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A FALSE DAWN FOR FEDERALISM: CLEAR STATEMENT RULES AFTER *GONZALES V. RAICH*

Ilya Somin

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*Ilya Somin**

Introduction

The Supreme Court's 2005 decision in *Gonzales v. Raich*[1] severely undermined hopes that the Court might enforce meaningful constitutional limits on congressional power.[2] In the aftermath of *Raich*, some observers hoped and others feared that judicial limits on federal power might be resuscitated in *Gonzales v. Oregon*[3] and *Rapanos v. United States*,[4] the two most significant federalism cases of the 2005–2006 term. The appointment of two new conservative justices—Chief Justice Roberts and Justice Alito—may have increased the chance of departing from precedent, though the justices these newcomers replaced had both dissented in *Raich.*

Oregon and *Rapanos* could potentially have constrained the virtually limitless Commerce Clause power that the Supreme Court allowed the federal government to claim in *Raich.* A less high-profile case, *Arlington Central School District v. Murphy*,[5] addressed the scope

*Assistant Professor of Law, George Mason University School of Law; B.A., Amherst College, 1995; J.D., Yale Law School, 2001; M.A., Harvard University Department of Government, 1997; Ph.D. expected. For helpful suggestions and comments, I would like to thank Jonathan Adler, Douglas Laycock, Marty Lederman, Mark Moller, John Copeland Nagle, and Maxwell Stearns.

[1]125 S. Ct. 2195 (2005).

[2]For a detailed analysis of the ways in which *Raich* undermined judicial review of congressional Commerce Clause authority, see Ilya Somin, Gonzales v. Raich: Federalism as a Casualty of the War on Drugs, Cornell J.L. & Pub. Pol'y (forthcoming 2006) (Symposium on the War on Drugs), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916965 (visited July 24, 2006).

[3]126 S. Ct. 904 (2006).

[4]126 S. Ct. 2208 (2006).

[5]126 S. Ct. 2455 (2006).

of Congress' power to set conditions on grants to state governments under the Spending Clause. Although the federal government suffered setbacks in all three cases, none of them actually imposes significant constitutional limitations on congressional power.

Oregon, Rapanos, and *Arlington* all involved challenges to assertions of federal regulatory authority that might run afoul of ''clear statement rules.'' These doctrines require Congress to clearly indicate its intent in the text of a statute before courts can interpret it in a way that ''raises constitutional problems,'' impinges on an area of traditional state authority, or imposes conditions on state governments that accept federal funds.

Part I briefly reviews the *Raich* decision and explains how it opened the door to virtually unlimited federal power under the Commerce Clause. I also briefly discuss a parallel precedent that gave Congress equally unconstrained power under the Spending Clause, *Sabri v. United States*.[6]

Part II shows that the major federalism cases of the 2005–2006 term fail to impose any constitutional limits on federal power, and also do not extend the reach of clear statement rules. Thus, the legacy of *Raich* remains intact. Indeed, all three decisions actually reinforce that legacy by emphasizing that Congress does not lack the power to regulate almost any activity, but merely failed to exert it to the utmost in these specific instances.

Part III argues that clear statement rules are neither a viable nor an adequate substitute for substantive judicial limits on federal power. *Raich* poses a serious threat to the longterm viability of federalism clear statement rules. If congressional Commerce Clause authority is virtually unlimited, it is difficult to see how any assertion of that power can trigger a clear statement requirement by raising constitutional problems or by impinging on a policy area reserved to the states.

The last section of Part III shows that clear statement rules are an inadequate substitute for judicial enforcement of substantive limits on federal power, even if the doctrinal difficulties created by *Raich* can be overcome. Clear statement rules sometimes protect the interests of state governments, but that is very different from protecting constitutional federalism. Indeed, state governments will often find

[6]541 U.S. 600 (2004).

it in their interest to support the expansion of federal power; courts applying clear statement rules cannot prevent this.

Indeed, clear statement rules may actually facilitate the expansion of federal power rather than restrain it. By reducing the chance that state governments will be blindsided by unexpected assertions of federal regulatory authority, they may make it more likely that states will collaborate in the expansion of federal power. The argument that clear statement rules can replace substantive judicial protection of federalism rests on the mistaken assumption that constitutional federalism is ultimately about protecting the interests of state governments rather than those of the general population.

I. Judicial Endorsement of Unlimited Federal Power

The Supreme Court's recent federalism decisions have embraced a nearly unlimited conception of federal power. In the Commerce Clause field, this result arises from the Court's well-known decision in *Gonzales v. Raich*.[7] Less well-known is the Court's 2004 decision in *Sabri v. United States*, which produced a similar outcome with respect to the Spending Clause.

A. Gonzales v. Raich *and the Unlimited Commerce Clause Power*[8]

The Commerce Clause gives Congress the power to ''regulate commerce . . . among the several States.''[9] Until the New Deal constitutional revolution of the 1930s, the Supreme Court generally did not treat this grant of power as an unlimited license for Congress to regulate any activity with even a remote connection to interstate

[7]125 S. Ct. 2195 (2005).

[8]The analysis of *Raich* in this section is a condensed version of that in Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2, at 4–13. For other analyses reaching similar conclusions about *Raich*, see Jonathan H. Adler, Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose, 9 Lewis & Clark L. Rev. 751, 753–54 (2005) (contending that *Raich* effectively repudiates *Lopez* and *Morrison*); and Glenn H. Reynolds & Brannon P. Denning, What Hath Raich Wrought? Five Takes, 9 Lewis & Clark L. Rev. 915 (2005) (same). For arguments that *Raich* leaves greater room for judicial limitation of federal power, see Randy E. Barnett, Foreword: Limiting Raich, 9 Lewis & Clark L. Rev. 743 (2005); and George D. Brown, Counterrevolution? National Criminal Law after Raich, 66 Ohio St. U. L.J. 947, 974–82 (2005) (arguing that *Raich* merely refuses to extend *Lopez* and *Morrison* rather than cutting back on them).

[9]U.S. Const. art. I, § 8, cl. 3.

commerce.[10] The Court's famous 1824 decision in *Gibbons v. Ogden*,[11] often described as a precursor to the modern conception of virtually unlimited federal power,[12] in fact defined congressional Commerce Clause authority in a relatively narrow way.[13] A series of decisions during the New Deal period expanded congressional power to encompass any activity that substantially affects interstate commerce, even if the regulated action did not itself involve interstate trade in goods or services. Most notably, the 1942 case of *Wickard v. Filburn*[14] upheld a federal law limiting wheat-growing even in a case where the wheat in question never entered interstate commerce, but was instead consumed on the same farm where it was grown.[15]

After *Wickard*, the Supreme Court virtually abandoned efforts to constrain Congress' Commerce Clause authority until the Rehnquist Court's decisions in *United States v. Lopez*[16] and *United States v. Morrison*.[17] The former struck down a provision of the Gun Free School Zones Act (GFSZA), which forbade gun possession in close proximity to schools, while the latter invalidated a section of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of violent attacks motivated by gender bias. *Lopez* and *Morrison* rekindled debate over the proper scope of federal power, but left the actual extent of judicial review in this area unclear.

