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Dilemmas of Liberty

Robert S. Smith
New York Court of Appeals

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**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE**

DILEMMAS OF LIBERTY

*Hon. Robert S. Smith**

DEAN MICHAEL M. MARTIN: Good evening, everyone. I'm Mike Martin. I'm the dean of the Law School. On behalf of the Lawrence W. Levine Foundation, Fordham University School of Law, and the *Fordham Law Review*, I am pleased to welcome you here this evening to the Spring 2014 Robert H. Levine Lecture.

Through the generosity of the Levine family, we have over the past two decades been really honored by the presence of outstanding judges and professors to give us an opportunity to learn more about the law. That list includes Justice Sandra Day O'Connor, Chief Judge Judith Kaye, Professor Ron Dworkin, and Dean Harold Koh, among many others.

This evening we are pleased to welcome, and to add to that distinguished roster, Associate Judge Robert S. Smith of the New York Court of Appeals. Judge Smith was appointed to the court by Governor Pataki in 2003, confirmed as a member in 2004.¹ Prior to that time, he had a career as one of New York's leading lawyers, after graduation from Columbia Law School, where he was editor-in-chief of the *Law Review* in 1968.² He joined Paul, Weiss, Rifkind, Wharton & Garrison and was a distinguished litigator with that firm.³ He also served during that time as a lecturer at the Columbia Law School.⁴

We are delighted to have him and his family and several of his law clerks with us this evening.

Judge Smith cuts an iconoclastic figure at the New York Court of Appeals. He is rightly proud of his independent thinking. His proclivity to write dissenting opinions has itself reached a level of notoriety, and he has written on other occasions quite perceptively about what it means to be a dissenter. Of course, many of his decisions have been for the majority and, in many cases, have been for a unanimous court.

* Associate Judge of the New York Court of Appeals.

1. *Hon. Robert S. Smith*, COURT OF APPEALS, THE STATE OF N.Y., <https://www.nycourts.gov/ctapps/jsmith.htm> (last visited Sept. 21, 2014).

2. *Id.*

3. *Id.*

4. *Id.*

The range of topics that he has addressed has covered the spectrum—civil, criminal, constitutional law issues. To each of these he has brought open-mindedness, analytic rigor, and respect for the judicial role.

I am eager to hear his thoughts this evening on dilemmas of liberty, and I am sure you are too. So it is with great pleasure that I introduce Robert S. Smith of the New York Court of Appeals.

ASSOCIATE JUDGE ROBERT S. SMITH: Thank you, Dean. It is a great honor to be giving the Levine Lecture. I am very grateful to Fordham, to the Levine family. It is a wonderful opportunity.

As a judge, you get asked to speak quite a lot, but not every day do you get asked to give a lecture in a lecture series named after an actual person, which is a big deal. You can't just stand up and be funny, which I seem to do even when I'm not trying to do so. You have to give a real speech with content, which I do not do all that often. But this is my attempt.

It is actually the second time that I have given a lecture named after a person. The first was the Hayek Lecture at NYU a couple of years ago. I am thinking that maybe some of you missed that one, so I am going to return to the same theme that I talked about. Don't worry, it's not the same speech, if you didn't miss it. But it is the same theme, which is the dilemma faced by a judge who is a strong believer in liberty. I said "dilemma." I know the program says "dilemmas." After the title was due, I decided it was singular. It wasn't a whole lot of dilemmas, it was only one dilemma. Sorry.

I said "a judge who is a strong believer in liberty." Guess which one I have in mind. Liberty—let me start out with what it means and why I am in favor of it, and give extremely quick, simple answers to both questions, because they are nice, easy questions.

As to what liberty means, I am going to oversimplify. It means freedom from being forced by physical compulsion or intimidation to do anything you do not want to do. That is indeed a gross oversimplification, but it is all you are going to get for the moment, except that I will give a corollary to that definition. Since, by the definition of government, government is the only lawful source of force or violence—and all right, that is an oversimplification too, but it will do—liberty means to a very large extent the imposing of limits on government.

I guess it is obvious, even from—maybe especially from—this oversimplified definition of liberty, that no sane person is going to be in favor of absolute liberty all the time—and, of course, I am not. But I do think of liberty as a very high value. I ask the question, why? I will give an equally simple answer to that question, but this time I do not think I am oversimplifying.

