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MAKING THE MOST OF *PENNHURST*'S "CLEAR STATEMENT" RULE

*Stewart A. Baker**

Pennhurst State School and Hospital v. Halderman[1] opens a major new line of analysis in federal grants cases. This article briefly summarizes *Pennhurst* and sketches two possible extensions of its holding that may be of great value to lawyers representing state and local governments. For those attorneys interested in pursuing a test case to extend *Pennhurst*, the article concludes with some thoughts on the type of case most likely to achieve this goal.

I. THE OPINION

The *Pennhurst* case was brought on behalf of the residents of Pennhurst, a large facility operated by the state of Pennsylvania for the mentally retarded. The plaintiffs claimed that the facility was "warehousing" the retarded instead of returning them to community living arrangements. Both the federal district court[2] and the court of appeals[3] found that conditions at Pennhurst violated federal law. The court of appeals relied on the Developmentally Disabled Assistance and Bill of Rights Act of 1975.[4]

In a 6-3 decision, the Supreme Court reversed the lower courts. Although section 6010 of the Act declares Congress's "findings" that the handicapped have particular "rights" and that the states have particular "obligations," the Court held that the Act does not create enforceable rights and obligations.

The petitioners argued that Congress, using its spending power, had conditioned the receipt of federal aid on observation of the rights and obligations listed in section 6010. Announcing a potentially sweeping new approach to such conditions, the Court held that a "conditioned" federal grant is like a contract, which the state must knowingly and voluntarily accept. For this reason, "if Congress intends to impose a condition on the

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1. 101 S. Ct. 1531 (1981).
2. 446 F. Supp. 1295 (E.D. Pa. 1977).
3. 612 F.2d 84 (3d Cir. 1979).
4. 42 U.S.C. §§ 6000-6081 (1976 & Supp. III 1979).

grant of federal moneys, it must do so unambiguously."[5]

In applying this new rule of statutory construction, the Court analyzed several factors. First, section 6010—unlike other sections of the Act—does not explicitly state that compliance is a condition of receiving federal funds.[6] Second, the Secretary of the United States Department of Health and Human Services (HHS) had not originally interpreted the section as a condition (although the United States later changed its mind and urged that interpretation in *Pennhurst*).[7] Third, the legislative history showed that the conference committee had rejected a provision clearly imposing strict standards as a condition of aid.[8] Fourth, requiring states to adhere to section 6010 would make meaningless other parts of the Act imposing more modest duties.[9] Finally, the Court compared "the enormous financial burden" imposed by section 6010 with the "woefully inadequate" amount ($1.6 million) granted to the state under the Act.[10] Considering all of these points, the Court held that section 6010 was not clear enough to impose a duty on aid recipients.[11]

Three Justices dissented, finding that section 6010 did impose a condition on federal grants.[12] A fourth, Justice Blackmun, agreed with the Court on that point but concurred to separate himself from another portion of the Court's opinion which hinted that a private party might not have standing to compel state compliance with the conditions of federal grant programs.[13]

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5. 101 S. Ct. at 1540. Some parties had argued that the rights and obligations were binding on the state even if it accepted no federal aid—that Congress had the power to impose these rules on the state as part of its fourteenth amendment enforcement authority. All nine justices joined in brushing aside this argument, for reasons that parallel the "clear statement" rule adopted for spending power cases. *See infra* notes 16-18 and accompanying text. The majority opinion stated that "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 101 S. Ct. at 1539. In his dissenting opinion, which was joined by Justices Brennan and Marshall, Justice White agreed with the majority on this point. *Id.* at 1549.

6. 101 S. Ct. at 1540-42.

7. *Id.* at 1543.

8. *Id.* at 1544.

9. *Id.*

10. *Id.* at 1543.

11. *Id.* at 1544-45.

12. *Id.* at 1548-49 (White, Brennan, and Marshall, JJ., dissenting in part).

