indeed, Professor Baker's argument would logically extend to preventing Congress from enacting laws clearly within its affirmative powers to which the people of a minority of states object. Yet it cannot be that, for example, federal gun-control legislation is invalid merely because the citizens of New Hampshire and Texas object.

120. When Congress acts pursuant to its spending powers, it gives the states a choice to maintain primary control over most matters of governance within the scope of the grant, with the obvious exception that the states are bound by the federal conditions (with which they might not, in the absence of federal action, have independently complied).

121. *See, e.g.*, Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

122. *Compare* Baker, *supra* note 11, at 1938 (comparing the plight of states that are dependent on the federal government for funds to welfare recipients), *and* Rosenthal, *supra* note 68, at 1135 (rejecting the contention that "the notion of duress, as imposed upon a governmental unit, is . . . an inappropriate one because it is an 'anthropomorphism' that is not conducive to logical analysis"), *with* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1254 (1977) ("Debating whether conditions on federal grants . . . 'coerce' the states is an unhelpful anthropomorphism."). *See generally* Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 912 (1994) (outlining competing positions).

whether *Pennhurst*'s clear-statement rule is essential to ensure that states can ascertain their obligations under federal law. States (or, more precisely, their policymakers and legal counsel) not only are familiar with traditional canons of statutory construction, but also are, for obvious reasons, more likely than ordinary citizens to be aware of requirements imposed by law.

Nevertheless, at bottom, the contract analogy suggests a desire to protect state voluntary choice and underscores the importance of notice to the states of the conditions sought to be imposed. Under this view, states can decide whether acceptance of an offer of federal funds is in their interests only if they have a full understanding of the burdens that acceptance will impose on them. Notions of elemental fairness require that the states be informed fully of the obligations that they will assume in accepting the funds. This is the basis of the state choice model.

As long as certain background norms of administrative interpretation—such as *Chevron*'s rule of deference—are set in advance, a state can "ascertain what is expected of it" from sources other than the plain statutory text. The state choice model thus does not focus on which federal actor—Congress or the administrative agency—imposed a burdensome condition on the state, but rather inquires whether *some* federal pronouncement is sufficiently clear to apprise the state of the obligation that it will undertake in accepting federal funds. Under the state choice model, Congress satisfies its burden under *Pennhurst* simply by making clear that it is attaching a condition, but it need not, as would be the case under the accountability model approach, "specifically identify and proscribe in advance every conceivable state action that would be improper."[123] Reasonable agency interpretations of statutory conditions accordingly may bind state recipients of federal funds—at least, as I discuss in detail below in Part III, when the agency interpretation was available when the state accepted federal funds.

This has been the Supreme Court's consistent understanding of *Pennhurst*.[124] In *Bennett v. Kentucky Department of Education*,[125] for

123. Sandoval v. Hagan, 197 F.3d 484, 495 (11th Cir. 1999) (citing Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 666-69 (1985)), *cert. granted sub nom.* Alexander v. Sandoval, 121 S. Ct. 28 (2000).

124. Cases decided before *Pennhurst*, moreover, consistently held that reasonable agency interpretations of ambiguous statutory grant conditions could bind state recipients of federal funds. *See* Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (construing the Public Works Employment Act of 1977, 42 U.S.C. § 6701, and stating that the Court has "repeatedly upheld" Congress's use of "the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with statutory *and administrative directives*" (emphasis added)); *see also, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (stating that the basic framework for deference to administrative interpretations of ambiguous statutory provisions applies in federal-state grant programs); Lau v. Nichols, 414 U.S. 563 (1974) (relying on Department of Health, Education and Welfare (HEW) regulations in construing Title VI's general proscription on discrimination to include policies with a disparate impact); *id.* at 571 (Stewart, J., concurring) (applying pre-*Chevron* deference to administrative

example, the Court made clear that *Pennhurst*'s clear-statement rule is designed to determine only if Congress has imposed *some* condition, and that "*Pennhurst* does not suggest that the Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance."[126] The Court did "not believe that ambiguities in the requirements should invariably be resolved against the Federal Government as the drafter of the grant agreement."[127]

The Court has followed this approach both in cases considering numerous other federal-state grant programs[128] and in cases construing the

interpretations); Rosado v. Wyman, 397 U.S. 397, 415 (1970) (deferring to HEW's interpretation of the statutory provision governing the Aid to Families with Dependent Children program); King v. Smith, 392 U.S. 309, 334-35 (1968) (Douglas, J., concurring) (deferring to HEW's interpretation of the statutory provision governing the AFDC program); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143-46 (1947) (construing the Hatch Act, 18 U.S.C. § 61*l*, which prohibited employees of state agencies whose work was funded in part by federal grants from actively participating in "political management or the political campaigns" and deferring to the interpretation of the U.S. Civil Service Commission that defined service on a political committee as a forbidden activity under the Act).

125. 470 U.S. 656.

126. *Id.* at 666.

127. *Id.* at 669. The Court in *Bennett* judged the validity of an effort by the Secretary of Education to recover from Kentucky funds granted under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, which provides federal grants to support state and local education programs for disadvantaged children. In 1970, Congress amended the Act to require that Title I funds be used to "supplement and, to the extent practical, increase the level of funds" that states and localities expend for the education of indigent children. *Id*. at 660 (citing 20 U.S.C. § 241e(a)(3)(B) (1970)). Shortly after Congress enacted the 1970 amendments, the Department of Education promulgated regulations that prohibited states from using Title I funds to "supplant" their own contributions for the education of disadvantaged children. *Id*. (citing 45 C.F.R. § 116.17(h) (1974)). After a federal audit concluded that Kentucky had used Title I funds to defray substantially all the costs of educating disadvantaged students in one of the state's programs, the Secretary demanded repayment of Title I funds. *Bennett*, 470 U.S. at 660-61. Relying on *Pennhurst*, the state argued (and the court of appeals agreed) that the state did not accept Title I funds "with 'knowing acceptance' of the condition the Secretary now seeks to impose." *Id.* at 662 (quoting Kentucky v. Sec'y of Educ., 717 F.2d 943, 950 (6th Cir. 1983)).

The Court did not explicitly apply *Chevron* deference to the agency regulations at issue in *Bennett*. The Court's ultimate conclusion—that Kentucky "clearly violated existing statutory and regulatory provisions that prohibited supplanting," *id.* at 670, and that "[b]oth the statutory provision and the implementing regulations expressly required that Title I funds not be used to supplant state and local funds for the *pupils* participating in Title I programs," *id.* at 671—seemed to turn as much on *Chevron* step one as on *Chevron* step two. Nevertheless, the Court recognized that Congress cannot be expected explicitly to anticipate every possible contingency and that, as a result, agencies often will be required to interpret the scope of the conditions that Congress imposes. *Id.* at 669. In addition, the Court implicitly recognized that the Department of Education's interpretation of the condition at issue was reasonable. *Id.* at 669-73. Finally, the Court clearly held that the Secretary correctly sought repayment of federal funds used in fiscal year 1974 because Kentucky had violated "then-existing requirements"—including requirements imposed by regulations that elaborated on the condition-creating statute. *Id.* at 673. At the very least, then, after the Court's decision in *Bennett*, a reasonable agency interpretation that is in effect when the state accepts the funds in question can bind the state, notwithstanding *Pennhurst*'s clear-statement rule.

128. *See, e.g.*, Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 427, 431 (1987) (holding that Department of Housing and Urban Development regulations implementing the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1401 (1970), created rights enforceable by tenants under 42 U.S.C. § 1983; applying *Chevron* deference; and

obligations imposed by general grant conditions that are unlinked to any *particular* grant of federal funds, such as Title VI of the Civil Rights Act of 1964,[129] section 504 of the Rehabilitation Act,[130] and Title IX of the Education Amendments of 1972.[131] These provisions are not themselves grant-providing, but rather are background conditions on the receipt of federal financial assistance distributed through other affirmative grant programs; Title VI's and section 504's antidiscrimination norms apply to "any program or activity receiving Federal financial assistance,"[132] and Title IX's applies to "any education program or activity receiving Federal financial assistance."[133] In the Title IX context, for example, the Court has consistently followed the state choice model and concluded that agency regulations interpreting the Act's ban on sex discrimination can, without running afoul of *Pennhurst*, give state recipients of federal funds notice of the conditions with which they must comply.[134]

rejecting the respondent's *Pennhurst* argument); Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 262, 269-70 (1985) (deferring to the Department of the Interior's interpretation of the Payment in Lieu of Taxes Act, 31 U.S.C. § 6901, and rejecting the state's federalism-based claims, concluding that the statute was sufficiently clear to impose the condition at issue). In *Suter v. Artist M.*, 503 U.S. 347 (1992), the Court concluded that the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679(a) (1988), does not confer rights enforceable under § 1983, because the regulations implementing the Act "are not specific and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government." 503 U.S. at 362. The Court's inquiry, however, was consistent with the state choice model, because the Court considered whether agency regulations interpreting the statutory condition—as opposed to the statutory text itself—are sufficiently specific and clear to give notice to the states that failure to comply subjects them to private suits for enforcement. *See also* Blessing v. Freestone, 520 U.S. 329, 335 (1997) (holding that Title IV-D of the Social Security Act does not give individuals a federal right to sue states to enforce conditions).