I hold it to be a self-evident truth that men and women are endowed by their creator with certain inalienable rights and that liberty is among them. You may have heard that. I did not make that up. But it is what I believe. And when I say self-evident, I mean self-evident. I do not have to talk about it anymore; it is self-evident.

It was Louis Armstrong or Fats Waller or somebody else who gave the famous answer to “What is jazz?”: “You got to ask, you ain’t never gonna know.”

That is my answer to why I am in favor of liberty. I have no particular use for instrumental or cost-benefit defenses of liberty—not that it is hard to make that kind of defense. It has been proved over and over again that liberty makes economies more efficient, that there is a strong tendency over time for free societies to prosper and grow and for unfree ones to wither and die. But that, to me, is not a necessary reason for supporting liberty. It is just proof that a beneficent Providence has created a world in which liberty thrives.

With all those little preliminaries behind us, what is this dilemma of liberty that I set out to talk about? I see a famous case, called *Lochner v. New York*,⁵ as an emblem of that dilemma. With apologies to those of you who know already all about *Lochner*, I am going to tell you about it.

Lochner was a 1905 Supreme Court decision that held a state law unconstitutional.⁶ That law limited the hours that a baker could work in a bakery to no more than a ten-hour day.⁷ The 1905 Supreme Court, by a vote of five to four,⁸ over a famous dissent by Justice Oliver Wendell Holmes,⁹ decided that was a violation of the Due Process Clause, because it infringed on the liberty of the boss and the worker to agree on how long the workday should be.¹⁰

As you do probably know, that view of the Due Process Clause has long since gone out of style. For many decades, *Lochner*, among those who talked and thought and wrote about such things, was essentially a byword for evil, both on the left and the right.¹¹

On the left, I suppose, it is obvious why it would be a bad thing, because it was an example of reactionary judges beholden to greedy business interests fighting against progressive legislation that protected working people from oppression.¹² The left did not like courts that invalidated maximum-hour legislation.

But, on the right, *Lochner* also came in for a lot of abuse because it was an example of so-called judicial activism—the tendency of judges to hold laws unconstitutional when the main flaw in the law is that the judge does not like it.¹³ Conservatives think—at least many of them do—that liberals are judicial activists, that they are always tossing out perfectly good laws for no good reason.¹⁴ They liked, and perhaps to some degree still do like, to taunt liberals by saying, “You are just like those Neanderthals who

5. 198 U.S. 45 (1905).

6. *Id.* at 64–65.

7. *Id.* at 52.

8. *Id.* at 45.

9. *Id.* at 74–76 (Holmes, J., dissenting).

10. *Id.* at 64–65 (majority opinion).

11. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* 1–2 (2011).

12. *Id.* at 2.

13. *Id.*

14. *Id.*

decided *Lochner*.” There can be no crueler insult than comparing you to those who support *Lochner*.

In the last—oh, I don’t know—five, ten, fifteen years, *Lochner* has made a little bit of a comeback—just a little bit. I do not think the Supreme Court is soon going to be invalidating wage and hour legislation under the Due Process Clause. But Richard Epstein, a professor I greatly admire, has said favorable things about *Lochner*.¹⁵ Another professor, named David Bernstein, published quite a good little book called *Rehabilitating Lochner*.¹⁶ It is a good book because it doesn’t go overboard. It does not try to tell you that *Lochner* was the greatest and wisest piece of jurisprudence since the beginning of the Republic. But it gives you some interesting details here and there and also kind of an interesting narrative.

You learn from the Bernstein book that the law in *Lochner* was not really designed so much to protect poor workers from oppression by greedy bosses as to protect established bakery businesses from upstart competitors and shops run by Italian or French or Jewish immigrants.¹⁷ In the smaller bakery shops it was not possible to operate on a ten-hour day.¹⁸ The only way to make it pay was for the two or three people who worked there to sleep in the store and to work pretty funny hours.¹⁹ The purpose of the law was, more or less, to put those people out of business.²⁰

You also learn that there was a legitimate legal tradition of constitutionally protected freedom of contract that supported the *Lochner* decision.²¹ Again, I do not want to go overboard on this, but it may have had more to be said for it than some of the other constitutional protections that Justices have thought up over the years.

You may have noticed that there is not a freedom-of-contract clause in the Constitution, but there are quite a lot of clauses that are not in the Constitution that somehow are now in the Constitution. The freedom of contract seems as respectable as the next one.

