1997

The Global Dimension of RFRA.

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THE GLOBAL DIMENSION OF RFRA

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A multi-faceted controversy is currently raging over the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA),[1] the federal legislative response to the Supreme Court's decision in *Employment Division v. Smith*.[2] In *Smith*, the Supreme Court eliminated most constitutional claims to religious exemption from generally applicable laws, abandoning a prior practice of subjecting such claims (verbally at least) to a compelling interest test. The majority asserted that the Free Exercise Clause does not require state or federal governments to accommodate conscientious objectors to compliance with generally applicable laws. Congress, in turn, emphasized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and acted to "restore the compelling interest test" as a matter of statutory right.[3]

Congress's authority to enact such a statute, particularly as applied to generally applicable laws of the states, has been disputed. The legislative history of RFRA indicates congressional belief that its interference with state laws could be justified as an exercise of enforcement authority under Section 5 of the Fourteenth Amendment. Several commentators have questioned this justification, arguing that Congress's reinstatement of a vision of religious liberty that the Supreme Court had just rejected stretches Section 5 authority beyond tolerable limits. The question of the source of congressional authority has acquired further salience as a result of the Supreme Court's decision in *United States v. Lopez*,[4] reasserting the doctrine of enumerated powers as a guide to the interpretation of the Commerce Clause and invalidating a purported congressional exercise of commerce

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1. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb et seq.).
2. 494 U.S. 872 (1990).
3. 42 U.S.C. §§ 2000bb(a)(2), 2000bb(b)(1).
4. 115 S. Ct. 1624 (1995).

power for the first time since the New Deal. The Court has accepted a case raising such a challenge to RFRA in its current term.[5]

Thus far, analysts have generally assumed that Section 5 provides the only possible basis for a broad federal intervention to protect religious dissenters across a wide range of state governmental activities. Fanciful defenses under the Commerce Clause might have been framed before *Lopez*, but they would clearly fail today.

Characteristically, constitutional commentators have neglected the global dimension of religious liberty. Religious freedom is a matter of international concern, and the United States has recently adhered to a major human rights treaty that addresses the question of religious exemptions. Consequently, an overlooked source of authority for RFRA, or for a RFRA-like statute, lies in Congress's power to implement the treaty obligations of the United States. The main purpose of this essay is to call attention to this perspective on the RFRA debate. If it also helps sensitize constitutional lawyers to the United States' international human rights obligations, then that is all to the good.

I. RFRA AND ITS PROBLEMS

As readers probably recall, the majority opinion in *Smith* offered a surprising reanalysis of the Supreme Court's Free Exercise Clause cases. Alfred Smith had been denied unemployment compensation after having been fired from his job due to his use of peyote as a matter of ritual within the Native American Church, in violation of Oregon law.[6] The majority held that his violation of a generally applicable criminal statute provided an adequate basis for denying him unemployment compensation, and that his religious beliefs did not entitle him to any exemption from the statute. Religiously motivated actions are constitutionally shielded against laws that "ban [them] only when they are engaged in for religious reasons, or only because of the religious belief that they display,"[7] but not against generally applicable prohibitions. The majority declined to examine whether the denial of a religious exemption was necessary to the achievement of

5. *City of Boerne v. Flores*, 117 S. Ct. 293 (1996) (granting certiorari); see also 65 U.S.L.W. 3282 (Oct. 15, 1996) (listing questions presented).

6. 494 U.S. at 874.

7. Id. at 877; see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (invalidating ordinance that prohibited animal sacrifice, while permitting killing of animals for other reasons).

a compelling government interest, the standard articulated in numerous cases since *Sherbert v. Verner*[8] in 1963. The Court reduced the *Sherbert* doctrine to a narrow line of cases in which a government benefits program includes a system of individualized exemptions but does not extend it to a "religious hardship."[9] It distinguished cases like *Wisconsin v. Yoder*[10] as presenting a "hybrid situation" implicating both the free exercise of religion and another constitutional right.[11] Having disposed of these holdings, the majority dismissed other applications of the compelling interest test as dicta, and maintained that a society as diverse as the United States would be inviting anarchy if it made government demonstrate to the courts the necessity for denying claims to religious exemption.[12]

The Court's rough handling of precedent and its withdrawal of a guarantee of accommodation to religious dissenters prompted an extraordinary political reaction.[13] Religious groups mobilized bipartisan support in Congress for a statutory "restoration" of the status quo as they perceived it to have existed before *Smith*. RFRA prohibits both state and federal governments from "substantially burden[ing]" a person's exercise of religion, unless the imposition of that burden is the least restrictive means of furthering a compelling governmental interest.[14] It provides for judicial relief against prohibited burdens, and places the burden of proof on government in the application of the compelling interest test.

For evident technical reasons, RFRA operates differently in the sphere of federal burdens and state burdens. RFRA creates a statutory right to religious exemption from the implementation of federal statutes, and creates statutory exemptions from prior federal statutes, but it cannot successfully bar subsequent federal statutes from imposing unnecessary burdens. Instead, it adopts a rule of construction by which subsequent statutes must explicitly reference RFRA in order to exclude its application.[15] In the sphere of state law, in contrast, federal supremacy permits

8. 374 U.S. 398 (1963).
9. 494 U.S. at 884.
10. 406 U.S. 205 (1972).
11. 494 U.S. at 881-82.
12. Id. at 883-85, 888-89.
13. See, e.g., Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 12-17 (1994); Douglas Laycock and Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994).
14. 42 U.S.C. § 2000bb-1.
15. 42 U.S.C. § 2000bb-3(b).

RFRA (if valid) to create an entitlement to exemptions from all state laws, current or future.