129. 42 U.S.C. § 2000d (1994).

130. 29 U.S.C. § 794 (1994).

131. 20 U.S.C. § 1681(a) (1994).

132. 29 U.S.C.A. § 794 (West Supp. 2000) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."); 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

133. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

134. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 643 (1999) (considering student-on-student sexual harassment and stating that "the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents"); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288, 292-93 (1998) (considering teacher-on-student sexual harassment and relying on Department of Education regulations); N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982) (holding that Title IX prohibits sex discrimination in employment relationships in educational programs and recognizing a framework of deference); *cf.* Sch. Bd. v. Arline, 480 U.S. 273, 279, 286 n.15 (1987) (relying in part on Health and Human Services (HHS) regulations in defining "handicapped individual" within the meaning of the Rehabilitation Act).

Although the Court has had numerous opportunities to change course, it has not done so. Indeed, even those members of the Court (other than Justice Kennedy) who have expressed particular concern about the imposition of unanticipated burdens on state recipients of federal funds have appeared reluctant to adopt the accountability model and thus suggest that agency interpretations of statutorily created conditions can never be accorded *Chevron* deference. Justice Thomas, for example, recently argued (in dissent) that, in light of *Pennhurst*, "the constitutionally mandated rules of construction applicable to legislation enacted pursuant to Congress' spending power" require the Court to interpret narrowly not only congressionally imposed conditions, but also reasonable agency constructions of those conditions.[135] He did not argue, however, that *Pennhurst*'s insistence on congressional clarity categorically forbids the application of *Chevron* deference to agency interpretations of statutorily imposed conditions. Instead, he proposed a modified version of the state choice model that would apply a super-clarity rule to agency regulations that interpret statutory grant conditions. Chief Justice Rehnquist also has argued for a heightened standard of clarity for agency interpretations of statutory grant conditions, but, like Justice Thomas, has done so applying what I term the state choice model.[136]

Notably, the Court has also deferred to agency interpretations of Title IX in cases that involved private (that is, nonstate) recipients of federal funds. *See* Grove City Coll. v. Bell, 465 U.S. 555, 569, 575 (1984) (crediting the Department of Education's interpretation of the statutory phrase "receiving Federal financial assistance" and holding that the Department of Education "may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations"); Cannon v. Univ. of Chi., 441 U.S. 677, 706-08 (1979) (referring to the Department of HEW's view that a private remedy to enforce Title IX will further the statute's purposes). The same is true in the Rehabilitation Act and Title VI contexts. *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 633-34 (1984) (holding that the Rehabilitation Act entitles a private employee to bring suit even if federal aid received by the employer was not primarily intended to promote employment, and deferring to HEW's regulations because HEW was "the agency responsible for implementing [the] congressional enactment"); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (deferring to an agency interpretation of the intent standard under Title VI). Indeed, the Court often has applied *Chevron* deference to agency interpretations of ambiguous statutory conditions on federal grants in cases involving private grant recipients. *See, e.g.*, Regions Hosp. v. Shalala, 522 U.S. 448 (1998) (Medicare); Rust v. Sullivan, 500 U.S. 173 (1991) (Title X of the Public Health Service Act). If the Court had applied the accountability model, however, then presumably the Court would have been willing to defer *only* in cases involving private recipients, thus creating conflicting standards depending on the public status of the grant recipient.

135. Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 79, 85 (1999) (Thomas, J., dissenting). In *Garret F.*, the Court held that IDEA "requires a public school district in a participating State to provide a ventilator-dependent student with certain nursing services during school hours." *Id.* at 68-69, 79.

136. *See Arline*, 480 U.S. at 291-92 (Rehnquist, C.J., dissenting). In *Arline*, the Court considered whether a person with a contagious disease can be considered a "handicapped individual" within the meaning of the Act. In concluding that a person with such a disease is protected by the Act, the Court found HHS's regulations, which defined the relevant statutory term, to be "of significant assistance." *Id.* at 279. The Court distinguished *Pennhurst*, which considered a statutory provision that merely expressed a "congressional preference," because "our

Notwithstanding its defects, the accountability model does suggest the primary criticism of the state choice model: The Court's refusal in *Garcia* to impose substantive limits on Congress's authority to regulate the states was premised largely on the structural protections for states inherent in the federal legislative process,[137] and (although it predated *Garcia*) *Pennhurst*'s clear-statement rule, in requiring Congress expressly to consider the burdens that it imposes on states, provides some assurance that those structural protections function effectively. Allowing agencies in effect to impose conditions on the states' receipt of federal funds risks undermining these protections, and creates the potential that agencies will impose conditions that were not within Congress's contemplation.

Although the state choice model promotes a number of interests that fall, generally speaking, on the federal government's side of the federal-state balance, it is not unduly weighted in favor of the federal government. By making notice the determinative factor, the state choice model echoes the intuitive appeal of the *Pennhurst* clear-statement rule: It is unfair, when offering states money that they arguably have little realistic choice but to accept,[138] to saddle them with obligations that they did not—and could not—anticipate. In this sense, the state choice model incorporates the notion that underlies the doctrine of qualified immunity for governmental officials. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken."[139] This standard seeks to avoid "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position," to take certain actions.[140] Similarly, the state choice model holds that a state can be held to a condition—and thus subject to whatever liabilities flow from violation of the condition, such as damages in suits by aggrieved private parties or withholding of funds by the federal government—only if it was clear, *at the time that the state accepted funds*, that the condition was part of the bargain. And, as is discussed in detail below, under the state choice model, as under qualified immunity doctrine,

holding is premised on the plain language of the Act, and on the detailed *regulations* that implement it." *Id.* at 286 n.15 (emphasis added) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 19 (1981)). In dissent, Chief Justice Rehnquist argued that the majority had ignored *Pennhurst*. He based his argument, however, on the fact that "the language of the Act, *regulations*, and legislative history are silent on this issue." *Id.* at 291-92 (Rehnquist, C.J., dissenting) (emphasis added). He therefore seemed to concede that explicit regulations could, in a different case, provide states with notice of ambiguous grant conditions.

137. *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 550-54 (1985).

138. *See supra* notes 70, 117-120 and accompanying text.

139. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)).

140. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

a state cannot be bound by a condition effectively imposed by an agency after the state accepted funds, if the state's own interpretation of the statutory condition is reasonable.

To be sure, qualified immunity doctrine exists mainly to encourage governmental decisionmaking and because it is unfair to hold a government employee liable in his individual capacity for reasonable actions taken in service of his employer,[141] goals that are largely irrelevant in the federal-state grant context. The analogy nevertheless is useful, because it highlights how the state choice model effectively limits the states' trump of federal obligations to those circumstances where the states are most likely to be victims of unfairness. Those circumstances arise when an agency issues, *after* the state accepts funds, an interpretation that conflicts with the state's own reasonable interpretation, on which the state has relied in planning its affairs. Under the state choice model, the validity of grant conditions turns not on which federal actor precisely defines the terms of the contract—Congress or the agency charged with enforcing the program—but rather on whether the terms are clear ex ante. A state that accepts funds after an agency has reasonably construed the grant program to require certain action by the state thus should be considered bound by the agency's interpretation, because in such a case the state cannot be said to be "unaware of the conditions" or "unable to ascertain what is expected of it."[142] Conversely, under the state choice model, a state would not be bound by an interpretation that the agency issues after the state accepts funds, regardless of the interpretation's reasonableness. Indeed, notice must be judged with reference to the time that the state enters the "contract"[143]—that is, when the state accepts the federal funds.

The state choice model therefore provides a useful way to consider the more difficult question with which the Court has not yet grappled: whether regulations issued after the state accepts funds nevertheless can impose a burden of compliance on the state. As I explain below, that question is a close one, and it merits consideration of alternative models of analysis.

III. THE QUESTION OF RETROACTIVITY

Because the accountability model categorically denies deference to agency interpretations of ambiguous statutory grant conditions, that model a fortiori would deny deference in the most difficult case for *Chevron* deference—namely, the case in which the agency issues the contested interpretation of the grant condition *after* the state accepts the federal funds.

141. *See id*.
142. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).
143. *Id.*

As suggested above, moreover, although the state choice model generally accords *Chevron* deference to agency interpretations of ambiguous grant conditions, the model precludes a court from binding a state recipient of federal funds to an agency's interpretation of a grant condition if the agency announced its view after the state has accepted funds. Therefore, although the competing models differ dramatically in their application to agency interpretations issued before the state accepts funds, they produce the same result when applied to retroactive agency interpretations. I now turn to the question whether categorically denying deference to this class of agency interpretations is, as a normative matter, a sensible limitation of federal power. Wholly aside from the competing models of *Pennhurst*'s clear-statement rule that I have been discussing, should administrative agencies be able to hold states to interpretations of statutory conditions announced after the state has accepted funds under the relevant program?