You learn also that the *Lochner* tradition, the line of jurisprudence stemming from *Lochner*—this I learned from Professor Bernstein’s book—became the basis for invalidating a Louisville, Kentucky city ordinance that said black people could not buy homes on white blocks.²² That law was invalidated by the 1917 Supreme Court unanimously,²³ although it is said that Justice Holmes thought about dissenting but did not.²⁴ I believe his reputation would not have gained from it if he had. But a unanimous Supreme Court in 1917 said it was unconstitutional, as a violation of

15. See, e.g., RICHARD ALLEN EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

16. See BERNSTEIN, *supra* note 11.

17. *Id.* at 23–25.

18. *Id.* at 25–26.

19. *Id.*

20. *Id.* at 23–25.

21. *Id.* at 18.

22. BERNSTEIN, *supra* note 11, at 82.

23. See *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917).

24. BERNSTEIN, *supra* note 11, at 82.

essentially the *Lochner* principle, to tell black people they could not buy homes in a block that was occupied by whites.²⁵

I was, in my relative youth—younger than I am now—one of those conservatives who derided *Lochner*. For me, as for some others, attacking *Lochner* was a way of proving how principled I was, because I was in sympathy with the ultimate result of the decision. I am sure some of you will be horrified that such a person could live, but I did, and do, disapprove of the law invalidated in *Lochner*. The liberty I believe in does include the liberty of people, a boss and a worker, to agree on the terms of their employment without state coercion. I am not a total fanatic. I do not think they can agree to work twenty-two hours. But I do think laws like the one in *Lochner* and some other even more egregious examples—I do not understand minimum wage laws at all, I have to tell you—I do think they are a significant interference with liberty, and I would be happy to have a world in which they did not exist.

Nevertheless, I am principled. I was very impressed—and I was not the first person to be impressed—by Justice Holmes’s dissent in *Lochner*.²⁶ I suspect, although I am not sure, that Justice Holmes was no fonder of the law that was upheld in *Lochner* than the majority Justices, but he did not think it was right for the Supreme Court to throw it out.

But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.²⁷

More in the same vein. It is quite a good opinion. That was what I believed, and maybe I still do. The Bernstein book, and a few other things, got me to thinking. I came to a point where I thought myself into a state of some confusion.

Then I learned something, as I often do, from a student that I was supposed to be teaching. I have for a few years been a co-teacher of a class at Cardozo Law School called “Authority and Liberty.” Co-teaching is one of those great gigs you get if you are a judge. What it means is that a real law professor—in this case, David Rudenstine—teaches the class and I get to show up and kibitz and make myself obnoxious. It is wonderful. I do it very well.

One year, the first class, he is teaching the class, and he goes around the room and asks the students what their names are and why they are taking the course. Of course, he gets the usual answers: “I am taking the course

25. See *Buchanan*, 245 U.S. at 81–82.

26. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE* 347 (3d ed. 2009); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1500 (2005); Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 144 (1927).

27. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

because I love constitutional law”; “I am taking the course because you are such a cool professor.”

Then he gets to one young woman, who says, “I am taking the course because I hate authority.” The course is called “Authority and Liberty.” She didn’t quite say “I love liberty.” That would have really sounded a little too pompous. I wouldn’t have said it either. But it is the same thing, really. It is absolutely the same thing. And I decided that this student and I would probably think alike.

The professor starts teaching the class, and the first thing we talk about is *Lochner*. See, this is relevant. You thought I was completely off the track, but I am back on *Lochner*.

After some discussion, David Rudenstine asked the students to vote on whether they agree with the decision or not. The woman who hates authority votes along with everyone else that it was wrong.

I say, “Wait a minute. I thought you hated authority.”

She said, “Yeah, but I think the Supreme Court is authority.”

It may not be the world’s most original idea, but I had never seen it put or put it to myself that neatly or concisely. That is the dilemma of liberty that I am talking about.

As a judge, I consider the protection of liberty and the enforcement of limits on authority as one of the most important parts of my job—maybe the most important. But I can only do it because I am clothed by the state—by Caesar, if you like—with authority. I have no reluctance to wield my authority to limit Caesar’s power, even though it was Caesar who appointed me. But I am reluctant, and it seems to me an infringement on everyone’s liberty, to wield authority that—I am going to stop talking about Caesar; I am going to go back to talking like a normal person—to wield authority that the people of the state of New York have not given me. Yes, I do regard “Caesar” and “the people” as synonyms. And I do think it is wrong to wield authority I have not been given, to exceed the limits, if you like, on my own authority. In other words, can I protect liberty without acting like a tyrant?