13. *Id.* at 1547-48 (Blackmun, J., concurring in part). The majority opined that Maine v. Thiboutot, 448 U.S. 1 (1980), which held that 42 U.S.C. § 1983 may provide a private cause of action for state deprivations of federal rights, might be inapplicable to legislation enacted pursuant to the spending power. 101 S. Ct. at 1545. This aspect of *Pennhurst* is

II. *PENNHURST*: TOOLS FOR CUTTING FEDERAL STRINGS

State and local governments concerned about litigation over the "strings" attached to federal aid will find, in *Pennhurst*, a broad new basis for resisting excessive federal mandates. *Pennhurst* announced a new canon of statutory construction: Congress must speak clearly to impose conditions on the states through its spending power. Read narrowly, the rule simply applies when the Court is attempting to discern whether a statutory provision imposes a condition.

Thus read, the rule is of modest importance. There may be federal aid statutes in which the existence of a duty is unclear, but the real problem for state and local governments is the congressional propensity to impose broad, fine-sounding duties as conditions and then leave it to executive agencies to interpret the provisions. In the hands of federal officials, the broadly-phrased conditions have typically come to mean more and more burdensome and detailed proscriptions. There are two possible extensions of *Pennhurst* that would address this problem.

A. Ambiguous Conditions

The rationale of *Pennhurst*'s rule is that a conditioned grant is in the nature of a contract and that major duties accompanying the grant should not be hidden in ambiguous, statutory "fine print." If it is an unfair surprise for a state to learn, after the fact, that ambiguous language actually imposes an onerous condition, it is equally unfair and equally surprising for the state to learn that an ambiguous condition—such as the *Pennhurst* requirement that the retarded receive "appropriate treatment"—actually requires an extensive and expensive overhaul of existing programs. *Pennhurst* can be read, therefore, as forbidding the courts to read aid conditions in a manner likely to impose heavy costs on recipients, unless Congress has clearly indicated its intent to impose such costs on state and local governments.

Because this extension of *Pennhurst* depends on a claim of "unfair surprise," it logically should arise only if the meaning of the condition was in fact vague when the state or local government accepted the grant. If executive or judicial interpretations of statutory language were clear at the time of the grant, the contract analogy will not avail. Nonetheless, this extension of *Pennhurst* could prove useful in defending against private suits to expand the scope of federal grant conditions. It would be particularly helpful to local governments, which have no eleventh amendment immu-

discussed in another part of this symposium. *See* Brown, *Pennhurst as a Source of Defenses for State and Local Governments*, 31 CATH. U.L. REV. 449 (1982).

nity from retroactive liability.[14] Local governments now face the danger that a new federal court interpretation of existing, but vague, conditions may expose them to *Thiboutot*-like damages for "violations" occurring years before the new interpretation was adopted.[15]

B. Executive Elaborations on Conditions

A second and even more valuable extension of *Pennhurst* is possible. A substantial argument may be made that after *Pennhurst*, the federal executive can only require state and local governments to conform to conditions that were set out with precision by Congress itself. If this principle can be established, it will mark a major shift in the balance of federal-state relations in grant programs. It would mean, for example, that the federal administrators in the Department of Health and Human Services could not write regulations requiring costly changes in state programs based on a vague congressional mandate that states offer "appropriate treatment" to the retarded. If Congress wanted such changes, it would need to express itself more clearly.

The primary weakness of this second extension is that it cannot draw support from the contract analogy; recipients cannot claim surprise if they accept grants after non-statutory administrative conditions have been announced. The justification for this extension, then, must rest squarely on a concern for preserving state and local autonomy.