By way of introduction, it is worth noting that the Supreme Court has never squarely addressed whether agency interpretations issued after the state receives funds can bind the state, although in dicta the Court has suggested, in applying the state choice model, that such agency interpretations cannot. In *Bennett v. Kentucky Department of Education*,[144] the United States contended that state recipients of Title I funds should be held bound by "*any* reasonable interpretation [by the Department of Education] of the requirements of Title I"[145]—that is, any interpretation, whenever issued, that would satisfy *Chevron* review. In *Bennett*, the agency had published its interpretation of Title I *before* the state had accepted the funds in question, and the state had agreed to comply with "the legal requirements in place when the grants were made."[146] As a result, the Court had

> no occasion . . . to address the circumstances, if any, in which the Secretary could impose liability for expenditures made in reliance upon an earlier interpretation provided by the Department, or to decide if a State may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation advanced by the Secretary after the grants were made.[147]

144. 470 U.S. 656 (1985).

145. *Id.* at 670 (emphasis added).

146. *Id.*

147. *Id.* (citation omitted). On the same day that it decided *Bennett v. Kentucky Department of Education*, the Court held, in *Bennett v. New Jersey*, 470 U.S. 632, 639-46 (1985), that a 1978 congressional amendment to Title I that increased the states' flexibility to use Title I funds did not govern the Department of Education's audit of New Jersey's misuse of funds granted for 1970-1972. Citing *Pennhurst*, the Court reasoned that "New Jersey, when it applied for and received Title I funds for the years 1970-1972, had no basis to believe that the propriety of the expenditures would be judged by any standards other than the ones in effect at the time." *Id.* at 640. The Court

The Court, however, was "reluctant to conclude that the States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation is not 'arbitrary, capricious, or manifestly contrary to Title I.'"[148]

It is also worth noting, as a preliminary matter, that it is possible to apply what I have called the state choice model and still conclude that a state recipient of federal funds is bound by an agency interpretation of a statutory condition issued after the state accepted funds. The state choice model turns, as I have explained, on notice to the state recipient of the relevant federal obligation. With *Chevron* as a background principle of

noted that "[r]etroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper." *Id.* The Court did not hold, however, that subsequent legislative enactments categorically cannot apply to prior federal grants; instead, it held that "absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." *Id.* at 641. Because the Court concluded that Congress intended the 1978 amendments to apply only prospectively, it held that New Jersey could not rely on them to exonerate its use of funds under an earlier grant.

148. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. at 670 (quoting Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984)). The Fifth Circuit has held that an agency's interpretation cannot retroactively bind a state. In *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the court addressed whether Title IX creates liability for a school district that negligently fails to prevent a teacher from sexually harassing a student. The court held that Title IX imposes liability only if the school district had actual knowledge that there was a substantial risk that sexual abuse would occur. In so concluding, the court relied on the fact that Congress enacted Title IX under the Spending Clause, and thus that there should be no liability "unless the recipient of the federal funds agreed to assume the liability." *Id*. at 654. The court noted that applicable agency regulations "fail to indicate any expectation that school districts will be vicariously liable under Title IX." *Id*. (citing 34 C.F.R. § 106.2(h) (1996)). The court recognized that the Department of Education had recently issued proposed Title IX guidelines that purported to impose liability when the school has constructive notice of the harassment and fails to remedy the problem, *id*. at 658 (citing 61 Fed. Reg. 52,173 (Oct. 4, 1996); 61 Fed. Reg. 42,728 (Aug. 16, 1996)), and acknowledged that "when interpreting [T]itle IX we accord the [agency's] interpretations appreciable deference." *Id.* (quoting Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1015 n.20 (5th Cir. 1996)). The court refused, however, to "apply these guidelines retroactively." Although "the government can add strings to the Title IX funds as it disburses them," it "cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education." *Id*. The court thus declined to apply the guidelines in *Rosa H.* and made "no comment on how these guidelines might affect cases in which a school district accepts Title IX funds after the guidelines' promulgation date." *Id*.

As discussed *infra* notes 179-193 and accompanying text, the Fifth Circuit misapprehended the nature of Title IX. Although Title IX plainly imposes a duty on state recipients of federal funds to refrain from discrimination on the basis of sex "under any education program or activity," 20 U.S.C. § 1681(a) (1994), it is not itself a grant-providing statute. Like Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), Title IX serves as a background condition on the receipt of federal financial assistance distributed through other affirmative grant programs. There is no such thing as "Title IX funds." As I explain below, application of the state choice model creates temporal problems when the issue is the applicability of an obligation imposed by a regulation interpreting such a background condition: In such cases, how should a court determine when the state—which likely receives funds regularly under many federal grant programs—accepted funds?

interpretation, it would not be unreasonable to conclude that a state recipient should be held to have received constructive notice that it would be bound by any subsequent reasonable agency interpretation of the statute. And even if one finds such a rule unduly harsh—especially in light of the fact that *Chevron* deference is applicable even to agency interpretations that wholly reverse prior agency interpretations,[149] thus creating the possibility that a state could be bound by an agency interpretation of a statutory grant condition that is the opposite of the agency interpretation in effect when the state accepted funds[150]—one could view the state as having received adequate notice of its obligations if Congress specified in the statute itself that state recipients would be bound, for example, by any subsequent reasonable agency interpretation, whenever issued.[151] Although it is perfectly reasonable to consider such a congressional statement as ratifying any subsequent agency interpretation—even one issued after the state has received funds—it only begs the question whether Congress should be permitted to delegate to an agency the authority retroactively to bind the state.[152] I proceed here under the assumption that faithful application of the state choice model precludes deference to retroactive agency interpretations.

Another way to conceptualize the question of "retroactive" agency interpretations of grant conditions is to ask whose interpretation of ambiguous grant conditions controls. As I discuss below, there are three actors whose interpretation could prevail: the state, the agency, or a court. Denying *Chevron* deference (that is, the result obtained, by definition, by applying the state choice model, or, for that matter, the accountability model) essentially entitles the state to interpret the condition, as long as its interpretation is reasonable (and thus arguably consistent with the statute). Conversely, a decision to privilege *Chevron*'s values by deferring even to "retroactive" agency interpretations entitles the agency to bind the state with any reasonable interpretation, regardless of the reasonableness of the state's own interpretation. Finally, the middle ground would be to allow a court to discern, as it would do outside of the administrative law context,

149. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Mobil Oil Corp. v. EPA, 871 F.2d 149 (D.C. Cir. 1989).

150. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. at 670.

151. *Cf.* Pennsylvania v. United States, 781 F.2d 334, 340 (3d Cir. 1986) (applying *Chevron* deference to uphold a regulation that held states strictly liable for erroneous issuances of benefits under the Food Stamp Program, and rejecting the state's *Pennhurst* argument because "[s]urely states are familiar with the broad discretion Congress accords to agencies that administer and resolve the ambiguities in complex social welfare programs"); Am. Hosp. Ass'n v. Schweiker, 721 F.2d 170, 183-84 (7th Cir. 1983) (upholding HHS regulations imposing community service obligations on hospitals).

152. *Cf.* Sunstein, *supra* note 79, at 336-37 (considering whether Congress has the power explicitly to delegate to an agency authority to address a subject governed by a "nondelegation canon").

Congress's intent with respect to the particular circumstances at issue; this approach thus would deny *Chevron* deference to the agency's interpretation, but it would not automatically credit the state's interpretation merely because it is a reasonable interpretation of the statute.

Below, I critique these approaches to agency interpretations of ambiguous grant conditions—and suggest two variations on letting the court decide whether the state should be bound—paying particular attention to how each furthers (or impairs) the values served by *Chevron* and *Pennhurst*. There are, as I explain, defects in each approach, and the question is close; my inclination is that, notwithstanding some significant problems, courts should not bind states to agency interpretations issued after the state accepted funds. Before I address the competing approaches, however, I discuss notions of retroactivity and attempt to define the class of cases with which I am concerned here.

A. *Notions of Retroactivity*

In *Bowen v. Georgetown University Hospital*,[153] the Court announced that because "[r]etroactivity is not favored in the law . . . . a statutory grant [to an agency] of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[154] As the Court explained in *Landgraf v. USI Film Products*,[155] a presumption against retroactivity is "deeply rooted in our jurisprudence" because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[156] *Bowen* thus requires Congress to indicate clearly when it intends to permit agencies to issue regulations—whether interpretations of statutory provisions enacted pursuant to Congress's spending power or any of its other affirmative sources of authority—that apply to conduct that predates promulgation of the regulations. *Bowen*'s fairness rationale is no less compelling when the entity regulated is a state actor.

In discussing whether *Chevron* deference should apply without regard to when the agency issued its interpretation, I do not purport to question the applicability of *Bowen*'s presumption against retroactivity. The discussion that follows, therefore, does not focus on interpretations that an agency issues after the state engages in the conduct that gave rise to the judicial controversy. In such cases, the agency interpretation cannot bind the state

153. 488 U.S. 204 (1988).
154. *Id.* at 208.
155. 511 U.S. 244 (1994).
156. *Id.* at 265.

recipient of federal funds, at least absent a clear congressional statement that agency regulations can apply retroactively. To the contrary, *Bowen*'s presumption against retroactivity would continue to apply.