To go back to *Lochner*, was the majority right to protect the liberty of people to agree on the terms of the hours of work or whatever, or was Justice Holmes right in saying that the majority was overreaching and substituting its own opinions for those of the people of the state of New York?

That tension is at the bottom of a lot of what I do, the tension between wanting to promote as much liberty as possible and wanting to stay within the limits of my own power.

It is not just when I interpret the Constitution. As a matter of fact, I feel the same tension, maybe more strongly, when I interpret the rent control laws or almost any other regulation of economic activity, of which there is not a great shortage in the State of New York. But I am going to limit this talk to interpreting the Constitution because that obviously has more sex appeal.

To simplify what I am talking about, I am going to put *stare decisis* completely aside. *Stare decisis*, respect for judicial precedent, for me, just raises the question of which judge is deciding the question. It does not speak to the question of whether the power is that of a judge or someone else, which is the question I am interested in today.

So let me assume, for simplicity's sake, that every issue coming up is coming up for the first time—there is no *stare decisis* problem. Every issue does, you know, come up for the first time once. The question is how in that context a judge is supposed to be faithful to liberty and to respect the limits on his or her own power.

I have not got, you'll be shocked to hear, a perfect answer to that question. But I am convinced of one basic point: that the only way to prevent a judge who is interpreting the Constitution from overstepping his limits or her limits—if I should use the male pronoun now and then for a judge, don't be offended; it is because I have a particular judge in mind that I am really thinking about—the only way to prevent a judge from overstepping the limits on his or her authority is what is called “originalism.”

I actually hate the term “originalism” because it sounds like some esoteric doctrine someone thought up, and I really think it is the most obvious principle in the world. If you are interpreting the document, you ought to try to figure out what the people who wrote it meant. That should not be an “ism.” The opposite: non-originalism, or belief in the living Constitution, or whatever you want to call it, that ought to be an “ism,” because I think that is weird. Nevertheless, “originalism” is the name that has stuck.

When I say you have to try to figure out what the authors of the document meant, I do not suggest that that is easy or that it solves all the problems. There are huge problems with originalism, with interpretation.

What do you mean by “the authors”? You mean the guy who wrote it—it was a guy, by the way—the convention delegates who passed it, the voters who ratified it?

How do you figure out what they meant? Are their words, the words they wrote into the text, the only legitimate evidence of what they meant? Can you look at so-called legislative history? And what does the word “meant” even mean? Do you look narrowly at what they were specifically thinking about, or broadly at what they were trying to accomplish? You want to say “broadly at what they were trying to accomplish.” But if you get carried away with that, you can say they were trying to accomplish good—they wouldn't want to accomplish bad, right?—and therefore anything I think is good is what the Constitution requires. That seems a departure from the principle of interpreting the Constitution according to its original intent.

Also you have to take into account that, if the authors of the Constitution were not idiots, they must have known the Constitution would be applied in new situations they could not foresee. So they must have meant there to be

some flexibility in interpreting what they wrote. And the problems with interpreting go on and on and on, until they make your head spin.

But those, to me, are not reasons to reject originalism. They are inherent in the process of interpreting any written law. They are just reasons it is hard, not reasons not to do it.

Interpreting the Internal Revenue Code is no picnic either, but nobody goes around asking tax lawyers, “Hey, are you an originalist or do you believe in a living Revenue Code?” You may have a hard time figuring out what the people who wrote the Code meant, but you do not say, “I don’t care what they meant. I am going to make the Revenue Code mean what I want it to mean.”

Yes, it is true that the United States Constitution dates back further than the Internal Revenue Code. But despite its age, we actually know quite a lot about what the people who wrote the Constitution were thinking. It was a rather high-profile event. It got a lot of attention. People have been writing about it for years.

We probably know less about the original intention behind many modern statutes than we do about the original intention behind provisions of the Constitution. I can certainly show you provisions of the New York Workers’ Compensation Law in which the original intent of the authors is a lot harder to figure out than the original intent behind some clauses of the Constitution, but I do not know anyone who believes in a living Workers’ Compensation Law. We do our best to interpret the Workers’ Compensation Law in accordance with the intentions of its authors.