The court appeared to have this concern in mind when it wrote *Pennhurst*. For example, in announcing the clear statement rule, the opinion relies on two eleventh amendment cases holding that the states lose their immunity from damages only when Congress has met a "clear statement" requirement.[16] Under eleventh amendment doctrine, federalism considerations—not contract analogies—demand strong evidence that the states have waived the prerogatives of sovereignty. As the Supreme Court has explained, "We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' "[17] Although the Court has not considered the issue in evaluating a statute based on Congress's commerce power, some justices believe that the eleventh amend-

14. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

15. *See* Maine v. Thiboutot, 448 U.S. 1 (1980). Local governments cannot raise the "good faith" defense that the law was unclear when they acted. Owen v. City of Independence, 445 U.S. 622, 650 (1980).

16. 101 S. Ct. at 1539-40. *See* Employees v. Missouri Pub. Health Dep't, 411 U.S. 279 (1973); Edelman v. Jordan, 415 U.S. 651 (1974).

17. Edelman v. Jordan, 415 U.S. 651, 673 (1974).

ment's "clear statement" rule means that congressional intent must be expressed in the statutory language itself—even explicit legislative history on the point is not enough.[18] Certainly no justice has suggested that later regulations which contain a "clear statement" will substitute for congressional language.

Incorporating eleventh amendment standards into the analysis of onerous federal grant conditions, therefore, would mean that federal administrators may not impose substantial new duties on the states by "interpreting" statutory language or even by issuing regulations for grant programs. The Court's treatment of the executive position in *Pennhurst* offers some further support for this view. The Court acknowledged that the Secretary of HHS had interpreted the Act to require state compliance with section 6010, a condition of federal aid.[19] The Court, however, attached little weight to this administrative interpretation, noting that the Secretary had made conflicting statements and had never cut off Pennsylvania's funds.[20]

An extension of *Pennhurst* to limit federal administrators can be supported in theory as well as under the opinion. Many legal scholars take the view that Congress is the natural protector of federalism and of the states, and the Executive is the states' natural adversary.[21] Hence, executive measures intruding on state and local authority without express congressional approval should not be given the deference usually accorded administrative rulings. And if it is Congress that must speak clearly in burdening the states, statements by the Executive—however clear—are an inadequate substitute.

A related theoretical ground for the proposed approach derives from the doctrine that Congress may not delegate lawmaking powers to the President. The Supreme Court has struck down legislation for excessive delegation only twice.[22] Nonetheless, the theory of the doctrine—that Congress must set limits on executive discretion when it confers power on him—

18. Hutto v. Finney, 437 U.S. 678, 705 (1978) (Powell, J., dissenting). While Chief Justice Burger and Justices White and Rehnquist joined in Justice Powell's conclusion that the doctrine of "clear statement" rests solely on statutory language, the majority of the Court indicated that legislative history was also a factor. *Id.* at 698 n.31.

19. 101 S. Ct. at 1543.

20. *Id.* at 1543 n.17.

21. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulations: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); 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); *but cf.* Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 183-84 (1977).

22. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

retains its vitality.[23] *Pennhurst* can be read as simply expanding the unlawful delegation doctrine to prevent the President from interfering with the states' traditional powers on the basis of a vague delegation.[24]

III. Strategy to Implement *Pennhurst* Limitations

It is one thing to find justifications for extending *Pennhurst* in this fashion. It is quite another to translate such justifications into case law. Lower federal courts generally have been cool toward efforts to redress the balance of federalism. They have distinguished *National League of Cities v. Usery*[25] far more often than they have followed it.[26] The best hope for extending *Pennhurst*, then, is the Supreme Court. The rest of this article sketches some of the considerations that advocates should take into account in mapping a strategy to bring these questions before the Court.

Although some justices have well-developed attitudes toward federalism, the views of others on the Court are probably typified by the *ad hoc* balancing Justice Blackmun displayed in his *National League of Cities* concurrence.[27] This emphasis on *ad hoc* balancing simply reinforces the importance of a rule Supreme Court advocates should always try to follow: if possible, choose a case with sympathetic facts when trying to establish a principle. Because the stakes are so high, state and local advocates have a

23. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

24. The traditional remedy for improper delegation, employed in both Panama Refining Co. v. Ryan, 295 U.S. 388 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is to strike the statute down. This is not the relief a state or local grantee would prefer, for the grant program might die with the condition. Instead, state or local government lawyers may wish to argue that the vague statutory condition should be construed narrowly as was done in *Pennhurst*, thus avoiding an unconstitutional delegation. Alternatively, they may argue that any condition that cannot be narrowed should be severed from the grant program and struck by itself.