As the Supreme Court correctly observed in *Bennett*, however, the important event for purposes of *Pennhurst*—at least under the state choice model—is the grant of federal funds to the state, not the "conduct" that gave rise to the dispute.[157] That conduct, of course, is not irrelevant; *Bowen* would prevent application of the challenged regulation to state conduct that predated its issuance regardless of when the grants were made. But once *Bowen* is accepted as a background rule for retroactive application of agency regulations, the relevant question, for purposes of *Pennhurst*, is whether the state received, *at the time that it accepted the funds*, adequate notice of the conditions that would bind it.

Accordingly, it is important (especially for purposes of this Essay) to distinguish between two different notions of retroactivity. The first type of retroactivity arises when the government seeks to apply an agency's standard-creating interpretation of a federal statute to state conduct that occurred before the agency issued its interpretation. These cases raise questions of what I call *Bowen* retroactivity. The most obvious such cases are ones in which a party adverse to the state seeks to judge a particular state actor's conduct by a standard announced by an agency after that conduct took place—for example, a suit claiming that a teacher's harassment of a student subjects the school district to liability under a standard announced by the Department of Education after the harassment allegedly took place.[158] The second type of retroactivity is implicated when an agency issues an interpretation of a statutory grant condition after a state has accepted funds under the program. These cases do not turn on the timing of any state actor's conduct, but rather turn solely on when the state accepted funds and thus what conditions the state had notice of when it entered its "contract" with the federal government. These cases raise questions of what I call *Bennett* retroactivity.

Not every case of *Bennett* retroactivity—that is, every case that addresses the validity of an agency's post-funds-transfer interpretation of a grant condition—presents a *Bowen* problem. To understand the difference between these two types of retroactivity, consider the various circumstances under which a judicial controversy over the validity of such an agency interpretation can arise. First, as in *Riley* and *Bennett*, a state may bring suit

157. Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 670 (1985) ("[T]he State agreed to comply with, and its liability is determined by, the legal requirements that were in place when the grants were made.").

158. *E.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 647-50 (1999) (noting that certain agency guidelines "were promulgated too late to contribute to the Board's notice of proscribed misconduct").

challenging the agency's interpretation after the agency attempts to withhold funds or take some other punitive measure.[159] Such a suit could be for review of a decision made in proceedings before the agency, or could be a direct judicial challenge to the agency's regulations or decision. Second, the question of the validity of an agency interpretation could arise in a suit by the federal government against a state grant recipient to obtain a refund of misused federal funds. In such a case, the federal government would rely on regulations to demonstrate the state's misuse of funds, and the state would claim that the regulations cannot bind it. Third, a court could be confronted with the validity of an agency's interpretation of a statutory grant condition when, as in *Arline*,[160] *Tatro*,[161] and *Rosa H.*,[162] a private party sues a state for engaging in conduct that harms the plaintiff and that is inconsistent with or violates the agency's interpretation. In these cases, the private plaintiff claims that the regulations give rise to rights enforceable against the state.[163]

In the second and third categories of cases, *Bowen*'s presumption against retroactivity at times would render inappropriate *Chevron* deference to the agency's interpretation—indeed, would preclude application of the agency's interpretation at all. In the second category—cases in which the federal government sues to recover "misused" funds—a *Bowen* problem would arise if the government's claim of misuse is based on a regulation defining the appropriate use of funds that the agency issued after the state used the funds in question. In such a case, the agency interpretation itself would define appropriate state conduct—that is, how the funds may be spent—and thus would apply to conduct that predated its issuance.[164]

159. *Bennett v. Ky. Dep't of Educ.*, 470 U.S. at 661-62; Bennett v. New Jersey, 470 U.S. 632, 637 (1985); Bell v. New Jersey, 461 U.S. 773, 777 (1983); Va. Dep't. of Educ. v. Riley, 106 F.3d 559, 560 (4th Cir. 1997).

160. Sch. Bd. v. Arline, 480 U.S. 273, 276 (1987).

161. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 886 (1984).

162. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 651 (5th Cir. 1997).

163. A private plaintiff's suit against a state can also involve a reversal of arguments—the plaintiff claims that the state acted inconsistently with some reasonable interpretation of an ambiguous statutory grant condition, and the state argues that deference is appropriate for the agency's interpretation, which favors the state's position. Rehab. Ass'n v. Kozlowski, 42 F.3d 1444, 1448-50 (4th Cir. 1994).

164. Take the example suggested earlier of the federal grant program that requires states to "assure that all public school students have reasonably individualized access to technology education." Imagine that the state receives its appropriation at a time when the Department of Education has not yet offered its view of the condition, and chooses to exhaust the funds by purchasing enough computers to ensure a five-to-one student-to-computer ratio. Imagine further that *after* the state spends the money, the Department of Education issues a regulation that interprets the condition to require the funds to be spent on salaries for teachers so that the state can maintain a ratio of one science teacher for every ten students. There is little doubt that the state's interpretation of the condition is reasonable, and to bind the state to the agency's (equally reasonable) interpretation could work a financial hardship on the state, which has already spent the federal funds. Although the agency's interpretation is reasonable, *Bowen* prevents it from binding the state, because the regulation governs the appropriate use of the funds. In contrast, no

Similarly, in the third category—cases in which a private party sues a state for engaging in conduct that violates an agency's interpretation of a grant condition—a *Bowen* problem would arise if the agency issued its interpretation after the conduct took place. For example, suppose that the Court had not yet decided *Davis* or *Gebser*, and thus that it was not clear whether teacher-on-student sexual harassment could render a school district liable under Title IX. For purposes of this hypothetical, moreover, imagine that Title IX is in fact a grant program, and not simply a background condition on other grant programs. Suppose further that after a public school teacher harasses a student and the district, despite knowledge of the problem, fails to take remedial action, the Department of Education issues an interpretation of Title IX's antidiscrimination norm that holds the district liable when it fails to remedy teacher-on-student harassment of which it had notice. *Bowen* would prevent the student from establishing the district's liability by relying on the agency interpretation. Conversely, no *Bowen* problem would arise if the agency issued its regulation after the state accepted funds under the program, but before the harassment and failure to cure occurred. Instead, that situation would involve *Bennett* retroactivity.

In contrast to the second and third categories, in the first category of cases—that is, those that involve a state's direct challenge to the validity of an agency's interpretation—there typically is no state "conduct" that could give rise to a *Bowen* problem. The question in such cases, instead, is simply whose interpretation of the statutory grant condition is binding on the parties: the agency's reasonable interpretation, or the state's alternative (and perhaps equally) reasonable interpretation.[165] And the answer to that question does not turn on whether any action by the state should be judged according to standards not in existence when the action took place, but rather turns solely on whether *Bennett* retroactivity creates a problem worthy of judicial correction—that is, whether a state should be bound by an agency interpretation that the state did not specifically contemplate when it accepted conditional federal funds. To be sure, in these cases, the state often has made some decisions—such as budgetary or other planning decisions—in reliance on its own reasonable interpretation of the statutory condition. Thus, for example, if in *Riley* the Department of Education had

Bowen problem would arise if the regulation were not in place when the state accepted the funds, but was by the time that the state decided to spend the funds. In that case, the state would have a claim not of *Bowen* retroactivity, but of *Bennett* retroactivity.

165. There is, as I discuss *infra* notes 195-200 and accompanying text, a third possible interpretation—that of a court, which could simply attempt to determine what the "parties" intended at the time that they entered the "contract." Under this approach, the court would not accord *Chevron* deference but would not automatically resolve the dispute in favor of the state.

not announced its interpretation of IDEA until after the grant of funds,[166] Virginia might have elected to spend more money on disabled students' tutoring services, believing that it had no obligation to spend funds on educational services for students disciplined for reasons unrelated to their disabilities. If the agency had then issued its interpretation, the state could reasonably have contended that, in light of its fiscal decisions in reliance on its own interpretation of the provision, application of the agency's view would "retroactively" burden the state. Such a burden, however, is no different than that borne by any contracting party who learns only later—in a judicial action to interpret the contract—that its interpretation of the contract in fact is not binding.[167]

For purposes of this Essay, I accept as a background norm *Bowen*'s presumption against retroactive application of agency regulations. I focus instead on the appropriate treatment of agency interpretations that raise questions of *Bennett* retroactivity. Indeed, these two different types of retroactivity raise different concerns. *Bowen*'s presumption is premised on considerations of elemental fairness. It simply is not equitable to judge the conduct of an actor—public or private—by standards not in effect when the conduct took place. But when an agency has issued its interpretation *before* the state engages in the challenged conduct—even if the agency issues the interpretation after the state has accepted the funds—the same fairness concerns are not present. Of course, in such a case, the state has another claim—that it had no notice of the interpretation when it accepted the funds, and that it might not have accepted the funds had it known of the interpretation at that time. But that question turns, as do most contract disputes, on a notion of reasonableness and forseeability, measured at the time that the parties entered the contract—here, when the state accepted the conditioned funds. And, as I explain below, in the contract context a party often finds itself, notwithstanding its own reasonable interpretation, bound by a contractual condition that is ambiguous in its application to particular circumstances not contemplated by the parties at the time that they entered the contract. I turn below to the contract analogy to shed light on whether courts should refuse to accord *Chevron* deference to agency interpretations that suffer from *Bennett* retroactivity. Before discussing the contract

166. As noted above, however, *Riley* did not present such a case. Instead, the agency had announced its interpretation three years before the state implemented its disciplinary policy. Va. Dep't of Educ. v. Riley, 23 F.3d 80, 83 (4th Cir. 1994).