[10] See, e.g., United States v. E.C. Knight, 156 U.S. 1 (1895) (holding that the Commerce Clause does not give Congress the power to break up an alleged sugar producer cartel); Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that the clause does not give Congress the power to regulate child labor).

[11] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[12] See, e.g., United States v. Lopez, 514 U.S. 549, 603 (1995) (Souter, J., dissenting) (citing the ''the Court's recognition of a broad commerce power in *Gibbons v. Ogden*''); Wickard v Filburn, 317 U.S. 111, 120 (1942) (claiming that ''Chief Justice Marshall's opinion [in *Gibbons*] described the Federal commerce power with a breadth never yet exceeded'').

[13] See Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2, at 30–32.

[14] Wickard v. Filburn, 317 U.S. 111 (1942).

[15] For a detailed history of the case, see Jim Chen, Filburn's Legacy, 52 Emory L.J. 1719 (2003); and Jim Chen, Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate, 82 Minn. L. Rev. 249 (1997).

[16] 514 U.S. 549 (1995).

[17] 529 U.S. 598 (2000).

The two cases outlined three areas of congressional Commerce Clause authority:

1. Regulation of ''the use of the channels of interstate commerce.''
2. ''Regulat[ion] and protect[ion] [of] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.''
3. ''[R]egulat[ion] [of] . . . those activities that substantially affect interstate commerce.''[18]

The most expansive category—and the only one at issue in *Lopez*, *Morrison*, and *Raich*—is the third: congressional power over activities that ''substantially affect interstate commerce.'' The *Lopez-Morrison* majority sought to confine this category by limiting the government's ability to use ''aggregation'' analysis in claiming that virtually any activity that affects interstate commerce is fair game if its impact is analyzed in conjunction with that of other similar actions. *Lopez* cabined the aggregation principle by focusing on the noncommercial aspects of the activity regulated by the GFSZA. Such gun possession had ''nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.''[19] Therefore, aggregation analysis could not be applied to it because doing so would inevitably lead to such a broad interpretation of federal power that the Court would be ''hard pressed to posit any activity by an individual that Congress is without power to regulate.''[20] Although the Court conceded that ''noneconomic'' activity could still be regulated as part of a broader ''regulatory scheme,'' such inclusion would have to be ''essential'' to the broader program.[21]

The *Morrison* decision went farther than *Lopez* in suggesting that ''noneconomic'' activity cannot be subjected to aggregation analysis. It struck down the relevant provision in VAWA even in the face of considerable evidence mustered by Congress indicating that violence against women had a substantial aggregate effect on interstate

[18] Lopez, 514 U.S. at 558–59; see also Morrison, 529 U.S. at 609.

[19] Lopez, 514 U.S. at 560.

[20] *Id.* at 564.

[21] *Id.* at 561.

commerce.[22] Chief Justice Rehnquist's opinion for the Court emphasized its ''reject[ion]'' of ''the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.''[23] While the Court indicated that it ''need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases,''[24] it emphasized that previous Supreme Court cases had only used aggregation to uphold ''regulation of intrastate activity only where that activity is economic in nature.''[25]

In 2005, the apparent limitations on federal authority established by *Lopez* and *Morrison* were virtually eviscerated in *Gonzales v. Raich*.[26] *Raich* upheld the application of the Controlled Substances Act's (CSA) ban on marijuana possession to cases where homegrown marijuana was used for medical purposes, as permitted by California law, and in a manner unconnected with any commercial activity.[27]

Raich undermined the *Lopez-Morrison* framework for limiting federal power in three separate ways. First, *Raich* adopts a definition of ''economic'' that is almost limitless, thereby ensuring that virtually any activity can be ''aggregated'' to produce the ''substantial[] [e]ffect [on] interstate commerce'' required to legitimate congressional regulation under *Lopez* and *Morrison*.[28] According to the *Raich* majority, the word ''economic'' ''refers to 'the production, distribution, and consumption of commodities.' ''[29] Almost any human activity involves the ''distribution'' or ''consumption'' of a commodity. Even having dinner at home surely involves the ''consumption'' of the commodity of food, while giving a birthday present to a friend entails commodity ''distribution.''

[22] See Morrison, 529 U.S. at 628–29 (Souter, J., dissenting) (describing the ''mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce'').

[23] *Id.* at 617.

[24] *Id.* at 613.

[25] *Id.*

[26] 125 S. Ct. 2195 (2006).

[27] See *id.* at 2200 (describing the facts of the case).

[28] See Lopez, 514 U.S. at 558–59; see Morrison, 529 U.S. at 609.

[29] Raich, 125 S. Ct. at 2211 (quoting Webster's Third New International Dictionary 720 (1966)).

Raich also makes it easier for Congress to impose controls on even ''noneconomic'' activity by claiming that it is part of a broader ''regulatory scheme.''[30] Here the Court greatly expanded *Lopez's* statement that Congress can regulate noneconomic activity if it is an ''essential part of a larger regulation of economic activity.''[31] The *Raich* majority ignored the *Lopez* requirement that the regulation of the noneconomic activity must be an ''*essential*'' part of a ''regulatory scheme'' intended to control interstate ''economic activity.''[32] If ''essentiality'' is no longer required, the regulation of almost any activity can be claimed to be part of a broader regulatory scheme. Indeed, the government could satisfy the requirement by claiming that any new regulation of noneconomic activity is just an addition to one of the numerous regulatory programs already in existence.[33]

Finally, *Raich* reasserts the so-called ''rational basis'' test, holding that ''[w]e need not determine whether [defendants'] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.''[34] This holding suggests that even in the rare case where an activity is considered ''noneconomic'' under *Raich's* expansive definition of ''economic,'' the regulation is not part of a broader regulatory scheme, and there is no real substantial effect on interstate commerce, congressional regulation will likely *still* be upheld if Congress could ''rationally'' conclude that such an effect exists.

[30] *Id.* at 2208–10.

[31] Lopez, 514 U.S. at 561. This language is quoted in *Raich*. Raich, 125 S. Ct. at 2210. However, the Court does not engage in any discussion of the implications of the word ''essential'' and seems to assume that it is of no significance.

[32] Lopez, 514 U.S. at 561 (emphasis added).

[33] Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2, at 12.

[34] Raich, 125 S. Ct. at 2208. The ''rational basis'' test had been applied in some pre-*Lopez* Commerce Clause cases. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 276 (1981) (''The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such finding.''); Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) (''Where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.''). But it had been implicitly set aside in *Lopez* and *Morrison*, which failed to apply it and instead closely scrutinized the government's rationale for the challenged statutes. See Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2, at 12–13.