25. 426 U.S. 833 (1976).

26. *See, e.g.*, Marshall v. City of Sheboygan, 577 F.2d 1, 3-4 (7th Cir. 1978); Marshall v. Owensboro-Daviess County Hosp., 581 F.2d 116, 118-19 (6th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169, 1170 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 154-55 (3d Cir. 1976) (all finding that *National League of Cities* does not invalidate Equal Pay Act portion of Fair Labor Standards Act). *But see* EEOC v. State of Wyo., 514 F. Supp. 595, 599-600 (D. Wyo. 1981) (*National League of Cities* basis for upholding state law requiring retirement of state park employees at 55 years of age).

It is worth noting that most of the above cases upholding the Equal Pay Act declare that the Equal Pay Act rests on Congress's power to enforce the fourteenth amendment. But nothing in the legislative history provides explicit support for this holding. The cases thus may be open to reexamination now that the Court has rejected the notion that Congress's reliance on § 5 of the fourteenth amendment may be inferred from silence. *See supra* note 5 and accompanying text.

27. 426 U.S. at 856.

special responsibility to use care in deciding which case should be the vehicle for seeking to extend *Pennhurst*. In particular, state and local lawyers should consider the following factors in deciding whether a given federal mandate should be the subject of a *Pennhurst* test case.

(1) *Legislative Ambiguity*. To state the obvious, the challenged federal statute must suffer from some ambiguity. There is no point in raising *Pennhurst* if the statute itself expressly imposes specific duties as a condition of federal aid. But, in many cases, statutory duties are broadly defined, if at all. The *Pennhurst* Court gave two good examples of such ambiguity: "It is difficult to know what is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment."[28] When an executive agency has taken language as broad and ambiguous as this and has written a restrictive and burdensome interpretation, rule, or mandate, the Executive's action is open to a *Pennhurst* challenge.

Before making the challenge, however, state and local government lawyers should follow the Court's example and conduct a thorough search to determine whether the legislative history is as opaque as the law. Similarly, the executive interpretation should be scrutinized for consistency with other parts of the statute and related laws. For example, the *Pennhurst* Court found it significant that other portions of the Act imposing limited duties would not have been necessary if section 6010 were treated as a condition.[29] In other cases, the law may leave open policy choices that the executive interpretation forecloses. Finally, state and local government lawyers should search for indications that Congress was merely offering state and local governments "encouragement" to adopt certain programs, rather than imposing "binding obligations."[30]

(2) *Consistency of Administrative Interpretation*. In *Pennhurst*, the Department of HHS was originally of the view that section 6010 did not impose a condition upon obtaining federal funds. Even after the Department changed its view in response to amendments to the Act, its position remained somewhat inconsistent with that of the Solicitor General.[31]

State and local governments will not always find this much disarray

28. 101 S. Ct. at 1543.

29. *Id.* at 1544.

30. *Id. See also* Harris v. McRae, 448 U.S. 297 (1980) (states are not obligated by Title XIX of the Social Security Act to fund medically necessary abortions where federal reimbursement is not available); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (section 504 of the Rehabilitation Act of 1973 required a state university to treat handicapped students in an even-handed manner but did not require affirmative action).