167. Of course, if the state carries out its policy—by, for example, denying a tutor to a disciplined disabled student—the student denied services might, in reliance on the agency interpretation, challenge the state's conduct. If the agency issued its interpretation after the state acted on its policy, then a *Bowen* problem would arise. But no *Bowen* retroactivity problem exists if the dispute is merely between the state and the federal government over whether a proposed state policy is permissible under the grant program.

analogy, however, it is useful to outline the various possible approaches to *Bennett* retroactivity and the values that each advances.

B. *Possible Judicial Approaches to* Bennett *Retroactivity*

1. *Categorically Deny* Chevron *Deference*

One possible approach to regulations that create questions of *Bennett* retroactivity is simply to deny deference. As explained above, this is the result if one applies the state choice model, because that approach makes notice dispositive, and a state cannot be said to have received notice of a condition that did not exist when it accepted funds.[168] Under this approach, if in fact the statutory condition cannot be said clearly to resolve the circumstances at issue (that is, if the case is not resolvable under *Chevron* step one), then the state cannot be bound by the agency's interpretation as long as the state has complied with a reasonable interpretation of the statute. (If the state has acted under an interpretation of the statute that is unreasonable, of course, then the state would have violated the statutory condition regardless of what the agency believes the statute to require.) According to this view—and assuming one applies, as the more general framework, the state choice model—the state can avoid the agency's interpretation until it next accepts funds under the program.[169] Although under programs that distribute funds annually this might not be a very long time, during that time the state has an effective trump against agency interpretations that are not mandated by the terms of the statute.

2. *Categorically Apply* Chevron *Deference*

The second approach is to apply *Chevron* deference to reasonable agency interpretations of statutory conditions regardless of when the agency issues the interpretation—except, of course, when application of the regulation would create a problem of *Bowen* retroactivity. Under this

168. Of course, this is also the result of applying the accountability model, which categorically precludes deference for all agency interpretations of grant conditions, whenever issued.

169. At bottom, then, the state choice model treats the question not as one of interpretation, but as one of remedy. A court's decision under the state choice model that an agency interpretation issued after the state has accepted funds cannot give the state adequate notice does not mean that the agency's view cannot be law. Instead, it means that the agency's view of the condition cannot be enforced against the state until the state again decides—this time with full notice of the agency's view—to accept funds under the relevant grant program. In this sense, the state choice model resembles Justice Harlan's approach to the validity of selective prospectivity of new constitutional holdings. United States v. Estate of Donnelly, 397 U.S. 286, 295-97 (1970) (Harlan, J., concurring); *cf.* Teague v. Lane, 489 U.S. 288, 299-310 (1989) (explaining when "new" rules of criminal procedure should apply retroactively).

approach, a state recipient is bound as long as the agency view is reasonable, and regardless of whether the state's view also is reasonable. This view, of course, is inconsistent with the state choice model.[170]

3. *Interpret the Statute de Novo*

The third possibility is to treat the statute governing the grant program as a true contract. Under this approach, a court would resolve the dispute between the state and the federal government by deciding how the parties would have intended the ambiguous provision to apply to the particular circumstances at issue. As in any contract dispute, neither party's view automatically would control; the agency would not get any special deference for its view, but the mere fact that the state's interpretation is reasonable also would not be dispositive.

4. *Analysis*

Denying *Chevron* deference values state autonomy by preserving the states' ability to structure their own affairs. Under this approach, a state cannot be bound midstream after committing resources in reliance on its own reasonable interpretation of the grant program's requirements. There is an intuitive appeal to a rule that a state grant recipient cannot be bound by a particular interpretation of an ambiguous statutory condition unless the state knew at the time that it accepted the funds that the interpretation was in place. Indeed, it is not difficult to imagine circumstances under which a state acts reasonably and in good faith, only later to be caught by a belated, contrary federal interpretation of the state's duties.[171]

170. It is not necessarily inconsistent, however, with *Pennhurst*. One could view *Pennhurst*'s rule as a means of distinguishing statutory provisions meant to bind states from provisions expressing hortatory statements of congressional policy. To be fair, however, the Court's decisions since *Pennhurst* suggest that its rule might mean more than that. *See supra* note 111 and accompanying text.

171. Consider again the example of the federal grant program that requires states to "assure that all public school students have reasonably individualized access to technology education." Imagine that the state's education agenda is to provide enough computers to ensure a five-to-one student-to-computer ratio. Suppose further that the federal funds are not sufficient to cover the cost fully. If the state receives its appropriation at a time when the Department of Education has not yet offered its view of the condition, but the Department of Education subsequently issues a regulation that interprets the condition to require one science teacher for every ten students, then requiring the state to exhaust the funds—and perhaps some of its own funds—to satisfy the Department of Education's view might preclude the state from fulfilling its own educational objectives. Indeed, had the state known, at the time that the funds were offered, of the Department of Education's view—and that acceptance of the funds effectively would preclude the state's computer initiative—the state likely would not have accepted funds. The state in this case would have an appealing argument that the agency's interpretation, although reasonable, should not bind it.

There is, however, a corresponding cost of entitling the state to defeat the agency's reasonable interpretation of the statutory grant condition. By refusing to defer to the agency's interpretation—at least until the state next agrees to accept funds—this approach undermines the values that *Chevron* is designed to advance: the preservation of executive enforcement discretion and the implementation of agency expertise. To be sure, these values are not permanently undermined, because the state would be bound by the agency's interpretation when (or if) the state elects to accept funds again in the next funding cycle. But because this approach would delay implementation of the agency's view, it is contrary to the conventional scope of executive enforcement discretion, which (by definition) often will entitle the executive to bring an enforcement action in circumstances that in the past may not have been subject to such actions. Indeed, *Chevron* was premised on the assumption that "Congress had delegated to the agency the legal authority to make those determinations."[172] Similarly, denying deference is in tension with *Chevron*'s command that courts "pay particular attention to the views of an expert agency where they represent 'specialized experience.'"[173]

It is possible to argue that the problem that this approach would ostensibly remedy—a state's being caught, after relying on its reasonable interpretation, by an agency's belated (and burdensome) interpretation—may be overstated. Once it is clear that *Chevron* deference will apply to all agency interpretations of statutory grant conditions, states arguably will know, when accepting funds, that they can be bound by any reasonable agency interpretation. In cases of ambiguity, a state can, before committing resources based on its own interpretation, seek the guidance of the agency charged with enforcing the grant program. Thus, *Chevron* simply would serve as a default rule in any federal grant "contract."[174]

There is, however, a Blackstonian flavor to this critique that may be inappropriate when judged according to modern notions of retroactivity. Under Blackstone's view, courts do not create law but rather discover it;[175] new decisions—or decisions overruling prior cases—are treated not as new law, but as "an application of what is, and theretofore had been, the true

172. Christensen v. Harris County, 120 S. Ct. 1655, 1668 (2000) (Breyer, J., dissenting).

173. *Id.* at 1667 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).

174. *See* Pennsylvania v. United States, 781 F.2d 334, 340 (3d Cir. 1986) (applying *Chevron* deference to uphold a regulation that held states strictly liable for erroneous issuances of benefits under the Food Stamp Program and rejecting the state's *Pennhurst* argument because "[s]urely states are familiar with the broad discretion Congress accords to agencies that administer and resolve the ambiguities in complex social welfare programs"); Am. Hosp. Ass'n v. Schweiker, 721 F.2d 170, 183-84 (7th Cir. 1983) (holding that federal financial assistance applicants "signed a very open-ended 'contract,' one which conferred a great deal of discretion upon the Secretary to define the precise measure of their obligations under it").

175. Linkletter v. Walker, 381 U.S. 618, 622-23 (1965).

law."[176] To contend that states have, when they accept funds, constructive notice of any reasonable interpretation that the agency might issue after the acceptance of funds suggests that the agency's view is, in some sense, preordained by the statute. As a practical matter, however, such a view—like Blackstone's view of the retroactive application of new judicial decisions—is pure legal fiction. That this is so is starkly illustrated by the hypothetical suggested by the *Bennett* Court: Because *Chevron* deference is applicable even to agency interpretations that wholly reverse prior agency interpretations,[177] deferring to agency interpretations issued after the state accepted funds could result in a state's being bound by an agency interpretation of a statutory grant condition that is the opposite of the agency interpretation in effect when the state accepted funds.[178]

Nevertheless, there is another problem with allowing states to defeat reasonable agency interpretations that postdate the state's receipt of funds. The most frequently litigated statutory conditions on the acceptance of federal funds—Title IX of the Education Amendments of 1972,[179] Title VI of the Civil Rights Act of 1964,[180] and section 504 of the Rehabilitation Act[181]—are not attached to any particular grant of funds through any particular program, but rather are background conditions that bind any recipient—public or private—of any federal funds.[182] When one of these background conditions is at issue, this approach creates difficult temporal problems that categorically deferring avoids. Specifically, there is no obvious way to determine when a state "receives" funds in order to trigger the applicability of a condition, such as Title IX, that does not come attached to any particular grant of funds.

