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Cover Page Footnote

Judge, United States Court of Appeals, Sixth Circuit. I am deeply grateful to my law clerks who provided very helpful edits and suggestions throughout the process of crafting this speech. I would also like to thank Ed Whelan, Michael McConnell, Phillip Muñoz, Nicole Garnett, and Rick Garnett for reviewing and commenting on initial drafts.

SMITH, SCALIA, AND ORIGINALISM

The Honorable Judge Amul R. Thapar⁺

We've come together at this symposium to discuss and explore ideas about the future of religious liberty in this country. I've enjoyed the conversations this morning and look forward to those in the afternoon sessions too.

From government compulsion to model ethical rules to college campuses, issues of religious liberty abound. And while we're focused on the future today, I'd like to take a step back into the past. I believe the only way to understand what comes next for religious liberty, is to understand where we've been. When we think about the current landscape of religious liberty most discussions begin in 1990—with *Employment Division v. Smith*¹ and its surprising author, Justice Antonin Scalia.

There are not many justices in the league of Justice Scalia. Justice Gorsuch rightly called him a “lion” of the legal profession—someone who was “a ferocious fighter when at work, with a roar that could echo for miles.”² Anyone who knew Justice Scalia admired him—whether you agreed with him or not. And his work both inside and outside the court has left a lasting influence on the legal profession and society in general. Whether you are reading *Scalia Speaks* for fun or referencing *Reading Law* to help understand a statute, Justice Scalia's presence endures.

So the question I have always struggled with is how could this lion of the profession and self-professed originalist author *Smith*. As I will explain shortly, *Smith* held that, under the Free Exercise Clause of the First Amendment, sincerely held religious objections do not excuse people from complying with generally applicable laws. The criticism of *Smith* was swift. And it came from all quarters—the ACLU, the Christian Legal Society, the American Jewish Congress, Congress, and even Justice Scalia's fellow originalists.

Principled originalists like Professor Michael McConnell believed that *Smith's* holding contradicted the original meaning of the First Amendment. McConnell argued that both the language and history of the First Amendment demonstrate that the religion clauses are best read as prohibiting “government action that promotes the majority's favored brand of religion and government

⁺Judge, United States Court of Appeals, Sixth Circuit. I am deeply grateful to my law clerks who provided very helpful edits and suggestions throughout the process of crafting this speech. I would also like to thank Ed Whelan, Michael McConnell, Phillip Muñoz, Nicole Garnett, and Rick Garnett for reviewing and commenting on initial drafts.

1. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).
2. Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. L. REV. 905, 905 (2016).

action that impedes religious practices not favored by the majority.”³ While I have not gone back and studied all of the sources Professor McConnell has, his thoughts made me wonder: How could an originalist like Justice Scalia not only join, but author the *Smith* opinion. So I took a deep dive into his speeches and opinions.

In this talk, I will first do my best to explain how Justice Scalia’s decision in *Smith* was driven by his commitments to judicial restraint and rules over standards. But then I will explain why subsequent refinements in Justice Scalia’s own originalist thinking—New Originalism—might suggest that Professor McConnell’s historical evidence gives McConnell the stronger claim about exemptions to generally applicable rules.

I.

To put the dilemma in context, I want to start with a New York state-court case before Justice Scalia’s time: *People v. Philips*.⁴ In 1812, Daniel Philips went to his Catholic Priest for confession.⁵ He told his priest that he had helped steal some goods from the victim, and gave the goods to the priest under the confidentiality of confession.⁶ When the priest gave the victim the goods, the victim informed the authorities.⁷ The authorities then subpoenaed the priest to identify the thieves before a grand jury.⁸ The priest asked the court to excuse him and said “that it would be [his] duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question.”⁹ The prosecutor responded, “[t]he constitution has granted religious ‘profession and worship’ to all denominations, ‘without discrimination or preference’: but it has not granted exemption from previous legal duties.”¹⁰ A New York court ruled that the constitution required an exemption for the priest. The government’s interest “did not outweigh the interference with the relationship between priests and penitents in the Roman Catholic Church.”¹¹

People v. Philips frames the issue in very simple terms, but it is an issue that has befuddled the courts as long as our country has existed. What do we do when generally applicable laws conflict with religious practices?

3. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 690 (1992).

4. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410–12 (1990).

5. *Id.* at 1410.

6. *Id.* at 1410–11.

7. *Id.* at 1411.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1412.