Taken in combination, these three elements of *Raich* place nearly insurmountable obstacles in the path of efforts to ensure meaningful judicial review of congressional exercise of the Commerce Clause power. After *Raich*, virtually any activity is considered ''economic,'' virtually any noneconomic activity can still be regulated as part of a broader regulatory scheme, and any stray activity that does not fall within the first two categories can be swept up under the rational basis test.

B. Unlimited Federal Power under the Spending Clause

The Spending Clause gives Congress the power to spend tax revenue to ''pay the Debts and provide for the common Defence and the general Welfare of the United States.''[35] The modern Supreme Court has generally been highly deferential to congressional efforts to define ''general Welfare'' broadly. Nonetheless, *South Dakota v. Dole*,[36] the leading modern precedent on the subject, does set criteria that Congress must meet if it wishes to impose conditions on federal grants to state governments. Any such conditions must 1) serve the ''general welfare'' under a standard that ''defer[s] substantially to the judgment of Congress,'' 2) state any conditions that the states must meet in order to acquire the funds ''unambiguously,'' 3) ensure that conditions are not ''unrelated to the federal interest in particular national projects or programs'' for which the funds were provided to the state, and 4) not violate ''other constitutional provisions.''[37] Furthermore, the Court noted the possibility that federal grants might be invalidated if ''the financial inducement offered by Congress [is] so coercive as to pass the point at which pressure turns into compulsion.''[38]

Of the four *Dole* requirements, only Condition Three—''relatedness'' to a federal interest—holds out the hope of substantive limits on the scope of federal power as opposed to purely procedural ones. In the aftermath of the Rehnquist Court's newfound interest in enforcing federalism-based limits on congressional power, some

[35] U.S. Const. art. I, § 8, cl. 1.

[36] 483 U.S. 203 (1987).

[37] *Id.* at 207–08.

[38] *Id.* at 211 (quotation omitted).

commentators expected that the Court might use the relatedness test to set meaningful limits on conditional federal spending.[39]

Basim Omar Sabri was a Minneapolis real estate developer who allegedly bribed a city official to ensure that the Minneapolis Community Development Agency (MCDA) would permit him to go forward with his plans to ''build a hotel and retail structure.''[40] Sabri was charged under 18 U.S.C. § 666(a)(2), which ''imposes federal criminal penalties'' on anyone who offers a bribe to a state or local official employed by an agency that receives more than $10,000 in federal funds during any one year period.[41] The Supreme Court upheld this application of § 666(a)(2) even under the assumption that Sabri's bribe had no connection to the use of the federal funds received by MCDA. The Court held that it could ''readily dispose of [the] position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense.''[42] Even if no such connection exists, Congress could still choose to impose conditions because of the fungibility of money:

> It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant. . . . But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained

[39] See, e.g., Lynn Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1962–77 (1995) (arguing that such limitations are a natural extension of the *Lopez* decision); Lynn Baker, The Revival of States' Rights: A Progress Report and a Proposal, 22 Harv. J.L. & Pub. Pol'y 95, 102–103 (1998) (compiling evidence indicating that a majority of the Supreme Court might have been willing to move in that direction). For my own argument for limiting federal grants to state governments, see Ilya Somin, Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments, 90 Geo. L.J. 461 (2002).

[40] Sabri v. United States, 541 U.S. 600, 602 (2004).

[41] *Id.* at 603 (quoting 18 U.S.C. § 666(a)(2)).

[42] *Id.* at 605.

> off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers . . . It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here, and on a bribe that goes well beyond liquor and cigars.[43]

This fungibility argument seriously undermines any hope that *Dole's* third prong might lead to meaningful judicial limits on conditional federal spending. After all, virtually any condition can be justified on the ground that if state or local governments are permitted to do X, it could siphon off funds from purpose Y, which the federal grants are intended to promote. And this would be true even if there is no connection between X and Y whatsoever beyond the mere fact that both agendas are being pursued by a government agency receiving federal funds.[44]

Unlike *Raich*, which was a 6–3 decision with strong dissents by Justice O'Connor and Justice Thomas,[45] *Sabri* was unanimous, with only Justice Thomas authoring a concurrence attempting to devise a more limited rationale for allowing the federal criminal case against Sabri to proceed.[46] Thus, *Sabri* was, if anything, an even more decisive setback for judicial review of federalism than the better-known *Raich* decision.

II. Pyrrhic Defeats: Unlimited Federal Power in the 2005–2006 Term

In light of *Raich* and *Sabri*, the Supreme Court could potentially resuscitate judicial enforcement of limits on federal power by overruling one or both of these precedents, or at least restricting their

[43] *Id.* at 605–06.

[44] For a more detailed analysis of *Sabri* reaching similar conclusions, see Gary Lawson, Making a Federal Case of It: Sabri v. United States and the Constitution of Leviathan, 2003–2004 Cato Sup. Ct. Rev. 119 (2004). See also Richard W. Garnett, The New Federalism, The Spending Power and Federal Criminal Law, 89 Cornell L. Rev. 1 (2003) (making similar arguments prior to the *Sabri* decision).

[45] See Gonzales v. Raich, 125 S. Ct. 2195, 2220–29 (2005) (O'Connor, J., dissenting); *id.* at 2229–39 (Thomas, J., dissenting).

[46] See Sabri, 541 U.S. at 610–14 (Thomas, J., concurring) (questioning the Court's fungibility rationale and arguing that the application of the statute to Sabri should be upheld under the Commerce Clause)

impact. Alternatively, it could limit federal power through purely procedural rather than substantive restraints. In the 2005–2006 term, however, it failed to pursue either of these options.

A Pyrrhic victory is one that is so costly to the winning side that it might have done better to avoid the battle at all. The federal government lost all three of the major federalism cases of the 2005–2006 Supreme Court term, yet the Court's reasoning served to reaffirm more than constrain the virtually limitless nature of congressional power. Although the feds did not win even Pyrrhic victories, they achieved the much more valuable outcome of protecting their victory in the larger battle despite (and in part because of) losing three minor skirmishes. For advocates of federal power, *Oregon, Rapanos,* and possibly even *Arlington* were Pyrrhic defeats, setbacks that underscore their dominant position in the larger struggle.

A. Oregon, Rapanos, *and Limits on Congressional Commerce Clause Power*

In addition to cutting back on *Raich* directly by reimposing substantive limits on federal power, the Court in *Oregon* and *Rapanos* could have constrained federal authority by relying on restrictive rules of statutory interpretation. There are two rules of construction by which the Court majority could have constrained congressional power. The ''constitutional avoidance'' canon requires courts to reject interpretations of a statute that ''raise serious constitutional problems'' unless there is a clear statement in the law that Congress intended it to be interpreted in that way.[47] The ''federalism canon'' requires a similar ''unmistakably clear'' statement of congressional intent in statutes that ''alter the usual constitutional balance between the States and the Federal Government.''[48] In the final analysis, neither substantive nor procedural limits on federal power were imposed by either decision.