The great defense of those who would abandon originalism is, “Come on, you are sticking us with a document from 1787 that is almost impossible to amend. If you do not let us change it, to update it—us judges—then it just will not work.”

Among the flaws in that argument is that states have constitutions too. You may not hear as much about them, but I taught state constitutional law for a few years, so I know whereof I speak. States really do have constitutions. They are mostly relatively recent. They get updated all the time.

No one, as far as I know, has made a coherent intellectual case against originalism in interpreting state constitutions. But, of course, nobody pays the slightest attention. Everybody interprets state constitutions exactly the same way as the federal one—and they often have the same words in them. It would be almost ridiculous not to. You might reach different results, but you do not reach different results because you say, “Oh, I am an originalist when I interpret the state constitution and not the federal one.” That would be a comedy routine—all right, not a very successful comedy routine.

But the point I am trying to make is that there is a certain absurdity in the rejection of originalism. For me, the clinching argument for originalism is not that it has no problems but that it is the only way to do it. I know everybody says there are seventeen different ways of interpreting the Constitution. I shocked a group of students not too long ago by saying no, there aren’t; there is only one. But I guess there are two.

The alternative to the right one, the one I believe in, is absolutely unfettered judicial tyranny. If you are not an originalist, it is your Constitution—that is, it is yours if you are the judge. It means exactly what you want it to mean, including things that would have had all the people who wrote it and voted for it running out the door screaming. If you are not an originalist, you can do that.

Nonoriginalists, of course, do not say that the Constitution means whatever they want it to mean. They say, “My decision-making process is a combination of ingredients. I look at the needs of contemporary society. I look at the text and history of the document. I look at the deep-seated traditions of our people. I look at whatever else I feel I want to look at. I give due weight to all of them, and I come up with a wise, judicious interpretation.”

Now, of course, since only the judge decides what the due weight is that he gives to all these things, the answer is always—and I do mean always—the one the judge wants it to be.

I do not mean that the nonoriginalist judge always arrogates all decision-making power to himself or herself. That judge may defer to the legislature. A nonoriginalist judge will defer to the legislature or the Executive or the states or somebody else, to exactly the extent that that judge thinks deference is a good idea—not to the extent the authors of the Constitution required it but to the extent that the judge is in favor of it. The nonoriginalist judge writes his or her own constitution.

If you think you can show me a counterexample, show me a nonoriginalist judge who says, in effect, “I really wish the Constitution said this. But it does not, and I cannot make it say what it does not say.” When you show me that judge, what you have shown me is a judge who, for that moment and to that extent, has become an originalist.

That is my rant about originalism and nonoriginalism. What does it have to do with the dilemma of liberty that I named this talk after? Nothing, really, except to show me that there is no way out of it. I cannot use my judicial office in the service of liberty or in the service of any other cause I believe in without usurping authority. My job is not to serve liberty; it is to do what the authors of the Constitution want me to do. I am just a conduit for their ideas. I am a kind of sophisticated automaton. What I happen to believe in is totally irrelevant.

You do not really buy that, do you? All right, maybe some judges do cheat on that once in a while.

But there is another answer: “Wait, wait, wait! There is no problem at all. The Framers of the Constitution agreed with me on everything. They were so smart that they thought exactly as I think and, therefore, I can be a complete originalist and nevertheless do anything I like.” That is a rather obviously seductive escape hatch for a judge who is interpreting a text and also has his or her own ideas of what he or she would have written. Those who take that escape route, as I hope I have made obvious, are often pretty well soaked in hypocrisy or self-delusion or both.

Maybe I'm just proving that point, but I am going to tell you that for the judge who loves liberty there is some legitimacy to the "The Framers agreed with me" theory.

Liberty was, after all, a pretty big deal to the people who wrote the Constitution, especially the people who wrote the Bill of Rights. Their idea of liberty was, surely to a significant degree, the simple, old-fashioned idea of liberty, the kind that Jefferson thought was self-evidently our inalienable right, the kind Locke wrote about, the kind Adam Smith believed in. All these people either were alive when the Constitution was written, or their memory was green.

The people who wrote the Constitution and the Bill of Rights may well be thought to have believed in what is sometimes called the "classical liberal paradigm," in which a limited government provides a level playing field and enforces a few clear, simple rules. That was, to a significant degree, part of the Enlightenment intellectual climate, the climate of the late eighteenth century, the climate the Constitution was created in. And it is also the kind of liberty that a number of people, of whom I am one, still believe in today.