And this is the exact dilemma that Justice Scalia and the Court faced in *Employment Division v. Smith*.¹² In that case, Oregon's controlled substance laws barred the use of peyote and did not make an exception for "the sacramental use."¹³ So when Alfred Smith and Galen Black ingested peyote for sacramental purposes they were fired from their jobs at a private drug rehabilitation organization.¹⁴ Thereafter, they sought welfare benefits, but Oregon's Employment Division determined they were ineligible because "they had been discharged for work-related 'misconduct.'"¹⁵ On appeal of that denial, Smith and Black claimed that Oregon's failure to provide for a religious exemption violated their Free Exercise rights.¹⁶ The Oregon courts agreed.¹⁷

The Supreme Court, however, did not. Justice Scalia, writing for the majority, held that Native Americans who ingested peyote as part of their religious exercise were not entitled to an exemption from Oregon's drug laws.¹⁸ Since the law was neutral and generally applicable, the Free Exercise Clause did not shield the Native Americans from compliance.¹⁹ Justice Scalia explained that democracy couldn't function if religious adherents were able to get exemptions from any law that burdened their religious freedom.²⁰

The five-justice majority noted that even though the Free Exercise Clause doesn't require exemptions from neutral laws of general applicability, religious adherents can still seek exemptions from the legislature.²¹ Justice Scalia recognized that leaving religious exemptions to the political process will likely place religious minorities at a disadvantage, "but," Scalia stated, "that . . . [is] prefer[able] to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."²²

Justice Scalia's decision drew criticism from many quarters. Some were upset because Justice Scalia chose government over religion. Others complained that Justice Scalia's majority opinion (and, in turn, his jurisprudence) would discriminate against minority religions. And as previously noted, some criticized his possible departure from originalism. I am not here to answer the critics, but rather to explain how Justice Scalia reached that decision in light of his overall judicial philosophy and his view of our constitutional structure.

12. *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

13. *Id.* at 876.

14. *Id.* at 874.

15. *Id.*

16. *Id.* at 874–75.

17. *Id.* at 875–76.

18. *Id.* at 890.

19. *Id.*

20. *Id.* at 885, 890.

21. *Id.* at 890.

22. *Id.*

II.

So how did Justice Scalia, a man of great faith who thought religion played an important role in society, come to author the opinion that established a government-friendly standard for review of Free Exercise claims? To best understand Justice Scalia's religious liberty viewpoint around 1990, we must understand how it fits within his overall philosophy and originalism as it was then understood. At its core, Justice Scalia's philosophy was based on the idea that the key to our liberty is the separation of powers. In his own words,

[A] bill of rights has value only if the other part of the constitution—the part that really “constitutes” the organs of government—establishes a structure that is likely to preserve, against the ineradicable human lust for power, the liberties that the bill of rights expresses. If the people value those liberties, the proper constitutional structure will likely result in their preservation even in the absence of a bill of rights; and where that structure does not exist, the mere recitation of the liberties will certainly not preserve them.²³

In more colorful language he went on to say that the bill of rights “. . . represents the fruit, and not the roots, of our constitutional tree.”²⁴

Why does that matter here? Because there was nothing more important to Justice Scalia than keeping the assigned branches from getting tangled. Justice Scalia believed it was important that each of the branches do its assigned role and no more. So, when it came to judges, he believed that they should not be engaged in policy-making or even policy-balancing, and that a judge's personal beliefs had no place in deciding cases. Legislators, however, could consider their personal and moral beliefs in passing laws.

Justice Scalia explained his philosophy on this point in a speech titled *Faith and Judging*. As he said there, religion and morals have shaped our laws since the founding. He pointed out that “[t]he primary impetus for the drive to abolish slavery was a religious one.”²⁵ The same impetus drove Prohibition and drives laws against bigamy and nudity to this day.²⁶ Justice Scalia's real point is that there is nothing wrong with legislators making policy through the lens of their religiously informed moral judgments.²⁷ And, as Justice Scalia pointed out in *Smith*, legislatures may make exceptions to the laws for religious beliefs.²⁸ Indeed, Justice Scalia believed that our country had a history of accommodating religion as he noted in that speech and others.

But judging is different. As Justice Scalia said,

23. ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 163 (Christopher J. Scalia & Edward Whelan eds., 1st ed. 2017).

24. *Id.*

25. *Id.* at 150–51.

26. *Id.* at 151.