[47] See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) (requiring a clear expression of an affirmative intention of Congress before a statutory interpretation that raises serious constitutional questions can be accepted).

[48] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

1. Gonzales v. Oregon.

Some perceive *Gonzales v. Oregon*[49] as a partial repudiation of *Raich* or at least as a reassertion of state autonomy.[50] *Oregon* rejected the Bush administration's attempt to interpret the CSA in a way that would have permitted it to punish Oregon doctors who use prescription drugs to facilitate assisted suicide, as they are permitted to do under the state's Death with Dignity Act.[51] The CSA, of course, is the same statute as the one at issue in *Raich.*

In reality, *Oregon* does not in any way undercut *Raich*'s constitutional holding. Both the majority and dissenting justices took pains to point out that the decision was a purely statutory one and did not conclude that Congress lacked constitutional authority to forbid assisted suicide using its powers under the Commerce Clause. Justice Kennedy's majority opinion emphasized that ''there is no question that the Federal Government can set uniform national standards'' for the ''regulation of health and safety'' despite the fact that ''these areas'' have traditionally been ''a matter of local concern.''[52] Justice Scalia's dissent, joined by Justice Thomas and Chief Justice Roberts, similarly noted that ''using the federal commerce power to prevent assisted suicide is unquestionably permissible'' under the Court's precedents, and that the only question addressed by *Oregon* is ''not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done so in the CSA.''[53]

The majority did make a small bow to federalism by stating that part of the basis of its decision was a lack of proof that, in enacting the CSA, Congress had ''the farreaching intent to alter the federal-state balance'' by overriding the states' traditional authority to regulate the practice of medicine.[54] This holding might be welcomed

[49] 126 S. Ct. 904 (2006).

[50] See, e.g., Linda Greenhouse, Justices Reject U.S. Bid to Block Assisted Suicide, N.Y. Times, Jan. 18, 2006, at A1 (''While the court's decision was based on standard principles of administrative law, and not on the Constitution, it was clearly influenced by the majority's view that the regulation of medical practice belonged, as a general matter, to the states.''); Tony Mauro, Court Sides with Oregon Over Assisted Suicide Law, Legal Times, Jan. 23, 2006, at 10 (suggesting that the Court had ''sid[ed] with states' rights'').

[51] Oregon, 126 S. Ct. at 911–26.

[52] *Id.* at 923 (quotation omitted).

[53] *Id.* at 939 (Scalia, J., dissenting).

[54] *Id.* at 925.

by those who would like to replace substantive judicial review of Commerce Clause cases with ''clear statement'' rules that require Congress to plainly indicate its intent in cases where a statute is intended to infringe on a particularly sensitive area of state authority.[55] Previous Supreme Court precedents already require Congress to make its intentions ''unmistakably clear in the language of the statute'' whenever it seeks to ''alter the usual constitutional balance between the States and the Federal Government.''[56]

However, the *Oregon* Court specifically disclaimed reliance on any such principle, claiming that ''[i]t is unnecessary even to consider the application of clear statement requirements'' because the correct interpretation of the CSA could so easily be determined through the use of ordinary statutory analysis and ''commonsense.''[57]

Only Justice Thomas, in a solitary dissent, suggested that there was a possible tension between the Court's reasoning in *Oregon* and its recent holding in *Raich*.[58] Thomas emphasized that the majority had ''beat[en] a hasty retreat'' from *Raich's* characterization of the CSA as '''a comprehensive regulatory scheme specifically designed to regulate which controlled substances can be utilized for medicinal purposes *and in what manner.*'''[59] He went on to note that he found the Bush administration's assertion of federal authority over assisted suicide to be both ''sweeping'' and ''perhaps troubling.''[60] Justice Thomas even implied that the government's position might be inconsistent with ''principles of federalism and our constitutional structure.''[61] But, after *Raich,* such concerns are ''now water under the dam.''[62] The administration stance in *Oregon* was, according to Thomas, ''merely the inevitable and inexorable consequence of'' *Raich*.[63] In any event, Thomas, like the other justices, emphasized

[55] See, e.g., Thomas M. Merrill, Rescuing Federalism after Raich: The Case for Clear Statement Rules, 9 Lewis & Clark L. Rev. 823 (2005).

[56] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

[57] Oregon, 126 S. Ct. at 925.

[58] *Id.* at 939–42 (Thomas, J., dissenting).

[59] *Id.* at 939 (quoting Gonzales v. Raich, 125 S. Ct. 2195, 2211 (2006)) (emphasis added by Justice Thomas).

[60] *Id.* at 940.

[61] *Id.* at 941.

[62] *Id.*

[63] *Id.*

that *Oregon* was merely a case about ''statutory interpretation, and not [about] the extent of constitutionally permissible federal power.''[64] In a footnote, Thomas points out that Oregon had ''not seriously pressed a constitutional claim'' and had accepted the validity of *Raich,* thereby ''foreclose[ing]'' any possible ''constitutional challenge.''[65] Thomas' argument aside, the other eight justices, especially those in the majority, did all they could to foreclose any possibility that *Oregon* might undercut *Raich* in a meaningful way.

2. Rapanos v. United States.[66]

Rapanos v. United States[67] involved the scope of federal authority to regulate ''wetlands'' under the Clean Water Act of 1972 (CWA), which gives the Army Corps of Engineers the power to regulate discharges into ''navigable waters,''[68] a term defined as encompassing ''the waters of the United States.''[69] Two property owners claimed that the Corps lacked both statutory and constitutional authority to regulate land they owned that was ''11 to 20 miles away from the nearest navigable water'' and connected to it only by man-made drains.[70] In a split 4-1-4 decision, the Court refused to endorse the government's claim that the CWA gives the Corps the power to regulate virtually any wetland area, regardless of the degree of connection to ''navigable'' waterways and instead remanded the case to the district court for further factfinding.[71] *Rapanos* is in some respects a sequel to *SWANCC v. United States Army Corps of Engineers*,[72] a 2001 decision in which the Court held that the CWA does not authorize the Corps to regulate isolated, nonnavigable intrastate waters merely because they are occasionally utilized by migratory birds.[73]

[64] *Id.*

[65] *Id.* at 945 n.2.

[66] Some of the material in this section is a revised version of a post produced for the Volokh Conspiracy Blog. See Ilya Somin, Preliminary Thoughts On Rapanos And Federalism—Much Ado About Very Little, The Volokh Conspiracy (June 19, 2006), available at http://volokh.com/posts/1150751435.shtml (visited June 28, 2006).