RFRA has been hailed as a historic vindication of the United States' commitment to religious liberty, and condemned as a dangerous interference with judicial authority and states' rights. To some of RFRA's detractors, the Supreme Court's decision in *Smith* expressed the correct understanding of religious liberty, and RFRA affords religious objectors an unjustifiable privilege.[16] Such criticism applies potentially to the use of RFRA to create religious exemptions in the federal sphere as well as in the state sphere. At the extreme, RFRA might run into Establishment Clause problems by overstepping the bounds of Congress's discretion to accommodate religious needs;[17] in less extreme instances, RFRA might be deemed an imprudent use of Congress's lawful power to accommodate. The severity of the problem may depend on how the courts interpret RFRA's "compelling interest" test.[18]

Another broad criticism of RFRA relies on the *Smith* majority's institutional critique of the use of the courts to balance the claims of religious conscience and compliance with public policy. Arguably legislatures are better suited than courts to identifying the occasions on which general policies may be safely or conve-

16. See Christopher L. Eisgruber and Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. Rev. 437, 448-50 (1994).

17. It could be argued that RFRA as a whole is more than the sum of its individual applications and violates the Establishment Clause on its face, see id. at 457-58, or that the extension of particular exemptions under RFRA would exceed Establishment Clause limits. Compare *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating absolute preference for Sabbath observers as Establishment Clause violation), with *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding Title VII exemption against Establishment Clause challenge). In cases of the latter kind, an actual finding of unconstitutionality could probably be avoided by recognizing government's interest in avoiding Establishment Clause violations as a compelling reason to withhold the exemption under RFRA itself. In enacting RFRA, Congress disclaimed any attempt to tamper with Establishment Clause doctrine. See 42 U.S.C. § 2000bb-4.

18. The applicable test is clouded somewhat by statutory references in the congressional findings and declaration of purposes. One of the "findings" maintains that "the compelling interest test *as set forth in prior Federal court rulings* is a workable test for striking sensible balances between religious liberty and competing prior governmental interests," while one of the stated purposes is "to restore the compelling interest test *as set forth in Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," id. §§ 2000bb(a)(5), 2000bb(b)(1) (emphasis added). Most observers believe that some cases decided between *Yoder* and *Smith* purported to apply the compelling interest test but did so less stringently than *Sherbert* and *Yoder*. These precedents may also have been "restored" by RFRA. See Berg, 39 Vill. L. Rev. 31-50 (cited in note 13); Laycock and Thomas, 73 Tex. L. Rev. at 222-27 (cited in note 13); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 Mont. L. Rev. 171 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249 (1995).

niently waived for the accommodation of religious objectors. Some think that *Smith*'s disclaimer of institutional competence renders RFRA a violation of separation of powers, even as applied to federal burdens.[19]

The most intriguing critique of RFRA, however, concerns Congress's power to create religious exemptions to state legislation. One may concede that the power to enact federal laws includes the power to mitigate the burdens those laws place on exercise of religion, and also that many instances of state regulation lie in the overlap between state and federal competence where Congress has the authority to modify state policies.[20] But the comprehensive character of RFRA suggests that a justification stitched together out of specific congressional powers over specific subject matters independent of religion may fail to cover all of RFRA's consequences. This appears particularly likely after the Supreme Court's emphasis in *Lopez* on preserving the local criminal law as a traditional field of state legislative power. Accordingly, critics and defenders alike have understood that RFRA must rest on some federal power to protect the exercise of religion itself. In accordance with RFRA's legislative history, they have focused on Congress's enforcement power under Section 5 of the Fourteenth Amendment as the available candidate. Critics maintain that RFRA's approach to religious liberty is fatally inconsistent with the Supreme Court's authoritative exposition of the Free Exercise Clause in *Smith*; defenders offer broader and narrower accounts of how *Smith* and RFRA can be reconciled.

RFRA thus revives the fundamental controversy over the meaning of Congress's power to enforce the Fourteenth Amendment, ignited by the majority and dissenting opinions in *Katzenbach v. Morgan*.[21] Justice Brennan's majority opinion in *Morgan* offered two alternative means by which Congress could justify outlawing a state governmental practice that the Court had upheld under the Fourteenth Amendment. Under what has come to be known as the "remedial" alternative, Congress might prop-

19. See *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995); Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 Mont. L. Rev. 5 (1995); see also *Smith v. Fair Employment and Housing Comm'n*, 913 P.2d 909, 931-39 (Cal. 1996) (Mosk, J., concurring) (finding that RFRA violates separation of powers even as to state court), petition for cert. filed, 65 U.S.L.W. 3034 (Jul. 8, 1996) (No. 96-31). Contra, *Flores v. City of Boerne*, 73 F.3d 1352, 1363 (5th Cir. 1996), cert. granted, 117 S. Ct. 293 (1996) (No. 95-2074).

20. Cf. Title VII, as amended in 1972, which prohibits state employment discrimination on grounds of religion.

21. 384 U.S. 641 (1966).

erly find that a federal prohibition, not itself required by the amendment, was an appropriate means of preventing future violations of the amendment.[22] Under the "substantive" alternative, Congress might legitimately find, as a matter of fact or as a matter of law, that a practice that the Court had upheld actually violated the amendment.[23] The latter alternative has been highly controversial, due to its apparent tension with the independent judicial duty to interpret the Constitution, articulated since *Marbury v. Madison*, and no case since *Morgan* has relied upon it.