27. *Id.*

28. *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

Unlike presidents, cabinet secretaries, senators, and representatives, federal judges do not (or are not supposed to) *make* policy, but rather are to discern accurately and apply honestly the policies adopted by the people's representatives in the text of statutes—except to the extent that those statutes conflict with the text, the underlying traditions, or valid Supreme Court interpretation of the United States Constitution.²⁹

In that task, he said, judges must restrain from enacting their own preferences. “Just as there is no Catholic way to cook a hamburger,” he said, “so also there is no Catholic way to interpret a text, analyze a historical tradition, or discern the meaning and legitimacy of prior judicial decisions—except, of course, to do those things *honestly* and *perfectly*.”³⁰ Justice Scalia made a similar point about judicial restraint when he said in an opinion that the question of whether churches should get exemptions from generally applicable laws must be decided by “the people, through their elected representatives,” not the courts.³¹

This is also why Justice Scalia preferred bright-line rules to looser standards. Rules are necessary to avoid judicial policymaking, and avoiding judicial policymaking is necessary to our constitutional tradition.³² Bright-line rules lead to certainty because they don't provide room for a judge to read his or her policy preferences into the law.³³ Justice Scalia described balancing tests (a type of standard) as asking judges to decide if “a particular line is longer than a particular rock is heavy.”³⁴ Of course, that's an impossible comparison. And when comparing two “incommensurate” interests, it is easy for a judge's personal beliefs and preferences to influence his or her decision-making. In Justice Scalia's view, standards allowed for policymaking. Rules did not.

III.

So now we come back to Justice Scalia's jurisprudence to see if his actions reflected his words. They did. I will summarize briefly three cases and Justice Scalia's view in those cases to prove my point.

In 1989, practitioners of a strict form of Judaism known as Satmar Hasidim bought a parcel of land in Orange County, New York.³⁵ There, they formed a village where they built their homes, established private religious schools, and

29. SCALIA, *supra* note 23, at 152.

30. *Id.*

31. *City of Boerne v. Flores*, 521 U.S. 507, 544 (1997) (Scalia, J., concurring).

32. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

33. *See id.* at 1177 (“[I]n a system in which prior decisions are authoritative, no opinion can leave *total* discretion to later judges. It is all a matter of degree.”).

34. *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

35. *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 690–91 (1994).

built their synagogue.³⁶ They lived a life very different from much of modern New York, and their village grew to a population of 8,500.³⁷ Yet as they grew, a problem arose—their schools could not adequately educate their special needs children.³⁸ So the special needs children had to go to public schools instead, but this caused them to go through “panic, fear, and trauma” because they had to leave their own community and be with people “whose ways were so different.”³⁹ Most of the children dropped out of those schools rather than suffer the trauma they associated with going to public school outside their small community.⁴⁰ In response, New York passed a law that allowed the village to establish their own separate school district including a school for special needs children.⁴¹

This law quickly got challenged on the ground that the government was participating in establishing religion. In 1994, a majority of the Supreme Court agreed and struck the law down.

Justice Scalia dissented. And it is worth reading the beginning of the dissent:

The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or the Grand Rebbe . . . founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful . . . as to have become an ‘establishment’ of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed ‘to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,’—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.⁴²

Justice Scalia further pointed out that “[w]hen a legislature acts to accommodate religion, particularly a minority sect, ‘it follows the best of our traditions.’”⁴³ And when the Court strikes down such legislative accommodation, it “turn[s] the Establishment Clause into a repealer of our

36. *Id.* at 691.

37. *Id.*

38. *Id.* at 692.

39. *Id.* (internal citation omitted).

40. *Id.* at 693.

41. *Id.*

42. *Id.* at 732 (Scalia, J., dissenting).

43. *Id.* at 744.

Nation's tradition of religious toleration."⁴⁴ So, in *Kiryas Joel*, Justice Scalia sided with the religious minority.

The second case is *Church of the Holy Trinity v. United States*⁴⁵—a case that predated Justice Scalia's tenure on the Supreme Court, but about which Justice Scalia expressed his views. Throughout his career, Justice Scalia remained consistent in believing that it was the legislature's, not the court's, job to create exemptions. In *READING LAW*, Justice Scalia stated that *Holy Trinity*, which sided with a religious *majority*, was wrongly decided. *Holy Trinity* involved a statute that prohibited bringing in immigrants to perform certain contractual services.⁴⁶ The law made exceptions for actors, artists and the like, but none for clergymen.⁴⁷ And when a New York church contracted with an Englishman to become its pastor, the United States sued.⁴⁸ The Supreme Court created an exception that was not provided for by the text.⁴⁹ As Justice Scalia noted, some commentators justified that decision because it allowed judges to use their sense of "community morality" or allowed judges to make the law "fairer, wiser, and more just."⁵⁰ At this Justice Scalia scoffed. And while he did so on textualist grounds, the consistency is what is important for our purposes. Justice Scalia did not believe that judges should depart from a clear textual command by creating religious exceptions to generally applicable laws, even if those exceptions favored his own religion.