This temporal problem is illustrated by the Fifth Circuit's decision in *Rosa H.*[183] The question presented in that case was whether Title IX renders liable a public school district that fails to prevent an instructor from sexually abusing a student. Although Title IX does not provide an answer, the Department of Education's Office of Civil Rights, shortly before the Fifth Circuit issued its decision but after the conduct that gave rise to the suit, had issued guidelines that advocated application of Title VII's

176. *Id.* at 623 (internal quotation marks and citation omitted).

177. *E.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Mobil Oil Corp. v. EPA, 871 F.2d 149 (D.C. Cir. 1989).

178. *See* Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 670 (1985).

179. 20 U.S.C. § 1681 (1994).

180. 42 U.S.C. §§ 2000d to 2000d-4 (1994).

181. 29 U.S.C. § 794 (1994).

182. Title IX's prohibition on sex-based discrimination applies only to "education program[s] or activit[ies] receiving Federal financial assistance," 20 U.S.C. § 1681(a), but, like Title VI and the Rehabilitation Act, it is not itself a grant program.

183. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997).

principles of agency liability.[184] The court noted that ordinarily it would defer to the agency's interpretation of Title IX, but declined to defer in that case because it would not apply the guidelines "retroactively."[185]

As explained above,[186] there is good reason, in both precedent and policy, to decline to apply agency interpretations of ambiguous grant conditions to state *conduct* that predates the issuance of the agency rule. The *Rosa H.* court thus was correct to apply (albeit without saying so) *Bowen*'s presumption against retroactive application of agency interpretations. The court in *Rosa H.*, however, spoke in terms of *Bennett* retroactivity: According to the court, the agency's interpretation could not apply because it was issued after the state received its "Title IX funds."[187] There is, however, no such thing as "Title IX funds." The court's error draws attention to a problem created by refusing to defer to retroactive agency interpretations—and, indeed, by the state choice model itself. Because the federal government does not grant funds to states under Title IX, there is no obvious relevant date for purposes of *Pennhurst* notice. Recall, however, that the state choice model places dispositive weight on the date that the state receives funds. Under an approach that requires courts to defer regardless of when the agency issued its interpretation, in contrast, because the agency interpretation is entitled to *Chevron* deference regardless of when the state accepted the funds, the absence of a relevant date for purposes of *Pennhurst* notice is inconsequential.

This error of the *Rosa H.* decision becomes apparent when one considers that most states receive funds under scores of federal grant programs. For example, suppose that a school district receives annual grants each January under Title I of the Elementary and Secondary Education Act of 1965,[188] grants each June under the Technology for Education Act of 1994,[189] and funds each October under IDEA.[190] Imagine further that in May, the Department of Education issues a regulation that defines what forms of student-on-student sexual harassment will be considered

184. *Id.* at 658 (citing 61 Fed. Reg. 52,172 (October 4, 1996)). For Title VII principles, see generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), which held that employers are subject to vicarious liability, under certain circumstances, for actions of supervisors.

185. *Rosa H.*, 106 F.3d at 658.

186. *See supra* notes 153-167 and accompanying text.

187. *Rosa H.*, 106 F.3d at 658 ("The government can add strings to the Title IX funds as it disburses them. But it cannot modify past agreements with recipients by unilaterally issuing guidelines through the Department of Education.").

188. 20 U.S.C. §§ 6302-6338 (1994).

189. 20 U.S.C. §§ 6801-6871 (authorizing the Secretary of Education to distribute federal funds to "support a comprehensive system for the acquisition and use by elementary and secondary schools in the United States of technology and technology-enhanced curricula, instruction, and administrative support resources and services to improve the delivery of educational services").

190. 20 U.S.C. §§ 1411-1420.

sufficiently "severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[191] Finally, suppose that in September a student in a public school in that state harasses, within the Department's definition of the term, another student, and the district "acts with deliberate indifference" to the student's harassment.[192] Assuming that the agency's interpretation of Title IX—technically, its definition of "discrimination"—is reasonable, could the school district be bound by the Department's regulation? The hypothetical state plainly accepted some federal funds in that calendar year (and, for that matter, in that fiscal year), and the issuance of the regulation clearly presents no retroactivity problem under *Bowen*, because the agency promulgated the regulation before the conduct at issue—both the harasser's and the district's—took place. Title IX, however, is not "attached" (in contrast to, for example, IDEA's requirement that states assure disabled students the right to a "free appropriate public education"[193]) to any specific grant of funds. What, then, would be the relevant date by which to measure whether the state had notice of the condition? When the condition at issue is not program-specific, this temporal question is not answerable by simple reference to *Pennhurst*'s notice principles.

Of course, one possible solution to this temporal problem is to apply, as has the Fourth Circuit, the accountability model and deny *Chevron* deference to agency interpretations of all grant conditions, whether program-specific or non-program-specific. As explained above, however, this approach unacceptably undervalues the bulk of the interests served by *Chevron* and *Pennhurst*. Refusing to defer is particularly inappropriate, moreover, in the context of non-program-specific conditions, because, as conditions that by definition apply to *all* grants of federal funds, those conditions are more likely to reflect a definitive congressional statement of national policy. Indeed, these conditions do not simply serve as restrictions on the use of federal funds,[194] but also set broad, normative limitations on appropriate state conduct.

Another solution would be to hold that an agency interpretation cannot bind the state until the state receives its next installment of federal funds, through whatever program. But when the state constantly receives federal funds under various programs, this approach seems arbitrary. More important, this solution underscores the main shortcoming of refusing to defer to retroactive agency interpretations: Under this approach (regardless

191. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

192. *Id.*

193. 20 U.S.C. § 1412(a)(1).

194. *Cf.* South Dakota v. Dole, 483 U.S. 203, 213-18 (1987) (O'Connor, J., dissenting) (arguing that the Court should insist that conditions on grants of federal funds bear a close relationship to the purpose of the funds); Baker, *supra* note 11, at 1914 n.11.

of whether the condition is freestanding or is attached to a particular program), states would have a trump card that defeats, at least until the next year's fund allocation, federally imposed obligations, as long as the state can offer an alternative reasonable interpretation of the statutory condition.

An approach (such as the state choice model) that categorically refuses to defer to retroactive agency interpretations is not without both practical and substantive defects. Limiting *Chevron* deference to those agency interpretations that predate the state's receipt of programmatic funds poses difficult temporal questions when the condition at issue is not attached to any particular grant of funds. This approach also arguably leaves underenforced the conditions that Congress considered most important to national policy and undermines the values that *Chevron* is designed to advance.

The second approach described above—categorically deferring to agency interpretations, regardless of when they were issued—is the converse of the first approach. By deferring even to agency interpretations that postdate the states' acceptance of funds, this approach advances the interests served by *Chevron*. This approach also ensures that federal mandates do not go unfulfilled simply because of the agency's timing in issuing its enforcement guidelines. In addition, categorically deferring avoids the temporal questions that arise when the grant condition at issue is not attached to any particular grant of funds. But this approach also at times will bind to costly burdens states that have acted reasonably and in good faith.

The categorical approaches thus both have a somewhat unsatisfying default. Under the first approach, the state (assuming it acts reasonably) always prevails in a dispute over how a statutory condition applies in new circumstances, whereas under the second approach, the agency (again, assuming it acts reasonably) always wins the interpretive dispute. The third approach described above responds to this all-or-nothing problem by vesting the power to make the interpretive decision in an objective third party: the courts. Courts regularly interpret ambiguous contractual provisions, and although there are competing views of how courts should resolve such questions—for example, some have argued that courts should attempt to discern the objective meaning of the terms of the contract, whereas others have argued that the determinative inquiry is what the parties would have intended, regardless of the objective meaning of the terms[195]—the ultimate task is not unfamiliar to the judicial process.

When private parties enter a contract under which one will provide funds on the condition that the other take certain actions, the existence of ambiguity in one of the conditions generally does not entitle the fund

195. *E.g.*, 2 E. ALLAN FARNSWORTH, CONTRACTS § 7.9, at 245-48 (1990).

recipient categorically to defeat the application of the term merely by following its own reasonable interpretation of the provision. Instead, both parties typically will be bound ultimately by the court's view of the provision's meaning. For example, imagine that a person contracts to pay a carpenter to build a house, that the contract provides that the carpenter "shall substantially complete work by January 1, 2001," and that, as of that date, the carpenter has completed sixty percent of the work, which he believes satisfies the contractual condition. If the prospective homeowner interprets the clause to require seventy-five percent completion by the required date and sues for breach, the court would not automatically construe the contract to mean that sixty percent satisfies the condition, even though that certainly would be a plausible reading of the provision. The mere fact that the carpenter received funds with a condition attached does not entitle the carpenter to defeat the other party's interpretation simply by invoking an alternative reasonable interpretation. That is not to say, of course, that the prospective homeowner's interpretation automatically would prevail, but the private contract analogy at least suggests that there is nothing inherent in the receipt of conditioned funds that entitles the recipient unilaterally to impose its view of the meaning of the conditions on the other party.