Supporters of RFRA have more commonly offered a "remedial" justification for the statute, contending that the statutory right to religious exemption is a prophylactic measure, designed to prevent violations of religious freedom that even the Supreme Court would recognize as unconstitutional after *Smith*. For example, Douglas Laycock has argued that the difficulty of litigating governmental motive has enabled generally applicable laws that were in fact designed to restrict religious practice to escape the judicial condemnation that they deserve.[24] Moreover, religions vary in the number and influence of their adherents, and the selective responsiveness of legislatures to requests for exemptions may amount to a form of discrimination.[25] Justice Scalia viewed this prospect with equanimity in *Smith*, but a subsequent majority gave it greater emphasis in the *Kiryas Joel* case (from which he dissented).[26]

Evaluating this "remedial" justification is made difficult by the sparse Section 5 case law and by uncertainties about the interpretation of RFRA. If RFRA is designed to prevent the use of generally applicable laws to discriminate against particular religions, then how often does such discrimination really occur, in proportion to the number of exemptions that RFRA will generate? This question turns on empirical data—as to which Con-

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22. Id. at 652-53.

23. Id. at 654-56.

24. E.g., Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221 (1993); see H.R. Rep. 103-88, 103d Cong., 1st Sess. 6 (1993) ("[L]egislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.").

25. Berg, 39 Vill. L. Rev. at 21-22 (cited in note 13); see S. Rep. 103-111, 103d Cong., 1st Sess. 8 (1993) ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths").

26. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2491-93 (1994).

gress made no quantitative findings[27]—and on the stringency of the RFRA standard as the courts will define and apply it. Critics have maintained that the likelihood that intentional discrimination motivated a given generally applicable law is too remote to support RFRA's sweeping grant of religious exemptions for all denominations.[28] One may compare the Supreme Court's refusal in *Oregon v. Mitchell* to accept voting rights for 18-to-20-year olds as a means of preventing discrimination against that age cohort.[29] Assuming, however, that matters of degree are for legislative rather than judicial determination, so long as the regulation employs a reasonable means to a legitimate end, RFRA might be justified anecdotally without quantitative inquiry.[30] If instead RFRA is designed to ensure equal responsiveness to minority religions, then one might question whether a noncomparative compelling interest test is suited to that function.[31]

At the same time, RFRA supporters have also offered a "substantive" justification. As Laycock has expressed it, RFRA "is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted."[32] The findings provision of RFRA itself could be construed as stating that, under a proper interpretation of the First Amendment, free exer-

27. See Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 Mont. L. Rev. 39, 62 & n.125 (1995); Lupu, 56 Mont. L. Rev. at 216-17 (cited in note 18).

28. Conkle, 56 Mont. L. Rev. at 61-62 (cited in note 27); Lupu, 56 Mont. L. Rev. at 216-17 (cited in note 18); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 S. Ct. Rev. 323, 342-44; see also *Sasnett v. Sullivan*, 91 F.3d 1018, 1021 (7th Cir. 1996) (Posner, C.J.) (finding it "not easy to take entirely seriously the proposition that the enactment of RFRA was necessary in order to prevent the states from engaging in forms of intentional discrimination that . . . could not readily be shown to be intentional"), petition for cert. filed, 65 U.S.L.W. 3370 (Oct. 29, 1996) (No. 96-710).

29. 400 U.S. 112 (1970). Moreover, some critics see merit in the claim once made by Justice Rehnquist that Congress's Section 5 powers with respect to substantive provisions of the Bill of Rights incorporated into the Due Process Clause of the Fourteenth Amendment should be judged by different standards than Congress's Section 5 powers with respect to the Equal Protection Clause. See *Hutto v. Finney*, 437 U.S. 678, 717-18 (1978) (Rehnquist, J., dissenting); Conkle, 56 Mont. L. Rev. at 68-69 (cited in note 27); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 Cardozo L. Rev. 357, 391-96 (1994); Lupu, 56 Mont. L. Rev. at 217 (cited in note 18).

30. See *City of Rome v. United States*, 446 U.S. 156 (1980); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 166-67 (1995).

31. See Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. Chi. L. Rev. 1245, 1289-90 (1994) (arguing that it is not).

32. Laycock and Thomas, 73 Tex. L. Rev. at 219 (cited in note 13).

cise rights would be as strongly protected against the incidental burdens resulting from "neutral" laws as against deliberately imposed burdens.[33] It is this interpretation of RFRA that raises the most fundamental questions, and that has excited the most vehement criticism.[34] On this interpretation, Congress has substituted its own broader understanding of the meaning of the Free Exercise Clause for the Supreme Court's understanding.[35] Congress has not even invoked the weaker (but still controversial) account of Section 5 power that would entitle it to apply its superior fact finding capacity to evaluate the constitutionality of state action under court-given standards.[36] Congress has rejected the court-given standards. Accepting this expansive view of Section 5 power would transform current conceptions of the roles of the branches in constitutional interpretation. *Morgan* does contain the seeds of such a transformation, but the Supreme Court has not encouraged their growth in the intervening years.

Judges have begun to examine the constitutionality of RFRA as applied to state-imposed burdens on the exercise of religion, and have reached different conclusions. Some district courts have upheld RFRA on either "remedial" or "substantive" rationales.[37] Two district court decisions have held RFRA unconstitutional,[38] although one was then reversed by the Fifth Circuit, which approved RFRA as an exercise of Congress's "remedial" authority.[39] The Fifth Circuit panel accepted the arguments (1) that RFRA compensates for the difficulty of proving motive, and serves as a prophylactic measure to prevent intentional discrimination against a particular religion or religion in

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33. See 42 U.S.C. § 2000bb(a).

34. See Conkle, 56 Mont. L. Rev. 39 (cited in note 27); Eisgruber and Sager, 61 U. Chi. L. Rev. 1245 (cited in note 31); Hamilton, 16 Cardozo L. Rev. 357 (cited in note 29); Lupu, 56 Mont. L. Rev. 171 (cited in note 18).