Similarly, while Justice Scalia believed the Constitution neither prohibited nor required legislative accommodations for religion, he also did not believe that the government could outright discriminate against religion. The Free Exercise Clause, in Justice Scalia's view, required neutrality toward religion.

That brings us to the third case: *Locke v. Davey*.⁵¹ In *Locke*, Chief Justice Rehnquist wrote an opinion holding that it was permissible for the State of Washington to exclude otherwise-qualified students from receiving a scholarship *solely* because those students wanted to pursue a theology degree.⁵² Justice Scalia dissented. When a state makes a benefit generally available, it should be available to all irrespective of their religious belief.⁵³ "[A]nd when the State withholds that benefit from some individuals solely on the basis of religion, it violates the *Free Exercise Clause* no less than if it had imposed a

44. *Id.* at 752.

45. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

46. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 11 (1st ed. 2012).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 12 (internal citation omitted).

51. *Locke v. Davey*, 540 U.S. 712 (2004).

52. *Id.* at 715, 725.

53. *Id.* at 726–27.

special tax.”⁵⁴ As Justice Scalia pointed out, the only program of study that was singled out for disfavor was religion.⁵⁵ Indeed, the plaintiff was not asking to be treated differently; rather he was asking that he be treated the same as everyone else.⁵⁶ Justice Scalia finished by saying,

Let there be no doubt: This case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the State’s policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set.⁵⁷

In sum, to his critics, Justice Scalia’s *Smith* decision ignored the country’s vow to protect religion. But Justice Scalia believed that religion and religious minorities were best protected by the legislature. And his decisions reflected this view. Justice Scalia believed (1) the legislature could not discriminate against religion (*Locke v. Davey*), (2) when the legislature accommodates minority religions “it follows the best of our traditions” (*Kiryas Joel*),⁵⁸ but (3) the courts cannot compel the legislature to make exceptions from generally applicable laws (*Smith*).

IV.

Let me conclude by explaining how Justice Scalia and his originalist critics might both have a point. To understand how I could make this statement, one must understand how originalism has developed over the last 30 years.

Modern originalism emerged largely as a reaction to the perceived excesses of the Warren Court. Originalists of that mold, such as Justice Scalia and Judge Robert Bork, cared deeply about religious liberty. But they believed that such protections would primarily come from the legislature, not the courts. These first-generation originalists worried most about the Court encroaching on democracy’s role. Where a judge had “no basis other than his own values upon which to set aside . . . community judgment,” he had no basis to intervene.⁵⁹ The answer, for these originalists, was judicial restraint, giving the political branches the benefit of the doubt.

Justice Scalia’s strong preference for rules over standards was likewise a response to the balancing tests of the prior era, which Justice Scalia perceived as mushy, unpredictable, and useful only for empowering judges. Thus, at the

54. *Id.* at 726–27.

55. *Id.* at 727.

56. *Id.*

57. *Id.* at 733.

58. Bd. of Educ. of Kiryas Joel v. Grumet et. al., 512 U.S. 687, 744 (internal citation omitted).

59. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971).

time of *Smith*, Justice Scalia filtered his originalism through the twin lenses of democracy and the need for clear rules over vague standards. To Justice Scalia, the “primary commitment” of originalism “was to judicial restraint” and “judicial deference to legislative majorities.”⁶⁰

So, what has changed? Self-described New Originalists realized that the entire interpretive model could not be built on responding to the Warren Court’s encroachments on federalism and the separation of powers. And Professor Michael McConnell, one of *Smith*’s foremost critics, is not surprisingly one of “the most prominent *new* originalist[s].”⁶¹ New Originalists rely heavily on historical evidence, linguistic analysis, and significant academic and historical scholarship.⁶² Most importantly, “*new originalism* does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”⁶³ In short, “[t]he primary virtue claimed by the *new originalism* is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”⁶⁴ A limited judicial role and democracy are still quite important under New Originalism, but the line dividing courts and legislatures must be grounded in the original public meaning of the specific text of the Constitution.