31. 101 S. Ct. at 1543 nn.17-18. *See infra* text accompanying note 35.

within the federal government. Nonetheless, they should scrutinize for consistency all past *Federal Register* notices and federal briefs dealing with a particular statutory provision. In addition, they should bear in mind the canon of statutory construction that administrative positions taken years after enactment carry less weight than contemporaneous administrative interpretations.[32]

(3) *Relationship Between Funding and Burden*. In *Pennhurst*, the total grant received by the state for 1976 was $1.6 million, yet the cost of complying with section 6010 seemed potentially limitless. The Court's statement, that when the federal government imposes affirmative obligations on the states it ordinarily picks up a greater percentage of the tab,[33] seems to reflect the Court's belief that the federal government *ought* to pick up more of the tab. The theme that links *Pennhurst* and *National League of Cities* is a reluctance to see the federal government lay the burden of heavy new expenditures on state and local governments without providing adequate funds.

Before undertaking a *Pennhurst* challenge, therefore, state and local governments should do detailed, careful, and credible studies of the potential burden imposed by the federal mandate.[34] Only if there is a substantial disparity between the burden imposed and the size of the grant should a case be brought. If possible, very small government units should be included as plaintiffs because they typically find federal administrative and financial burdens greatest in comparison to the size of their grants.

(4) *Nature of the Federal Mandate*. In *Pennhurst*, the federal government sought to impose a condition on the state by litigation; it had issued no regulations to back up its view of the law. Indeed, the published policies of HHS were at least partially at odds with the government's litigating position.[35] Expanding *Pennhurst* to cover federal regulations may be difficult. Informal policy statements, directives, guidelines, and similar pronouncements are more susceptible to a *Pennhurst* challenge, particularly if the agency has ignored the requirements for notice, comment, and *Federal Register* publication.

(5) *Effect on Traditional Federal-State Division of Authority*. A federal administrative mandate is most susceptible to a *Pennhurst* challenge if it appears to intrude on an area of traditional state or local authority. State and local tax policy, land use regulations, educational policy, and relations with government employees are examples of traditional state and local

32. General Elec. Co. v. Gilbert, 429 U.S. 125, 142-46 (1976).

33. 101 S. Ct. at 1543.

34. The studies can later be introduced into the record.

35. *See* 101 S. Ct. at 1543 & nn.17-18.

concerns. Federal mandates intruding on these areas may receive unfriendly scrutiny unless they are designed to further traditionally federal concerns, such as foreign affairs or the protection of civil rights.

(6) *Link Between Mandate and Grant*. The Court is most likely to find a condition reasonable if it is closely linked to the purposes of the grant or to the grant-making process. Thus, audit and accounting requirements may be seen as reasonable parts of a grant program, even if they are not grounded in specific statutory language. In contrast, mandates that serve broad social purposes, but bear no particular relationship to the grant, are likely to be received less favorably.

Broad "cross-cutting" conditions imposed upon a number of grant programs are subject to scrutiny for another reason. At some point, the condition is linked to such a substantial amount of federal aid that state and local governments have no real choice but to participate in the programs and accept the condition. Arguably, this makes no difference—if the federal government controls the funds, it should be able to set any conditions it wishes. The Supreme Court, however, has consistently kept open the possibility that a spending condition will be struck down as "coercive" where the condition is pervasively tied to very large sums and is unduly intrusive on state and local prerogatives.[36] Indeed, in *Pennhurst*, the Court reiterated that "[t]here are limits on the power of Congress to impose conditions on the States pursuant to its spending power."[37] It went on to suggest that there are particular "constitutional difficulties" with imposing "affirmative obligations on the States pursuant to the Spending Power."[38]

IV. Conclusion

No federal executive branch interpretation of an ambiguous statutory condition will meet all of the factors discussed above. State and local lawyers will have to determine the strengths and weaknesses of particular *Pennhurst* challenges, and they are sure to find other, less easily generalized factors that may also affect the decision to bring a test case. It is important, however, that state and local governments actively consider bringing *Pennhurst* challenges against vague and overbroad federal executive mandates. Otherwise, the opportunity offered by *Pennhurst* may be lost by default.

36. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585-98 (1937).
37. 101 S. Ct. at 1540 n.13.
38. *Id.*