35. Because Congress's conception of free exercise rights is broader, not narrower, than the Court's, and because Congress has not attempted to tamper with Establishment Clause doctrine, RFRA is consistent with the "ratchet theory," that Section 5 empowers Congress to expand but not to contract constitutional rights. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

36. Lupu, 56 Mont. L. Rev. at 216-17 (cited in note 18); see Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971).

37. See *Sasnett v. Dep't of Corrections*, 891 F. Supp. 1305 (W.D. Wis. 1995) (remedial), aff'd *sub nom Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3370 (Oct. 29, 1996) (No. 96-710); *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Haw. 1995) (substantive); *Abordo v. Hawaii*, 902 F. Supp. 1220 (D. Haw. 1995) (ambiguous).

38. *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591 (D. Md. 1996); *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995), rev'd, 73 F.3d 1352 (5th Cir. 1996), cert. granted, 117 S. Ct. 293 (1996) (No. 95-2074).

39. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), cert. granted, 117 S. Ct. 293 (1996) (No. 95-2074).

general, and (2) that RFRA compensates for the unequal political power of minority religions, thus serving both free exercise and equal protection values.[40] Subsequently, the Seventh Circuit questioned the factual basis for the intent rationale, but viewed Congress's remedial authority as broad enough to support the more plausible rationale of unequal responsiveness.[41] An Eighth Circuit judge, in contrast, has interpreted RFRA as necessarily relying on a "substantive" rationale, substituting its view of the meaning of the Free Exercise Clause for the Supreme Court's view, and as therefore unconstitutional.[42] The Supreme Court has already granted certiorari to review the Fifth Circuit decision, and so may address the question in the current term.[43]

II. RELIGION AND THE COVENANT ON CIVIL AND POLITICAL RIGHTS

In the midst of the movement toward the passage of RFRA, but apparently without attracting much attention from its proponents, the United States acceded to the International Covenant on Civil and Political Rights (CCPR). The CCPR is one of the major multilateral human rights treaties, part of the International Bill of Rights, designed to give more concrete and binding form to the vision expressed in the Universal Declaration of Human Rights of 1948.[44] It has more than one hundred states-parties, which have undertaken to respect and to ensure to individuals a series of civil and political rights including life, liberty, physical integrity, privacy, equality before the law, and freedoms of thought, conscience, expression and association.

The obligations of states-parties to the CCPR are not merely negative. Under CCPR Article 2, each agrees "to take the necessary steps, in accordance with its constitutional processes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[45]

40. Id. at 1359-60.

41. *Sasnett v. Sullivan*, 91 F.3d 1018, 1021-22 (7th Cir. 1996) (Posner, C.J.), petition for cert. filed, 65 U.S.L.W. 3370 (Oct. 29, 1996) (No. 96-710).

42. *Hamilton v. Schriro*, 74 F.3d 1545, 1566-68 (8th Cir. 1996) (McMillian, J., dissenting), cert. denied, 117 S. Ct. 193 (1996); see also *Goehring v. Brophy*, 94 F.3d 1294, 1306 (9th Cir. 1996) (Fernandez, J., concurring) (expressing "serious doubts about the constitutionality of Congress's attempt to overrule *Smith* and to reinstate (or instate) a flawed view of the scope and proper construction of the religion clauses"). In both cases, the panel majority did not reach the constitutional issue, finding instead that the plaintiffs' RFRA claims failed on the merits.

43. *City of Boerne v. Flores*, 117 S. Ct. 293 (1996) (granting certiorari).

44. See Louis Henkin, *Introduction*, in Louis Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* 1 (1981).

45. CCPR Article 2(2).

Formal enactment of the rights does not suffice if further measures, tailored to existing social conditions and the features of the legal system, are needed for their realization.[46] This may require laws shielding rights against certain forms of interference from private parties as well as from the government itself.[47] In addition, Article 2 requires the assurance of "an effective remedy" for the violation of covered rights, to be determined by a "competent authority," and indeed encourages states-parties "to develop the possibilities of judicial remedy."[48] Forms of international oversight of compliance with the CCPR exist, but "the implementation of human rights under international law is primarily a domestic matter."[49]

Although the CCPR was opened for signature in 1966, the United States was slow to ratify it. President Jimmy Carter originally sent the CCPR to the Senate for its advice and consent in 1978.[50] After the end of the Cold War, President George Bush renewed the request for Senate action, urging that ratification would "strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world."[51] The Senate gave its consent on April 2, 1992,[52] and the CCPR has been in force for the United States since September 8, 1992.[53]

In acceding to the CCPR, the United States placed certain limits on its promises, by adopting a brief series of reservations, understandings and declarations.[54] Most of the reservations ad-

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46. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 36-37, 55-56 (N.P. Engel, 1993); Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* at 311, 319-20 (cited in note 44).

47. See Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* at 77-78 (cited in note 44); Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 38, 313, 315 (cited in note 46).

48. CCPR Article 2(3); see Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 58-60 (cited in note 46); Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* at 311, 325, 329 (cited in note 44).

49. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 27 (cited in note 46).

50. See Sen. Exec. Rep. 102-23, 102d Cong., 2d Sess. 2 (1992) ("*Sen. Exec. Rep.*").

51. Id. at 25.

52. See 138 Cong. Rec. S4781-84 (1992).

53. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 889 (cited in note 46).

54. See 138 Cong. Rec. at S4783-84; David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings*

dressed treaty constraints that were stricter than U.S. constitutional constraints. For example, a reservation to CCPR Article 6 (right to life) preserves the United States' discretion to impose capital punishment on anyone, other than a pregnant woman, for a crime committed at any age, whenever its own Constitution permits.[55] Conversely, broad American views on freedom of speech necessitated a reservation to CCPR Article 20, which would otherwise have required more sweeping prohibitions against propaganda for war and against advocacy of national, racial, or religious hatred than the First Amendment would permit.[56] Moreover, one of the declarations attached by the Senate designates the CCPR as non-self-executing, i.e., not directly enforceable in the courts.[57] Finally, the Senate added an understanding relating to federalism, to which we will return in Part III.