[67] 126 S. Ct. 2208 (2006).

[68] 33 U.S.C. §§ 1311(a), 1344(a).

[69] 33 U.S.C. § 1362(7).

[70] Rapanos, 126 S. Ct. at 2214, 2219.

[71] *Id.* at 2235.

[72] SWANCC v. United States Army Corps of Engineers, 531 U.S. 159 (2001).

[73] *Id.* at 172–74.

Some observers hoped and others feared that *Rapanos* might rein in the impact of *Raich* on judicial review of federalism.[74] Such hopes and fears have turned out to be groundless. *Rapanos* does not enforce any constitutional limits on federal power. Nor does it increase the protection for federalism provided by rules of statutory interpretation.

Neither Justice Scalia's opinion nor Justice Kennedy's concurrence addresses the constitutional issues raised by the property owners.[75] Both rely exclusively on statutory interpretation arguments about the meaning of the Clean Water Act (CWA).[76] They hold that Congress in the CWA *didn't* give the Army Corps of Engineers the power to regulate any and all bodies of water, no matter how small or nonnavigable. But that does not mean that it *couldn't* do so if it wanted to. Indeed, it is striking that Scalia's opinion does not even mention *Raich*, while Kennedy's does so only briefly, using it to justify interpreting the CWA to give the Corps greater regulatory authority than the plurality would allow.[77]

Rapanos also does little or nothing to limit congressional power through rules of statutory interpretation. The *Rapanos* majority largely eschews both the constitutional avoidance and federalism canons, despite the fact that the Court previously relied on both in

[74] See, e.g., Sara Beardsley, The End of the Everglades? Supreme Court Case Jeopardizes 90 percent of U.S. Wetlands, Sci. Am., May 22, 2006, available at http://www.sciam.com/article.cfm?chanID=sa006&colID=5&articleID=000997CF-938F-146C-91AE83414B7F0000 (visited June 28, 2006) (claiming that *Rapanos* might radically reduce federal regulatory authority over wetlands and noting that ''federalist watchdogs cling to *Rapanos* . . . as an opportunity to curb Washington's power'').

[75] In their brief, the owners claimed that the Army Corps of Engineers' interpretation of the CWA expands federal power beyond the limits of the Commerce Clause, even after *Raich.* See Brief for Petitioner at i, 23–28, Rapanos v. United States, 126 S. Ct. 2208 (2006) (No. 04-1034) (Dec. 2, 2005), available at 2005 WL 3294932.

[76] Rapanos, 126 S. Ct. at 2220–25 (interpreting CWA reference to ''waters of the United States'' to cover only ''relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams[,] . . . oceans, rivers, [and] lakes'') (citations and quotation marks omitted); *id.* at 2248 (Kennedy, J., concurring) (interpreting it to require ''the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense'').

[77] *Id.* at 2250 (Kennedy, J., concurring) (citing Gonzales v. Raich, 125 S. Ct. 2195, 2206 (2005)).

rejecting the Army Corps of Engineers' ''migratory bird rule'' in the *SWANCC* case. [78]

Justice Scalia's plurality opinion briefly cites the two canons to buttress its interpretation of the CWA.[79] However, Scalia mostly relies on a detailed textual analysis of the statute.[80] His opinion does not hold that either canon would require rejection of the government's interpretation of the CWA even if the latter were otherwise the most persuasive available option. This is a significant omission, since previous avoidance canon cases specifically note that clear statement rules require courts to reject even ''an otherwise acceptable construction of a statute'' if endorsing it ''would raise serious constitutional problems.''[81]

According to Scalia, ''[e]ven if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows,'' the federalism and constitutional avoidance canons would compel rejection of the Corps of Engineers' interpretation of the CWA.[82] He notes that, under the federalism clear statement rule, ''[w]e ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.''[83] However, Scalia's discussion of the canon assumes that they apply only when a statute is ''ambiguous'' on the issue at hand,[84] and fails to reiterate earlier precedents that require Congress to make its intention to upset the ''usual'' federal-state balance ''unmistakably clear in the language of the statute.''[85] Instead, Scalia contends that such an intention requires a ''clear and manifest statement from Congress,'' a potentially less demanding standard.[86]

With respect to the constitutional avoidance canon, Scalia concludes only that ''we would expect a clearer statement from Congress

[78] SWANCC, 531 U.S. at 172–74.

[79] Rapanos, 126 S. Ct. at 2224.

[80] *Id.* at 2220–23, 2225–34.

[81] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988).

[82] *Id.*

[83] Rapanos, 126 S. Ct. at 2224.

[84] *Id.*

[85] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

[86] Rapanos, 126 S. Ct. at 2224.

to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.''[87] This is a weaker requirement than the traditional formulation of the canon, which holds that ''when an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is clearly contrary to the intent of Congress.''[88]

Justice Scalia may not actually intend to weaken the standards required by the two avoidance canons. His departure from previous, stronger formulations of these rules may simply constitute loose use of language. Even so, there is no indication that he and the other justices who signed on to his opinion intend to strengthen the two canons in order to offset some of the impact of *Raich.*

In any event, Scalia's treatment of the canons probably lacks precedential significance and does not bind lower courts because Justice Kennedy specifically rejected it in his concurring opinion. Because *Rapanos* is a 4-1-4 decision, Kennedy's vote was decisive to the result. As Chief Justice Roberts (who signed on to Scalia's interpretation of the CWA) points out in a concurring opinion, cases where there is no one opinion endorsed by a majority of the Court are governed by *Marks v. United States*.[89] According to *Marks*:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.[90]

In this case, Kennedy is probably the justice who concurred on the ''narrowest grounds,'' since his opinion places fewer restrictions

[87] *Id.*

[88] DeBartolo, 485 U.S. at 574. See also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) (requiring a ''clear expression of an affirmative intention of Congress'' before a statutory interpretation that raises serious constitutional questions can be upheld). Scalia cites *DeBartolo* (Rapanos, 126 S. Ct. at 2224), but does not refer to the language quoted here.

[89] See 126 S. Ct. at 2236 (Roberts, C.J., concurring) (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

[90] Marks, 430 U.S. at 193.

on the Corps than Scalia's, and also provides a less sweeping and more ambiguous interpretation of the CWA. Even if Justice Scalia's plurality opinion is binding instead of Justice Kennedy's concurrence, the implications for clear statement rules are little different. Thus, *Rapanos* is unlikely to expand the application of the two avoidance canons to statutes that rely on Congress' Commerce Clause authority.