When one thinks about it through this lens, one sees how Justice Scalia could write the *Smith* decision and how principled originalists today could criticize it and conclude perhaps that although Scalia’s perspective was defensible then, *Smith*’s holding may not be today. *Smith* employed very little history in its analysis. Contrast that with McConnell’s critique where he provides both a historical and a linguistic basis for why *Smith* is wrong.⁶⁵ While Justice Scalia did not initially engage the historical evidence in *Smith*, he did in his *Boerne* concurrence seven years later. There he argued that the evidence was inconclusive at best.⁶⁶ He pointed out that even Professor McConnell conceded that “constitutionally compelled exemptions [from generally applicable laws regulating conduct] were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause.”⁶⁷ Therefore, Justice Scalia believed that when the evidence was inconclusive “the people” rather than

60. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004).

61. *Id.* at 608.

62. *Id.* at 608–09; see, e.g., Thomas R. Lee & Steven C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792 (2018); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 850–51 (2003); Josh Blackman & James C. Philips, *Corpus Linguistics and the Second Amendment*, HARV. L. REV. BLOG (August 7, 2018), <https://blog.harvardlawreview.org/corpus-linguistics-and-the-second-amendment/>.

63. Whittington, *supra* note 60, at 609.

64. *Id.*

65. McConnell, *supra* note 4, at 1414–15; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115–17 (1990).

66. *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring).

67. *Id.* at 537–38 (emphasis omitted).

the courts should decide whether exemptions should exist.⁶⁸ And more recent history, in the form of state and federal statutes passed to protect religious exercise, has proven that this can occur.

Ultimately, Justice Scalia was an originalist with a strong democratic bent. But Justice Scalia also remained open-minded, and he was willing to revisit his past thinking on issues.⁶⁹ Perhaps better than most, he understood that the Court was not “final because [it was] infallible, but . . . infallible only because [it was] final.”⁷⁰ The million-dollar question, however, is would he have revisited *Smith*. On the one hand, when viewed through the lens of New Originalism—as Professor McConnell compellingly does—there are many arguments for why *Smith* is wrong. On the other hand, Justice Scalia firmly believed that the interpretation of the Constitution should never rest upon “the changeable philosophical predilections of the Justices,” but rather on the “deep foundations in the historic practices of our people.”⁷¹ And when he believed the Constitution was silent on a particular question, he put greater trust in the answer of nine Americans randomly chosen from the telephone directory than the nine justices.⁷²

Sadly, we will never know the answer to this question because Justice Scalia left us too soon. Yet we can see, at least, that the Justice who wrote *Smith* was not anti-originalist but rather a certain kind of originalist. While he led the theoretical shift from original intent to original public meaning—a move foundational to modern originalism—Justice Scalia was perhaps more willing to defer to the democratic processes when he thought the original meaning of a constitutional provision did not clearly forbid a democratic enactment.

In the end, whether you agree with Justice Scalia or not, I believe we can all agree on this: Justice Scalia’s great faith in the American people drove his philosophy. He trusted them with policy decisions more than he trusted the

68. *Id.* at 544.

The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether . . . church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.

Id.

69. Justice Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L. J. 1600, 1603–04 (2017).

70. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

71. *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting). As Justice Scalia once said, “our Nation’s protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people.” *Id.*

72. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

unelected judiciary. And this shone through, even in areas where his friends objected.⁷³

* * *

So, where do we go from here? For New Originalists, deference to the people remains important, but only after one studies all of the sources—historical, academic, and linguistic—to try to determine the original meaning of the Constitution. Perhaps Professor McConnell said it best when he said that “[t]he job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent.”⁷⁴ While judges must be restrained—because they should have faith in the people—they must first engage in the hard work to give the constitutional clauses meaning. And for New Originalists this would mean not only grappling with Professor McConnell’s thoughtful scholarship, but also with the scholarship of Professors like Gerard Bradley, Philip Hamburger, Rick Garnett, Bill Kelley, Phillip Muñoz, and others, many of whom disagree with McConnell.

Although judicial modesty remains a critical virtue of judging—one that both undergirds our separation of powers and reflects the people’s role in our democratic republic—judges’ first obligation is to the Constitution itself. In fulfilling that role, if judges can determine the meaning of a particular clause of the Constitution, they must say so and provide the historical record supporting their conclusion.

I hope the conversations that we have begun at this Symposium and the papers that result will provide judges more scholarship and insights when cases of religious liberty come before them. Thank you very much for having me.

73. In a recent statement respecting denial of certiorari, Justice Alito noted that the *Smith* decision “drastically cut back on the protection provided by the Free Exercise Clause.” See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., concurring). Justices Thomas, Gorsuch, and Kavanaugh joined Justice Alito’s statement.

74. Michael W. McConnell, *Fidelity in Constitutional Theory: Fidelity as Integrity: The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1273 (1997).