None of the American reservations, however, addresses CCPR Article 18, concerning freedom of thought, conscience, religion, and belief. That Article expresses a broader conception of religious liberty than the *Smith* interpretation of free exercise.[58] It guarantees to every person not only an absolute right "to have or to adopt a religion or belief of his choice," but also a

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and Declarations, 14 Human Rights L.J. 77 (1993). Doubts have been expressed about the validity of some of these reservations, understandings and declarations, or about their binding character, see, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 343 & n.11, 346-47 (1995); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1311, 1331-32 (1993). These issues do not affect the present essay, because there is no reservation to Article 18.

55. See Reservation No. 2, 138 Cong. Rec. S4783 (1992). Moreover, a reservation to CCPR Article 7 (right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment) serves to trim "'cruel, inhuman or degrading'" back to U.S. constitutional standards under the Fifth, Eighth, and Fourteenth Amendments; this reservation was prompted by European human rights case law critical of death row conditions in the U.S. See Reservation No. 3, 138 Cong. Rec. S4783 (1992); Stewart, 14 Human Rights L.J. at 81 (cited in note 54).

56. See Reservation No. 1, 138 Cong. Rec. S4783 (1992).

57. See Declaration No. 1, 138 Cong. Rec. S4784 (1992). The effect of such declarations has been disputed. See, e.g., Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi.-Kent L. Rev. 515, 527 (1991); Henkin, 89 Am. J. Int'l L. at 346-47 (cited in note 54). But that dispute need not concern us here.

58. The acceptance of the obligation to respect the manifestation of religious beliefs illustrates an important point about the significance of the CCPR in the United States. Human rights experts critical of the United States' reservations to the CCPR have described them as designed to ensure that the U.S. was taking on no new obligations, beyond what its constitution and laws already required. See, e.g., Henkin, 89 Am. J. Int'l L. at 344 (cited in note 54). This rhetoric should not be misunderstood. The U.S. certainly identified a series of respects in which the CCPR would have imposed new obligations, and sought to avoid them. But the reservations contain no systematic exclusion of new

more qualified right "to manifest his religion or belief in worship, observance, practice and teaching."[59] Limitation of the right to manifest one's religion or beliefs is permitted only where "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[60]

The reference to freedom to "manifest" one's religion was not an innovation of the CCPR, but rather adopted language of the Universal Declaration of Human Rights.[61] In both cases, the language has been understood as extending beyond verbal expression of beliefs to include certain actions required by religious convictions.[62] The Human Rights Committee, the principal international body that oversees implementation of the CCPR,[63] has explained:

> The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. . . . The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated

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obligations, and the U.S. did not explicitly reserve against every aspect of the CCPR that went beyond existing law.

59. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

CCPR Art. 18(1). The absolute character of the former right is expressed in Art. 18(2):

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

60. CCPR Art. 18(3). In full:

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(For completeness, Art. 18(4) provides:

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.)

61. UDHR art. 18 ("to manifest his religion or belief in teaching, practice, worship and observance").

62. See Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 320-22 (cited in note 46); Martin Scheinin, *Article 18*, in Asbjørn Eide, et al., eds., *The Universal Declaration of Human Rights: A Commentary* 263, 263-64, 267 (1992).

63. See A.H. Robertson, *The Implementation System: International Measures*, in Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* 332, 337 (cited in note 44). The Human Rights Committee's General Comments and decisions in individual cases have become a major source for interpretation of the CCPR. See generally Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991); Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (cited in note 46).

> with certain stages of life, and the use of a particular language customarily spoken by a group.[64]

Furthermore, "[t]he Covenant does not explicitly refer to a right of conscientious objection [to military service], but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."[65]

To be sure, the right to manifest one's religious beliefs is not absolute, and the criteria for justification of limitations on the right are not identical to the compelling interest test of United States constitutional law. Article 18(3) lists specific interests that might justify the limitation of the right, and because rights under Article 18(3) are nonderogable, this list cannot be supplemented by assertion of emergency powers.[66] The listed interests—public safety, order, health, and morals and the fundamental rights and freedoms of others—is probably broad enough to include any interest that would be recognized as compelling in U.S. law, as well as some non-compelling interests.[67] The standard "necessary to protect [those interests]," as generally interpreted in the CCPR and comparable human rights treaties, incorporates a principle of proportionality. "Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."[68] The requirement of proportionality may entail

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64. Human Rights Committee, General Comment No. 22, ¶ 4 (1993).

65. Id. ¶ 11. This comment represents a shift from a view earlier expressed by the Committee, that the phrasing of CCPR Article 8(3)(c)(ii), providing that alternative service "in countries where conscientious objection is recognized" does not amount to prohibited forced labor, implied that the Covenant did not entail a right of conscientious objection to military service. See *L.T.K. v. Finland* (No. 185/1984) (1985), reprinted in 2 *Selected Decisions of the Human Rights Committee Under the Optional Protocol* 61 (1990).

66. See CCPR Article 4(2) (listing nonderogable rights). The CCPR permits states, "[i]n time of public emergency which threatens the life of the nation," to derogate from certain rights, i.e., to impose greater restrictions on their exercise than the CCPR would otherwise allow, "to the extent strictly required by the exigencies of the situation." Id. Art. 4(1).

67. The Human Rights Committee has noted, however, that limitations for the protection of morals "must be based on principles not deriving exclusively from a single [social, philosophical or religious] tradition." General Comment No. 22, ¶ 8.