Even as a matter of pure statutory interpretation, *Rapanos* probably does not impose significant limits on the scope of federal authority under the CWA. The full impact of *Rapanos* will not become clear until lower courts (starting with the district court that will consider the remanded *Rapanos* case itself) go through the process of applying Justice Kennedy's ''significant nexus'' test to particular cases. As this article goes to press, the U.S. Court of Appeals for the Ninth Circuit has just decided *Northern California River Watch v. City of Healdsburg,* the first lower court appellate decision to apply *Rapanos.* Unfortunately, *River Watch* sheds little light on the broader implications of *Rapanos,* with the important exception of confirming that Justice Kennedy's concurring opinion is the controlling one under *Marks v. United States*.[91] It is also worth noting that preliminary assessments by environmental scholars on both sides of the political spectrum conclude that the decision is likely to impose only minor limitations on the Army Corps of Engineers.[92]

[91] Northern Calif. River Watch v. City of Healdsburg, 2006 WL 2299115, at *1, 6 (9th Cir. Aug. 10, 2006) (holding that ''the controlling opinion [in *Rapanos*] is that of Justice Kennedy''). *River Watch's* broader significance for interpretations of the ''significant nexus'' test is very limited because if was not a close case under that standard. See *id.* at *6–7 (noting extensive ''hydrological,'' ''physical,'' and ''ecological'' connections between the body of water at issue in the case and ''navigable waters''). One possible noteworthy aspect of *River Watch* is the court's holding that ''mere adjacency'' to navigable waters is not sufficient to justify federal regulatory jurisdiction under *Rapanos. Id.* at *6.

[92] See, e.g., Jonathan Adler, All Wet: Landowners May Have Won The Battle Against Federal Wetlands Regulations, But Lost The War, National Review Online, June 27, 2006, available at http://article.nationalreview.com/?q=NDExM2MxYmY3OGE1ZWRjOTYwMDkxZDM1M2NlZmJmYzY=(visited Aug. 9, 2006) (op ed by leading libertarian environmental law expert concluding that *Rapanos* ''will do little to limit the scope of federal regulation''); Richard Lazarus, Discussion: Rapanos and Carabell, SCOTUS blog, June 19, 2006, available at http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar_1.html (visited Aug. 9, 2006) (prominent liberal environmental law scholar suggesting that ''Kennedy['s concurrence] plus the Stevens dissent provides lots of regulatory space for the government and for environmental protection'').

B. Arlington Central School District v. Murphy *and the Spending Power*

Arlington Central School District v. Murphy[93] received far less publicity than either *Oregon* or *Rapanos.* Nonetheless, *Arlington* raises the same issues in the Spending Clause context after *Sabri* as the other two cases do with respect to the post-*Raich* Commerce Clause.

The *Arlington* case involved competing interpretations of a provision of the Individuals with Disabilities Education Act (IDEA), which allows courts to ''award reasonable attorneys' fees as part of the costs'' to parents who win a case against their public school under the act.[94] The point in dispute was whether or not ''this fee-shifting provision authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions'' in addition to traditional attorneys' fees.[95]

The IDEA cause of action is a condition of state governments' receipt of federal education funds.[96] For that reason, it is subject to one of the Court's strongest federalism clear statement rules. Because federal grants to state governments are ''much in the nature of a contract,'' any conditions attached to the funds must be stated ''unambiguously'' in order to ensure that they are accepted ''voluntarily and knowingly.''[97]

The Supreme Court has not always applied this requirement rigorously. For example, in its 1999 decision in *Davis v. Monroe County Board of Education,*[98] the Court upheld the imposition of Title IX liability for student-to-student sexual harassment on schools receiving federal funds, despite the fact that such liability is not specifically mentioned in the text of Title IX and cannot easily be inferred from the structure or legislative history of the statute.[99]

[93] Arlington Central School Dist. Board of Education v. Murphy, 126 S. Ct. 2455 (2006).

[94] 20 U.S.C. § 1415(i)(3)(B).

[95] Arlington, 126 S. Ct. at 2457.

[96] *Id.* at 2458–59.

[97] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981).

[98] Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

[99] *Id.* at 643–49; see also *id.* at 657–64 (Kennedy, J., dissenting) (explaining why liability for student-to-student sexual harassment cannot be inferred from the text of Title IX).

In *Arlington,* however, the Court refused to interpret IDEA to allow courts to award funds for payment of experts. Justice Alito's majority opinion emphasized that the text of the IDEA, which permits only ''the award of reasonable attorneys' fees,'' does not ''even hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts.''[100] Even Justice Breyer's dissenting opinion, joined by Justices Stevens and Souter, accepts that compensation for expenditures on experts cannot be inferred from the text alone.[101] Breyer in fact concedes that ''the statute on its face does not *clearly* tell the States that they must pay expert fees to prevailing parents.''[102] The dissenters claim that such a rule can nonetheless be justified by reference to IDEA's legislative history and purpose.[103] But if we concede that the text is unclear at best, it becomes impossible to prove that IDEA ''*unambiguously*'' permits courts to award expert fees to victorious plaintiffs.[104]

Arlington therefore maintains the rule that states must have clear notice of any conditions imposed on the receipt of federal funds. At the same time, it is telling that three justices dissented despite admitting that the text of the statute was unclear. Their view, in effect, constitutes a rejection of the clear statement rule. A fourth, Justice Ginsburg, concurred in the result, but emphasized that a ''clear notice'' requirement should not apply to cases involving remedies for violations as opposed to those involving the substance of the conditions themselves.[105] Ginsburg also argues that clear statement requirements should not be imposed on conditional grants enacted ''pursuant to § 5 of the Fourteenth Amendment,'' as she believes IDEA was.[106]

Thus, *Arlington* reveals that the Spending Clause clear statement rule is far from irrevocably established. Three justices largely reject the requirement and a fourth (Ginsburg) would apply it only to a limited range of grants. And even the majority justices did not

[100] Arlington, 126 S. Ct. at 2459.

[101] *Id.* at 2466 (Breyer, J., dissenting).

[102] *Id.* at 2470 (emphasis in original).

[103] *Id.* at 2466–70.

[104] Pennhurst, 451 U.S. at 17 (emphasis added).

[105] Arlington, 126 S. Ct. at 2464 (Ginsburg, J., concurring).

[106] *Id.*

attempt to strengthen the rule relative to previous cases in order to offset the impact of *Sabri.* Moreover, they carefully noted that they do not intend to limit the substantive reach of Congress' Spending Clause power, emphasizing that ''Congress has broad power to set the terms on which it disburses federal money to the States.''[107]

Arlington reaffirms a longstanding, seemingly pro-federalism clear statement rule. But it also reveals that the rule commands only a narrow majority on the Court.