The private contract analogy thus suggests that the first approach above, under which a state can, simply by following an alternative reasonable interpretation of a statutory condition that is ambiguous in its application to particular circumstances, avoid an agency's interpretation, treats states better than similarly situated private parties. But if, as the *Pennhurst* Court suggested, contract principles truly are the relevant rules of decision, then perhaps state grant recipients should be treated as any other similarly situated contracting party. To be sure, one could also draw from the private contract analogy that neither should the grantor be entitled categorically to impose its interpretation of any ambiguous contract term. Indeed, the point of the private analogy is that the court, and not any one party, gets to decide the meaning of the disputed contractual term. But when courts interpret contracts between private parties, principles of administrative deference typically are irrelevant.[196] When the grantor is the federal government, on the other hand, *Chevron*'s values argue in favor of judicial deference to the federal government's interpretation of the ambiguity. Pure judicial interpretation—that is, without deference to agency views—might make perfect sense when private parties dispute the meaning of a contract, because there are no countervailing institutional interests

196. There are times, of course, when the meaning of a term in a contract between private parties turns on a government agency's interpretation, or when an agency interpretation determines the scope of a private party's contractual rights.

(such as the promotion of agency expertise and the preservation of executive enforcement discretion) to be served. Judicial construction, without deference, of the terms of federal grant programs, however, impairs these competing institutional values. Indeed, the Court in *Chevron* weighed these competing interests and sensibly concluded that, although there is value in preserving the judiciary's ultimate role in construing statutes, the interest in judicial supremacy does not entirely trump the need for executive discretion and agency expertise. Those interests are no less compelling when the ambiguous statutory provision is a condition to a grant of federal funds.

The third approach thus has its own, quite significant defect: It seems flatly inconsistent with *Chevron*. Although courts routinely interpret the terms in contracts between private parties, those cases typically do not implicate the same governmental interests that are at stake when Congress enacts the disputed terms. The mere fact, therefore, that courts are competent to interpret private contracts does not mean that courts should ignore, simply because *Pennhurst* is premised on quasi-contract principles, the limitations that *Chevron* imposed on the judicial role.

Indeed, the closest analogy to cases that involve *Bennett* retroactivity—a contract in which the federal government grants funds to a private party to take some action to benefit the government—suggests that a state (as a fund recipient) should not be able automatically to avoid one reasonable interpretation of a grant condition simply because it has relied on an alternative reasonable interpretation. Quite to the contrary, that analogy suggests that the federal government's reasoned interpretation of statutory contract terms is entitled to deference. When the payer of the funds is the federal government, as opposed to a private party, and the recipient is a private party, the values advanced by *Chevron* generally entitle the relevant agency to impose on the grant recipient the agency's interpretation of the contract, even if the agency issues the interpretation after the parties entered the contract.

Consider, for example, a hypothetical case in which the federal government contracts with a private manufacturer to build a prototype of a plane. Imagine that Congress passes a statute that provides (similar to the private contract hypothetical above) that the Department of Defense will grant the manufacturer ten million dollars to construct the plane, and that the grant is conditioned on the manufacturer's "substantially completing" work on the prototype "by January 1, 2001." Suppose further that after the Department grants the funds to the manufacturer (but before January 1, 2001), the Department issues a regulation that defines "substantially complete" to mean seventy-five percent complete. Finally, imagine that on January 1, 2001, the manufacturer has completed sixty percent of the project. If the Department sues the contractor for breach (or if the

Department refuses to allocate further funds and the manufacturer sues), the court most likely would apply *Chevron* deference to the Department's view of the contract.[197]

The only difference in cases of *Bennett* retroactivity is that the fund recipient is a state rather than a private party. When Congress offers the states funds with strings attached, the federal government's objective is that the states will accomplish some federal policy goal, and the "consideration" is the granted money itself. Similarly, the states' objective is to obtain funds to support their programs, and the "consideration" is the promise to abide by the conditions attached to the funds. In this way, federal-state grant programs resemble common contracts in which one party (either the government or a private party) pays another private party to accomplish some predetermined goal. Indeed, this was the premise of *Pennhurst*. In such cases, the interests served by *Chevron* are as compelling as they are when the fund recipient is a private party; the agency still has a strong interest in applying its expertise, the executive still has a significant interest in exercising its enforcement discretion, and the courts have an institutional interest in promoting that expertise and discretion.

When the fund recipient is a state, there is, to be sure, a countervailing interest in preserving state autonomy, and this interest must be considered in deciding whether courts should defer to agency interpretations issued after a state accepts funds. But *Chevron*'s values themselves—which turn, at least in part, on considerations of horizontal separation of powers—are unaffected by these considerations of vertical separation of powers. And, as I have argued above, the interest in state autonomy is insufficient to trump *Chevron*'s values when the agency's interpretation of the grant condition predates the state's receipt of funds. The ultimate question, then, is whether

197. *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. Garrett, 6 F.3d 1547, 1561 (Fed. Cir. 1994) (applying *Chevron* deference to uphold a provision in Federal Acquisition Regulations, which are default terms in government procurement contracts). There is, to be sure, an argument that the common-law interpretive rule of *contra proferentem* ("against the profferer") would prevent the government from imposing its interpretation of the grant condition on the state recipient. Under that rule, "if language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred." 2 FARNSWORTH, *supra* note 195, § 7.11, at 265. The rule, however, is inapposite in the context of federal-state grant programs. First, the doctrine is primarily designed to protect a weaker party against bargaining imbalance, and it has particular application in cases involving adhesion contracts. Although some commentators have argued that federal grants are, in light of resource imbalances, inherently coercive, *see supra* notes 116-120 and accompanying text, one can hardly argue that grants of federal funds to the states are adhesion contracts. Second, if one takes *Garcia* at its word, then the states have had, in a sense, some say in the drafting of the "contract," because the federal representatives have taken into account the needs of the states in crafting the grant scheme. Finally, application of the doctrine to federal-state grant statutes would undermine other values in this context; as explained above, categorical acceptance of the states' interpretations of grant conditions would, in effect, require Congress to legislate at an impossible (and undesirable) level of specificity, and would undermine the values advanced by *Chevron*.

Chevron's values should be thought to trump the states' interest in maintaining decisionmaking autonomy in that narrow category of cases in which the agency issues its interpretation of the grant condition after the state accepts funds.

There is another problem—perhaps a corollary of the approach's tension with *Chevron* itself—with allowing the court to interpret the statute without applying any deference to the agency's view. In many cases, the court will have no identifiable reason to prefer one reading of the statute over another. To illustrate this point, consider again the hypothetical technology education program under which state recipients of federal funds must "assure that all public school students have reasonably individualized access to technology education."[198] The state's view of the condition (which requires lowering the student-to-computer ratio) is certainly as reasonable as the agency's view (which requires lowering the student-to-teacher ratio). Assuming that the legislative history doesn't address the dispute, what principles would a court apply in determining what the statute requires?

Imagine instead that the dispute between the agency and the state were not over computers versus teachers, but rather simply were over the exact student-to-computer ratio required. How would a court decide whether five-to-one or ten-to-one is a correct reading of the statute? The virtue of *Chevron*'s rule is that when Congress has delegated substantive rulemaking authority—that is, the authority to fill in gaps in a statute's application—to an agency, a court has no reason to prefer one view to another, while the expert agency does. Of course, one could respond that the state has as much interest and expertise in the problem (here, education, a local matter) as does the agency, and that the state should get to decide. But typically the party on whom a burden has been imposed is not allowed to decide for itself the extent of the burden.

It would not be unreasonable to conclude, in light of general contract principles and the interests that *Chevron* serves, that states should (absent the *Bowen* retroactivity problems described above) be bound even by agency interpretations that postdate the state's acceptance of funds. Elemental notions of fairness for the state recipients give pause, however, especially when one considers the hypotheticals of the agency's reversing its prior view or the state's committing the grant funds in reliance on its own reasonable view, only to learn later that the agency has a different (albeit reasonable) view. Because the question is such a close one, below I consider some alternative approaches.

198. *Supra* p. 1189.

C. *Alternative Approaches to* Bennett *Retroactivity*

There is virtue in a categorical rule for the treatment of agency interpretations of statutory grant conditions. Nevertheless, there are other analytical frameworks that could conceivably apply in determining whether the federal government can bind a state with an agency's belated interpretation of a statutory grant condition. The most promising, at least at first blush, is the distinction made by the Administrative Procedure Act (APA)[199] between interpretive rules and substantive (or "legislative") rules. Although this distinction is important in the APA context primarily in answering the procedural question whether an agency is required to satisfy the Act's notice-and-comment requirements, it has an intuitive relevance in deciding whether an agency interpretation that postdates a state's receipt of funds should bind the state.