68. Human Rights Committee, General Comment No. 22, ¶ 8; see also Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 325 (cited in note 46) ("The requirement of necessity implies that the restriction must be proportional in severity and intensity to the purpose being sought and may not become the rule.") (emphasis deleted); Torkel Opsahl, *Articles 29 and 30*, in Eide, UDHR Commentary at 449, 462 (cited in note 62) ("the necessity of applying a limitation depends on whether there is a reasonable proportion between the purpose to be achieved and the measures adopted").

that only compelling interests would justify severe interferences with the right to manifest beliefs in practice, while imposing a more relaxed burden of justification on less severe interferences.

Thus, once the United States ratified the CCPR, it acquired a treaty obligation to ensure that the freedom to manifest religious beliefs in action would not be infringed without proportionate justification. Whether that treaty obligation was validly acquired depends on whether it conflicts in some way with the Constitution. The mere fact that the treaty may require the extension of religious exemptions within areas of traditional state regulation creates no obstacle to its validity. The reach of the separately enumerated treaty power to matters ordinarily of local concern, free from any "invisible radiation from the general terms of the Tenth Amendment," was settled in *Missouri v. Holland*.[69]

Even if the grant of the treaty power includes some inherent limit requiring treaties to address matters of legitimate international concern,[70] there can be no doubt today that human rights are among those matters. How a country treats its own nationals is no longer a matter of exclusive domestic concern, but rather a subject of international cooperation and oversight.[71] The United Nations Charter commits the U.N. to promote observance of human rights and commits its members to take joint and separate action in cooperation with the U.N. to achieve that purpose.[72] The proposition that promotion and protection of human rights is a legitimate concern of the international community recently received strong reaffirmation in the Vienna Declaration and Programme of Action of 1993, and in the resulting establishment of a U.N. High Commissioner for human rights.[73] The United States has not only made human rights conditions in other countries a major focus of its foreign policy, but has even explained military

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Readers may need to be warned that international tribunals overseeing compliance with human rights treaties often defer to national courts by according them a "margin of appreciation" in assessing local conditions that would justify limitation of a right. Thus international tribunals deliberately "underenforce" the standard of justification, and its stringency is not directly evidenced by their conclusions in particular cases.

69. 252 U.S. 416, 434 (1920); see Restatement (Third) of the Foreign Relations Law of the United States § 302, comment d (1987).

70. But see Restatement (Third) of the Foreign Relations Law of the United States § 302, comment c (1987) (denying the existence of such a limitation on the treaty power).

71. Id. at 144-45.

72. U.N. Charter, Arts. 55, 56.

73. See *United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action*, § I, ¶¶ 4, 6, reprinted in 32 I.L.M. 1661, 1665-66 (1993); *United Nations: General Assembly Resolution on the High Commissioner for the Promotion and Protection of All Human Rights*, ¶ 3, reprinted in 33 I.L.M. 303, 305 (1994).

interventions in other countries by the need to protect the human rights of their own nationals.[74] Reciprocal guarantees of human rights subject the United States to international scrutiny of its human rights record while facilitating American and international scrutiny of other countries' records. In urging the Senate to give its consent to the CCPR, the Bush administration emphasized that "U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world."[75] Indeed, only by ratifying the CCPR did the United States gain the opportunity for one of its own nationals, Professor Thomas Buergenthal, to become a member of the Human Rights Committee and participate in its elaboration and oversight of the CCPR.[76]

To reject the validity of the CCPR as a binding United States treaty and a source of congressional power, one would have to repudiate *Missouri v. Holland*[77] and enshrine the program of the failed Bricker amendment of the 1950s, which was designed to insulate "states' rights" from international human rights treaties, particularly in the fields of racial discrimination and social legislation.[78] The Supreme Court's reinvigoration of the inherent limits of the Commerce Clause in *Lopez* is unlikely to foreshadow so radical a change. The statute invalidated in *Lopez* needlessly doubled legislation that the individual states could enact for themselves (and largely had).[79] Individual states cannot, however, enter into reciprocal agreements with foreign na-

74. See Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 Am. J. Int'l L. 96, 125 (1995) (under heading War Powers—Deployment of U.S. Military Forces into Haiti); W. Michael Reisman, *Haiti and the Validity of International Action*, 89 Am. J. Int'l L. 82 (1995); Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in Lori Fisler Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* 77, 89-90, 94-95 (1993) (describing U.S. participation in measures to protect Kurds and Shi'ites in Iraq).

75. Sen. Exec. Rep. at 25.

76. CCPR art. 28(2) (requiring Committee members to be nationals of States-Parties to the CCPR).

77. 252 U.S. 416 (1920).

78. See Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988); Henkin, 89 Am. J. Int'l L. at 348-49 (cited in note 54). One prominent feature of most versions of the Bricker amendment was "the which clause," providing that "A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty*." S.J. Res. 43, reprinted in Tananbaum at 223-24 (emphasis added).

79. See *United States v. Lopez*, 115 S. Ct. at 1624, 1626 (noting charges against Lopez under both Texas and federal law); id. at 1641 (Kennedy, J., concurring) ("[T]he reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States

tions guaranteeing that both will maintain certain laws. The Constitution expressly denies to the states the power to make "Treat[ies]," and permits them to enter into a lesser category of international "Agreement[s]" only with the consent of Congress.[80] Requiring the unanimous agreement of Congress and all the states for ratification of any treaty that includes a provision addressing "local" concerns would greatly hamper American participation in international treaty regimes. The present Court shows no evidence of any intent to hamstring the international relations of the United States in this manner.