III. The Limits of Clear Statement Rules

In the aftermath of *Raich,* Thomas Merrill has argued that a federalism clear statement rule is a superior alternative to substantive limitations on congressional Commerce Clause authority, and Justice Breyer advances a similar argument in a recent book.[108] Other scholars defend clear statement rules as a useful supplement to substantive judicial review of federalism.[109] Unfortunately, clear statement rules are unlikely to be an adequate substitute for substantive judicial review, and it is not even clear that they make the situation better at the margin.

After *Raich,* it is far from clear that clear statement rules can still be applied in the Commerce Clause field, though they remain viable with respect to the Spending Clause, as *Arlington* demonstrates. Even if the post-*Raich* doctrinal challenges to clear statement rules can be overcome, these canons are unlikely to provide adequate protection for constitutional federalism. In some cases, they may even contribute to the growth of federal power.

A. The Uncertain Future of Federalism Clear Statement Rules

Neither academic advocates nor any of the justices who authored opinions in *Oregon* and *Rapanos* have so far considered the implications of *Raich* for the future of clear statement rules. It is far from

[107] *Id.* at 2459.

[108] See generally Merrill, *supra* note 55; Stephen E. Breyer, Active Liberty: Interpreting our Democratic Constitution 64–65 (2005).

[109] See, e.g., Ernest A. Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1385–92 (2001) (arguing for clear statement rules, but also emphasizing the need for a ''substantive backstop''); Larry J. Obhof, Federalism, I Presume? A Look at the Enforcement of Federalism Principles through Presumptions and Clear Statement Rules, 2004 Mich. St. L. Rev. 123, 150–64 (defending clear statement rules without taking a position on the merits of substantive judicial review of federalism).

clear that either the constitutional avoidance canon or the federalism canon remains viable after *Raich.*

1. The Constitutional Avoidance Canon.

If *Raich* is correct and congressional Commerce Clause power is essentially unlimited, a statute that relies on a broad interpretation of that power cannot ''raise serious constitutional problems.''[110] After *Raich,* there can be no ''problem'' because there are no constitutional limits for Congress to infringe. To be sure, the avoidance canon might be resuscitated if federalism is viewed as an ''underenforced constitutional norm.''[111] Under this approach, the Court could explicitly admit that meaningful limits on federal power, though required by the Constitution, cannot be enforced because of political considerations or because of inadequate judicial competence. Clear statement rules might be viewed as a sort of second best strategy, providing a measure of protection for federalism without placing substantive judicial limits on congressional authority.[112] Even this relatively modest agenda, however, would require the Court to retreat from the vision of virtually unlimited federal power articulated in *Raich.*[113] A new Supreme Court decision would have to repudiate the reasoning of *Raich* and instead conclude that there are meaningful limits to congressional Commerce Clause authority after all—even if those limits can only be ''enforced'' through clear statement requirements.

2. The Federalism Canon.

Raich poses a similar dilemma for the federalism canon. If federal regulatory authority is virtually unlimited, it becomes almost impossible for Congress to write a statute that ''alter[s] the usual constitutional balance between the States and the Federal Government.''[114] Under *Raich*, the ''usual constitutional balance'' is one where there are no structural limits to congressional authority. The only ''usual constitutional balance'' that can exist is whatever Congress decides on.

[110]Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988).

[111]See generally Lawrence Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

[112]This approach is similar to that defended in Merrill, *supra* note 55.

[113]See Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2, at 4–13; see *supra* Part I.A.

[114]Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

As with the avoidance canon, it is possible to get around this problem by envisioning federalism as an ''underenforced'' constitutional norm. But, as already noted, this solution would require a major rollback of the reasoning adopted in *Raich.*

An alternative approach would be to unmoor the canon from the Constitution entirely and define the state-federal ''balance'' by reference to tradition and status quo practices. If Congress seeks to intervene in a field previously left to the states, it has to enact a statute that meets the terms of the clear statement rule. However, in the modern regulatory state there are few if any policy areas that remain free of federal involvement. Such traditional areas of state authority as education, criminal law, and local land use regulation are all now subject to extensive federal intervention. Indeed, *Arlington* (education), *Raich* (criminal law), and *Rapanos* (land use) addressed federal regulations in precisely these three fields.

Even if the specific assertions of federal authority considered in these three cases can be viewed as novel, it is undeniable that statutes such as the Clean Water Act, the CSA, and a variety of federal education statutes including IDEA and the No Child Left Behind Act,[115] have led to the entrenchment of federal power over policy issues that were once under more or less exclusive state control. Using the status quo as a baseline is therefore a nonstarter unless new federal regulations are considered in an arbitrarily narrow light. If, for example, the federal government has had a longstanding role in setting education policy, it is not clear why federal restrictions on gun possession in school zones (*Lopez*) should be viewed as altering the ''usual'' state-federal balance rather than applying it. [116]

This difficulty underscores the crucial point that defenders of the federalism clear statement rule lack a coherent theory that can determine where the rule should apply. Professor Merrill, the leading recent advocate of the canon, concedes that ''no set formula is possible'' and urges courts to make their decisions by drawing ''on

[115] Indeed, the NCLBA expands federal control of education so much that liberal Democratic critics of the act have attacked it for undermining states' rights. See Sam Dillon, President's Initiative to Shake up Education is Facing Protests in Many State Capitols, N.Y. Times, Mar. 8, 2004, at 12 (noting liberal Democratic criticisms of the act for excessive intrusion on state control of education policy).

[116] Gregory, 501 U.S. at 460.

historical experience in implementing the Commerce Clause, leavened with some common sense.''[117] It is certainly desirable to take advantage of both experience and common sense. However, judges with differing ideologies and backgrounds are likely to draw very different lessons from ''historical experience.'' And that which appears to be ''common sense'' to liberal jurists may well be viewed as folly by conservatives or libertarians, and vice versa. If we want a post-*Raich* federalism clear statement rule to be applied at least somewhat consistently, courts will need some kind of theory to guide them in determining what factors are relevant to the rule's application and how to weigh them against each other in cases where they conflict.

3. Conditional Federal Spending.

As the *Arlington* case demonstrates, the clear statement canon requiring Congress to unambiguously identify the conditions attached to federal grants to state governments remains intact—at least for the moment.[118] It is not threatened by *Raich* because it applies to all conditions attached to federal grants, apparently irrespective of their impact on the state-federal balance or even their impact on other constitutional values. Although this canon therefore escapes some of the problems bedeviling its two cousins, it is still far from clear that it is an adequate substitute for substantive limits on federal power.

B. Clear Statement Rules and the Fallacy of Equating Federalism and the Interests of State Governments

1. Why Clear Statement Rules Are Not Enough.

Even if the doctrinal and conceptual problems bedeviling clear statement rules can be overcome, they are still an inadequate substitute for judicial enforcement of substantive limits on federal power. The key flaw in the case for clear statement rules is the implicit assumption that constitutional federalism is reducible to the protection of state government interests. For example, Professor Merrill contends that a federalism clear statement rule will be effective ''to the extent [that] we think that state and local governments have at least some influence with Congress, and to the extent we wish to harness these political safeguards as part of a larger strategy of

[117] Merrill, *supra* note 55, at 845.