Under the APA, notice-and-comment rulemaking is not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[200] Generally speaking, "[t]he agency, by issuing its [interpretive rule], asserts that existing legislation already has established by implication the position that the agency interpretation now specifies. The interpretation, therefore, does not project new legal effect of its own."[201] An agency statement thus typically is considered interpretive if it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers";[202] if it is "explicitly based upon an analysis of the meaning of the statute or regulation";[203] or if it "deals with an aspect of [a statute] . . . already prescribed in detail by Congress."[204] A rule is substantive, in contrast, if Congress delegated "legislative power to the agency" and the agency "intended to use that power."[205] In general, a substantive rule "fill[s] in the gaps in a complicated regulatory scheme"[206] and "create[s] new law, rights, or duties."[207] The question whether a rule is interpretive or legislative thus often depends on "how tightly the agency's interpretation is drawn linguistically from the actual language of the statute or rule."[208] A rule is not legislative "merely

199. 5 U.S.C. §§ 551-559, 701-706 (1994).

200. *Id.* § 553(b)(A).

201. Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 13 (1994).

202. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) (internal quotation marks and citations omitted).

203. Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 237 (D.C. Cir. 1992).

204. Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 559 (D.C. Cir. 1983).

205. *Id.* at 558.

206. *Id.* at 559 (citation omitted); *accord Nat'l Family Planning*, 979 F.2d at 237.

207. Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) (citation omitted).

208. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 588 (D.C. Cir. 1997).

because it supplies crisper and more detailed lines than the authority being interpreted";[209] instead, "the legislative or interpretive status of the agency rules turns not in some general sense on the narrowness or breadth of the statutory (or regulatory) term in question, but on the prior existence or non-existence of legal duties and rights."[210]

If one assumes (contrary to the accountability model) that reasonable agency interpretations issued before a state accepts federal funds can bind the state, but, consistent with the state choice model, that there is some unfairness in binding the state to an agency interpretation issued after the state accepts funds, then one possible solution to cases of *Bennett* retroactivity is to allow only interpretive rules to bind the state. Indeed, the principal unfairness in giving binding force to the agency's interpretation occurs in cases in which the state did not anticipate the agency's view and made decisions (and committed funds) based on an alternative reasonable view of the statutory condition's application.[211] Because an interpretive rule merely explains what "existing legislation already has established by implication," there is no unfairness in binding a state to agency interpretive rules. In such cases, the state (at least theoretically) by definition has received adequate notice from the statute itself of its application to the circumstances at issue. Substantive (or legislative) rules, on the other hand, create "new" duties beyond those that the grant statute itself explicitly or implicitly creates—and therefore purport to impose obligations that the state recipients could not specifically have anticipated.

Although there is some analytical appeal in using the distinction between interpretive and substantive rules to determine whether an agency interpretation that suffers from *Bennett* retroactivity should bind a state recipient of federal funds, there is good reason not to follow this approach. The ostensible virtue of the approach is that it helps to identify those situations in which there is no unfairness to the state—those situations, that is, in which the state in effect should have known from the statute that it would be bound by the agency's subsequent interpretation. In practice, however, "[d]etermining whether a given agency action is interpretive or legislative is an extraordinarily case-specific endeavor."[212] Indeed, although it is not difficult to state in generic terms the difference between interpretive and substantive rules, the distinction often is blurred in practice,[213] and courts accordingly have struggled in characterizing agency statements.[214]

209. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

210. *Id.* at 1110.

211. *See supra* notes 169-172 and accompanying text.

212. Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

213. For example, although one hallmark of a substantive rule is that it creates new legal duties, Fertilizer Inst. v. EPA, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991), courts have noted that

Another possible analytic framework is the nondelegation doctrine itself. That doctrine prevents Congress from transferring the legislative power—that is, the "open-ended discretion to choose ends" within the "affirmative reach of federal authority"[215]—to other agents, principally to administrative agencies. Congress therefore may grant to agencies the authority to issue substantive rules *if* Congress has cabined that authority by establishing—even if only in general terms—the objectives of the regulatory program; accordingly, the Court will uphold a delegation of authority to an agency to promulgate rules if Congress has provided intelligible standards for the exercise of that authority.[216] The nondelegation doctrine, broadly stated, serves at least two important functions: It ensures that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will";[217] and, by requiring that Congress specify standards for the exercise of the delegated power, it facilitates judicial review of the validity of that power once exercised.[218]

So stated, the nondelegation doctrine supplies a possible analytical framework for judging agency interpretations of statutory grant conditions. Indeed, as explained above, the accountability model's concern really is another way of stating a concern about delegation. As it currently stands, however, the nondelegation doctrine is satisfied when Congress expresses, at a comparatively broad level of generality, the ends of the federal

"interpretive rules may have a substantial impact on the rights of individuals." Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 560 (D.C. Cir. 1983). Similarly, courts generally consider a rule interpretive if it is "explicitly based upon an analysis of the meaning of the statute or regulation." Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 237 (D.C. Cir. 1992). But that almost always is the case, at least in some sense, with legislative rules as well. And the ambiguity is not easily resolved by the principal element in the test that the courts apply to determine whether a rule is interpretive or substantive: "whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *Am. Mining Cong.*, 995 F.2d at 1112. That inquiry merely begs the question.

214. *See, e.g.*, Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93 (D.C. Cir. 1997) ("We have long recognized that it is quite difficult to distinguish between substantive and interpretive rules."); *Am. Hosp. Ass'n*, 834 F.2d at 1045 (stating that the "spectrum between a clearly interpretive rule and a clearly substantive one is a hazy continuum"); Gen. Motors v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (stating that the distinction between legislative and interpretive rules is "enshrouded in considerable smog").

215. TRIBE, *supra* note 75, at 982.

216. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928))).

217. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment).

218. *See id.* at 686; TRIBE, *supra* note 75, at 364-65.

enactment; Congress need only provide "intelligible" standards to fulfill its obligation to retain the legislative power.[219]

To be sure, a number of judges and commentators have suggested that the current nondelegation doctrine does not impose adequate limits on Congress and inappropriately entitles Congress to punt important policy decisions to agency decisionmakers and, ultimately, to the courts.[220] These concerns are not insubstantial, but they are beyond the scope of this Essay. It suffices to note here that a delegation model would appear to address many of the concerns about agencies' power to interpret statutory provisions, including statutory conditions on state recipients of federal funds; and if the nondelegation doctrine as currently applied does not, in all contexts (including grant programs), adequately limit the power of Congress to give away the legislative power, then perhaps a revision of that doctrine is in order. As matters currently stand, however, the nondelegation doctrine, which identifies the outer limits of Congress's power to permit agencies to fill in the gaps in statutory schemes, is not violated when an agency issues—either before or after a state accepts federal funds—its interpretation of a statutory grant condition that plainly imposes some burden on the state recipients.

IV. CONCLUSION

Narrowly construed, *Pennhurst* is a sensible (even if not necessary) process-based limitation on Congress's power to bind states to costly burdens. If read to mean that a state can never be bound by a grant condition when the statute itself does not unmistakably speak to a particular set of circumstances, however, *Pennhurst* becomes a substantive limitation on federal authority that significantly impairs Congress's ability to accomplish national goals. And if one reads *Pennhurst* to support the

219. *Mistretta*, 488 U.S. at 372.

220. *See, e.g.*, *id.* at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"); *Am. Petroleum Inst.*, 448 U.S. at 686 (Rehnquist, J., concurring in the judgment) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as one writer has phrased it, 'a case of death by association.'" (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133 (1980))); Am. Trucking Ass'ns v. EPA, 195 F.3d 4, 14 (D.C. Cir. 1999) (Silberman, J., dissenting from the denial of rehearing en banc) ("But, sad to say, [Justice Rehnquist's view in *American Petroleum Institute*] is not shared by a majority of the Court which has acknowledged only a theoretical limitation on the scope of congressional delegations to the executive branch."), *rev'd in part sub nom.* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 78-94 (1978).

accountability model, then *Pennhurst* not only unduly impairs federal authority, but also undermines the interests served by *Chevron*; indeed, so read, *Pennhurst* would jeopardize the functioning of the administrative state itself.

As I have explained, the question whether a reasonable agency interpretation that postdates a state's receipt of funds should bind the state is a close one. A conclusion that it should, although plausible, would be easier to swallow if some exceptions to the rule were created. Perhaps, for example, a state should not, notwithstanding an express waiver of Eleventh Amendment immunity in accepting federal funds, be held liable for damages in a private suit challenging conduct that is unlawful only under the agency's belated interpretation. And perhaps, if one were to adopt an approach of categorically deferring, there could be an exception when the agency reverses the interpretation that was in force when the state accepted funds. At bottom, however, the question requires a difficult balancing between values that are not easily quantified: state decisionmaking autonomy, on the one hand, and the separation of powers and the application of specialized governmental expertise to concrete problems, on the other. Whichever approach is correct, the question has assumed increased importance as the Supreme Court has closed (or at least erected barriers to) other avenues for the exercise of federal authority over the states. As the federal government increasingly turns to conditioned spending as a means of accomplishing national objectives, this question becomes correspondingly less academic. Its resolution will provide a degree of welcome clarity both for regulators in the federal government and for state recipients of federal funds.