At the same time, a treaty must not violate the constitutional rights of individuals.[81] Specifically, a question of the Establishment Clause limitations on the grant of religious exemptions may arise with respect to Article 18, parallel to the question that arises with respect to RFRA.[82] But Article 18(3) includes an escape clause parallel to that of RFRA: if a particular requested exemption were so extreme as to violate the Establishment Clause, then its denial would probably be necessary to protect the "fundamental rights and freedoms of others."[83] Indeed, the rule of proportionality may strike a more equal balance between the rights of conscience and the rights of others than does RFRA's compelling interest standard. Moreover, Article 18 is less vulnerable to the charge of unduly favoring religion than RFRA may be, because Article 18 does not confine its protection to the religious. The freedom to manifest religion or belief also applies to nonreligious convictions—although presumably these are manifested less in worship and observance than in practice and teaching.[84]

The question might remain whether some conception of separation of powers or the primacy of judicial interpretation of constitutional rights prevents the federal government from acceding

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already have criminal laws outlawing the possession of firearms on or near school grounds.").

80. See U.S. Const. Art. I, § 10, cls. 1, 3; Louis Henkin, *Foreign Affairs and the Constitution* 229-33 (Foundation Press, Inc., 1972).

81. *Reid v. Covert*, 354 U.S. 1 (1957); Restatement (Third) of the Foreign Relations Law of the United States § 302, comment b (1987).

82. See note 17 and accompanying text.

83. See Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 329 (cited in note 46) ("the term 'fundamental rights' points primarily toward national law and describes in general those subjective rights that, in comparison to other rights, are more strongly protected (usually at the level of the constitution) with special national remedies").

84. General Comment No. 22, ¶¶ 2, 5 ("Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief"); Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 316 (cited in note 46).

to an international human rights treaty that employs a broader conception of religious liberty than that contained in the First Amendment. The answer is surely no. The *Smith* decision does not stand for the proposition that the only defensible conception of religious liberty is one that subjects conscientious objectors to all generally applicable criminal laws. Justice Scalia's opinion for the Court is a typically positivist performance. It invokes the words of the First Amendment "[a]s a textual matter,"[85] the Court's own precedents (albeit creatively),[86] and "constitutional tradition and common sense."[87] It relies on pragmatic institutional objections to enforcement of the compelling interest test by the judiciary,[88] and invites the affirmative accommodation of religious belief by the legislature: "[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts."[89] So long as the adoption of a more expansive vision of religious liberty does not violate some other constitutional value (like non-establishment), it does not exceed the treaty power. Nor is adherence to an international human rights treaty subject to the reproach that it undermines the integrity of the courts by commanding them to "participate in a constitutional charade."[90]

By 1993, then, the United States had an international obligation to ensure a right of religious practice, subject to permissible limitations. Legislative reaction to the *Smith* decision's withdrawal of judicial protection was not only appropriate, but necessary.

III. CONGRESSIONAL IMPLEMENTATION OF THE CCPR

The Necessary and Proper Clause empowers Congress to enact legislation implementing a valid international treaty, just as it may implement other federal powers.[91] Accordingly, Congress

85. 494 U.S. at 878.
86. Id. at 878-84.
87. Id. at 885.
88. Id. at 887, 890.
89. Id. at 890.
90. Eisgruber and Sager, 69 N.Y.U. L. Rev. at 470 (cited in note 16).
91. *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Neely v. Henkel*, 180 U.S. 109, 121-22 (1901). For an apt post-*Lopez* exposition, see *United States v. Yian*, 905 F. Supp. 160, 163-65 (S.D.N.Y. 1995) (upholding broad definition in Hostage Taking Act as reasonably related to implementation of International Convention Against the Taking of Hostages).

has the power to enact domestic legislation implementing Article 18 of the CCPR as a valid treaty obligation of the United States.

Indeed, Congress could have justified RFRA itself as a means of effectuating Article 18. In some respects, RFRA probably affords individuals greater protection than Article 18 would strictly require, while in other respects it affords less protection. The compelling interest test of RFRA appears to be more demanding than the standard for "necessary" limitations under Article 18. RFRA's category of substantial burdens on the exercise of religion might be broader than the category of limitations on the right to manifest one's religion in worship, observance, practice, and teaching.[92] Nonetheless, just as Congress found in RFRA that the compelling interest test was a traditional and workable standard for resolving conflicts between the exercise of religion and other government interests, so Congress could reasonably find that the traditional categories of religious exercise and compelling interest provided an appropriate mechanism for protecting the manifestation of religious beliefs in practice within the legal system of the United States.

Meanwhile, RFRA's focus on the exercise of religion is narrower than Article 18's attention to the manifestation of both religious and nonreligious beliefs. And RFRA employs traditional domestic state action concepts, regulating direct interference with religion by governments, and not interference with religion by private actors. RFRA therefore provides only a partial implementation of Article 18. The United States Constitution, however, gives Congress the authority to enact legislation enforcing those aspects of a treaty for which Congress deems legislation necessary, while leaving other aspects of the treaty for implementation by other means. So long as RFRA's selectivity does not violate other constitutional norms, like equal protection or non-establishment, its narrower scope creates no constitutional objection.[93]

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92. The reach of both the statute and the treaty in relation to conduct motivated, but not dictated, by religious beliefs is unsettled. Compare Laycock and Thomas, 73 Tex. L. Rev. at 231-34 (cited in note 13) with Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 321 (cited in note 46) (speculating on limits of the concept of "practice").

93. To say that Congress may constitutionally proceed one step at a time is not to say that the United States has no present international duty to comply fully with the obligations it has undertaken. The CCPR requires compliance, not progressive implementation over a lengthy period, unlike the companion International Covenant on Economic, Social and Cultural Rights. See Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* at 56-57 (cited in note 46); Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* at 323-24 (cited in note 44).