[118] See *supra* Part I.B.

accommodating stability and change in intergovernmental relations.''[119] The focus on state government interests is also evident in *Arlington,* where the Court emphasizes that the Spending Clause clear statement rule requires it to ''view the IDEA from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds.''[120]

In theory, clear statement rules help activate the political power of state governments by alerting them to any overextension of federal power embedded in pending legislation.[121] The states can then ''mobilize in opposition to such regulation,'' potentially obviating the need for substantive judicial review.[122] The flaw in this reliance on the political power of state governments is that state politicians often have incentives to undermine federalism rather than promote it, by acquiescing in the extension of federal power.

For example, state officials sometimes lobby for federal intervention to help form a cartel to prevent interstate competition for residents and businesses.[123] State governments may also fall under the influence of interest groups that seek to impose their preferred policies nationwide and, as a result, use their political leverage to lobby for uniform federal regulation.[124] Elsewhere, John McGinnis and I have explained in more detail the numerous incentives state governments have to support the expansion of federal power, even at the expense of constitutional federalism.[125] Whether one has an originalist/textualist or structural theory of federalism,[126] clear statement

[119] Merrill, *supra* note 55, at 834.

[120] Arlington Central School Dist. Board of Education v. Murphy, 126 S. Ct. 2455, 2459 (2006).

[121] Merrill, *supra* note 55, at 833.

[122] *Id.*

[123] Somin, Closing the Pandora's Box of Federalism, *supra* note 39, at 470; John O. McGinnis & Ilya Somin, Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System, 99 Nw. U.L. Rev. 89, 117–18 (2004).

[124] See Lynn A. Baker & Ernest Young, Federalism and the Double Standard of Judicial Review, 51 Duke L.J. 75, 117–28 (2001).

[125] McGinnis & Somin, *supra* note 123, at 112–13, 114–15, 118, 119–20.

[126] For structural arguments in favor of judicial review of federalism, see, e.g., *id.*, and Baker & Young, *supra* note 124. For a textualist critique of unlimited federal power, see Somin, Federalism as a Casualty of the War on Drugs, *supra* note 2. For an originalist case for judicial enforcement of federalism, see, e.g., Randy E. Barnett, Restoring the Lost Constitution chs. 7, 11 (2004); and Saikrishna B. Prakash & John

rules are unlikely to be effective methods of implementing it because state governments will often have incentives to use their power in ways that undermine it. As Justice O'Connor notes in her majority opinion in *New York v. United States*, ''powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.''[127]

In theory, clear statement rules could empower ordinary voters to police the boundaries of federalism instead of state government officials. However, it is unlikely that very many voters have the time and expertise needed to carefully study thousands of pages of statutory text in order to identify potential infringements on federalism. Indeed, decades of survey evidence indicate that most citizens have very low levels of political knowledge and that many are ignorant of even very basic political facts.[128] Thus, it is highly improbable that voters can make effective use of the products of clear statement rules.

Of course, one could simply reject judicial enforcement of federalism entirely, as do scholars such as Herbert Wechsler, Jesse Choper, and Larry Kramer.[129] But then it is not clear why there is any need for judicially created clear statement rules. If, as critics of judicially enforced federalism claim, the political process is the best way to determine the appropriate balance of power between Washington and the states, then it is difficult to see why judges should enforce clear statement rules any more than they should enforce substantive limits on federal power.

C. Yoo, The Puzzling Persistence of Process-Based Federalism Theories, 79 Tex. L. Rev. 1459 (2001).

[127] New York v. United States, 505 U.S. 144, 182 (1992).

[128] For analysis of the evidence and its implications for judicial review, see Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the ''Central Obsession of Constitutional Theory,'' 89 Iowa L. Rev. 1287 (2004).

[129] See Jesse Choper, Judicial Review and the National Political Process, ch. 4 (1980) (rejecting judicial review of federalism); Jesse Choper, The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552 (1977); Herbert F. Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government, 54 Colum. L. Rev. 543 (1954); and Larry D. Kramer, Putting the Politics Back into the Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000).

2. Clear Statement Rules and the Expansion of Federal Power.

Even if clear statement rules are an inadequate substitute for substantive judicial review, they could still serve a useful function by giving Congress an incentive to draft clearer and less ambiguous laws. And it is certainly possible that they do restrict the growth of federal power slightly. These benefits might be sufficient to justify the continued use of federalism clear statement rules. Even if such rules have relatively few benefits, they also do not seem to impose significant costs.

This calculation may turn out to be correct. But there is at least one potentially substantial cost of federalism clear statement rules that the existing literature on the subject fails to consider. If clear statement rules function as intended, they reduce the chance that a new federal program will inflict unwelcome surprises on state governments. For example, the Spending Clause clear statement requirement ensures that states that accept federal funds are only subject to those obligations that they agree to ''voluntarily and knowingly.''[130] Similarly, the requirement that statues that raise constitutional problems or upset the state-federal balance clearly state this result in the statutory text helps ensure that new statutes do not expand federal regulatory authority in ways that state officials find unacceptable.

By reducing the probability of unwelcome surprises from new federal legislation, clear statement rules increase the incentive of state governments to support expansion of federal power and accept federal funds. If clear statement rules are effective in protecting states against legislative surprises, they help to eliminate a potential reason for some state governments to oppose new extensions of federal power. For supporters of the expanding federal role in American public policy, this may be a beneficial result. But it certainly should not be welcomed by advocates of federalism and decentralization.

The magnitude of this effect depends in large part on the degree to which clear statement rules really do reduce perceived uncertainty about the impact of new federal statutes, an empirical issue on which we have no systematic evidence. If states have effective methods to minimize uncertainty even in the absence of clear statement rules,

[130] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981).

then the latter are unlikely to increase support for the expansion of federal power. But if clear statement rules do not serve to reduce uncertainty about the meaning of statutes, it is difficult to see why judges should bother to enforce them at all. The more effective clear statement rules are in achieving their intended purpose of decreasing legal uncertainty, the more likely they are to strengthen state government support for expanded federal power.

Conclusion

Although the federal government suffered three notable defeats during the 2005–2006 Supreme Court term, these setbacks do not herald a revival of judicially enforced limits on federal power. Two of the three decisions—*Oregon* and *Rapanos*—do not even restrict federal power through the use of clear statement rules, while the third does not expand the relevant rule beyond its preexisting scope.

The future viability of federalism clear statement rules remains in serious doubt. And even if the courts choose to keep the rules alive in the face of doctrinal conundrums created by *Gonzales v. Raich,* there is little reason to believe that they can ever be an adequate substitute for judicially enforced limits on federal power.