Thus, we see that Congress could have justified RFRA as an implementation of Article 18, but evidently did not rely on this basis at the time of enactment. How should this affect a court reviewing the constitutionality of the statute? On the one hand, Congress expressly found that new legislation was needed in order to effectuate the freedom to act in accordance with the dictates of conscience, and the statute and its legislative history leave no doubt that Congress intended to intrude on state regulatory authority to whatever extent the standards legislated in RFRA required. If, as Justice Brennan stated in *EEOC v. Wyoming*, it suffices that a court "be able to discern some legislative purpose or factual predicate that supports the exercise of [a given] power," and "'[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise,'"[94] then the presumption of constitutionality may oblige the courts to uphold a statute under any congressional power that objectively supports it.[95] On the other hand, the current Supreme Court majority is more protective of state power and more willing to make exercises of federal authority depend on clarity of statement or explicitness of findings.[96] In the case of RFRA, where Congress expressly identified a different source for its authority, there may be an important process value in refusing to defer to implicit conclusions that Congress demonstrably never drew.

There is further reason for courts to be hesitant to interpret the current RFRA as an implementation of Article 18. The Senate has expressed its *political* reluctance to use the CCPR to displace state lawmaking, in the "understanding" on federalism included within the package of reservations, understandings, and declarations at ratification. That understanding provides:

> That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it

94. 460 U.S. 226, 243-44 n.18 (1983) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). It should be admitted, however, that the immediately succeeding sentence in *Cloyd Miller* begins: "Here it is plain from the legislative history that Congress was invoking its war power . . . ."

95. See also *United States v. Lopez*, 115 S. Ct. 1624, 1656 (1995) (Souter, J., dissenting); id. at 1658-59 (Breyer J., dissenting); *Sasnett v. Sullivan*, 91 F.3d 1018, 1021 (7th Cir. 1996) (Posner, C.J.) ("[I]t is not the motive of the legislators that is important . . . but whether [RFRA] is within the scope of their constitutional authority."), petition for cert. filed, 65 U.S.L.W. 3370 (Oct. 29, 1996) (No. 96-710).

96. See *United States v. Lopez*, 115 S. Ct. 1624, 1631-32 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 468-70 (1991); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 Case W. Res. L. Rev. 695 (1996).

> exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[97]

The legislative history explains that an understanding rather than a reservation was employed, because "the intent is not to modify or limit U.S. undertakings under the Covenant but rather to put our future treaty partners on notice with regard to the implications of our federal system concerning implementation."[98]

It has been observed that this understanding "serve[s] no legal purpose."[99] Adding such a declaration of intent does not decrease the United States' international obligations and does not decrease in the slightest the power of Congress to implement those obligations. The content of the understanding is wholly circular—"measures appropriate to the Federal system" include, when Congress deems it necessary, federal legislation ensuring that state and local governments comply with the international obligations of the United States. Indeed, if one takes seriously Justice O'Connor's insistence in *New York v. United States*[100] that state autonomy and political accountability preclude the federal government from "commandeering" state legislatures and administrators to carry out federal programs, then implementing the CCPR through direct federal legislation is *more* "appropriate to the Federal system" than leaving implementation to the states. (Actually, this observation may illustrate the inapplicability of *New York v. United States* to exercises of the treaty power,[101] and the weakness of the evidence for the anti-commandeering principle in general.)

The federalism understanding does, however, signal the political reality that some members of Congress are reluctant to

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97. Understanding No. 5, 138 Cong. Rec. S4784 (1992). It may bear mention that the consent to ratification of the CCPR was a product of the 102d Congress, and RFRA was a product of the 103d.

98. Sen. Exec. Rep. at 18 (cited in note 50) (reprinting Bush Administration's explanation).

99. Henkin, 89 Am. J. Int'l L. at 346 (cited in note 54).

100. 112 S. Ct. 2408 (1992).

101. Cf. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method In Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1260 (1995) (describing the anti-commandeering principle, without citation, as "a limit not applicable, of course, to the treaty power").

exercise existing federal power to enforce the CCPR in areas of traditional state regulation. This reality, as well as inattention, may explain why Congress did not refer to the CCPR as one of its bases for enacting RFRA.

Ultimately, then, CCPR Article 18 probably does not provide a proper basis for upholding RFRA as enacted in 1993, although it would support a verbatim reenactment of the statute if Congress so chose. Nonetheless, Article 18 is important to the debate over RFRA in two major respects. First, understanding international human rights law as an alternative source for congressional adoption of a statutory model of religious liberty that diverges from Supreme Court doctrine may expose some of the flaws in the argument that RFRA places Congress in opposition to the judiciary. It illustrates how a remedial statute can invoke constitutional values and standards for legitimate instrumental reasons, and need not be seen as an effort to redefine them. It makes clearer the duty of the courts to interpret and enforce the law, and to ensure that they do not confuse similarly phrased statutory and constitutional norms. Judges as pragmatic crafters of doctrine may overrule earlier formulations that they find "unworkable," but only in the most extreme cases do they have the authority to reject a legislatively mandated standard on such grounds.

Second, Article 18 offers a variant model of religious exemption that may be normatively more attractive than the compelling interest model that RFRA appears to embody. Article 18 recognizes the demands of both religious and secular conscience, within their differing ranges of conduct. Its standard of proportionality is more flexible and requires more in the way of mutual accommodation than the literal application of a compelling interest test. Although Congress's authority to implement Article 18 includes the power to enact more rigid commands, Article 18 would also permit a more moderate regime of accommodation that would respond to *Smith* without excessive sacrifice of other values.

If RFRA should someday be invalidated due to lack of congressional authority, it will be because Congress did not pay heed to the CCPR, not because Congress could not have found the authority. Renewed attention to the protection of religious liberty in global perspective could then lead to a firmer foundation for federal action, and perhaps to a better-designed statute. Overcoming the reluctance to rely on the CCPR would also em-

bed the RFRA policy in a context that expresses a broader commitment to human liberty.