So I tell myself, anyway, that I can be both an apostle of liberty and a faithful adherent of the original meaning of the Constitution, sometimes, in some cases, within reason. And when I've got it figured out better than that, I will let you know. I will also let you know when I decide what I think about *Lochner*.

Meanwhile, I am going to close with a true story that may or may not shed some light on what I am saying.

One of my colleagues on the court some years ago put a sentence in a draft opinion that said something to the effect of, "*Lochner* has long since been discredited." Now, if he had normal, sane colleagues, he would not have had to worry about that sentence.

But I was on the court. I sent him an email saying, "Humor my eccentricity. Change the sentence that says '*Lochner* has long since been discredited' and say instead, '*Lochner* has long since been abandoned.'"

I have no problem saying that, because it is true. *Lochner* is dead and it is not coming back—obviously true. But I might bring it back if I could, or I might not. For some strange reason, I am actually wasting my brain cells worrying about that wholly academic question.

Speaking of questions, maybe I should take a few.

QUESTION: How does textualism fit into originalism?

JUDGE SMITH: As I conceive it, textualism is a subcategory of originalism. Textualism is an answer to the question "How do you figure out what the original intention was?"

Of course, original intention is much, much more slippery than it sounds. We really do not want to absolutely read the mind of every person who supported the legislation. If we read it, it would probably say, "God, I want to get this done and get home for the evening and not get in trouble with my constituents."

But it is pretty widely admitted that the words that the author actually wrote are a pretty good guide to the original intention. I think some will say that they should be the exclusive guide, or they should be the exclusive guide unless they are ambiguous. That, to me, is entirely consistent with the idea of originalism.

I do consider myself sort of a soft-core textualist, if that is your question. That is, I would much rather be relying on the words actually written in the Constitution or in a statute than on what some genius said it was supposed to mean.

But I am not a complete fanatic on that. I think there are times when it is really fairly clear that the legislature or the authors of the Constitution or whoever they are meant something different from what they said—that is, they really just made a mistake in expressing themselves. When I am satisfied that that is true, I try to go with what I think they meant rather than what they said.

QUESTION: While you were on the Court of Appeals, did you ever decline to participate in a decision? If so, what was your reason?

JUDGE SMITH: It depends on what you mean by “decline to participate.” I have declined to participate in the majority and dissented. I do it all the time. My beloved former chief judge probably aged about seven years trying to deal with my tendency not to participate in her decisions.

If you mean, in a more technical sense, do I ever not participate by simply withdrawing from the case, yes. That is almost always for a technical reason—Dan Kornstein’s law firm is involved, or someone else I used to practice law with and still have some ties, that sort of thing.

QUESTION: Can you address the possibility that the drafters agreed only on the language that they used and not on the meaning that they intended to be attached to it?

JUDGE SMITH: Yes. I certainly have had cases where I thought that was true. I suppose that is never a hundred percent true in that almost any language they agreed on is going to have more meaning than a blank piece of paper. My view of nonoriginalists is that they really think that they have a blank piece of paper in front of them.

I do not ever think I have that. But certainly I have made some decisions—it happens plenty of times—where there was no evidence of what the people who wrote it were thinking other than the words themselves, either because they were not thinking anything else or because the evidence is hopelessly lost—then you do your best. You read the words and look at what you think they mean.

You look at, if necessary, the historical background in which they were written, and you try to attribute—though it may be a fiction, you attribute to the authors a certain degree of intelligence and wisdom. Of course, now I am sliding in the direction of saying they all thought just like me. You do the best you can.

QUESTION: The Constitution says you do not have to be a witness against yourself in any criminal proceeding.²⁸ If the IRS asks you to come to court and asks you to present your books and records and they can be used against you, can you reject that?

JUDGE SMITH: That is a question that has gotten a good deal of attention. It is not self-evident that turning your books and records over to the IRS is the same as being compelled to be a witness against yourself in a criminal proceeding. But, as you are about to do, you can certainly construct an argument that is exactly that.

Many, many pages have been written, only a very few of which I have read, that try to answer that question. The short answer to your question is I am not really well-educated enough in that area to answer it.

QUESTION: Some historians make a nuanced difference between liberty and freedom, and make much of it. David Hackett Fischer comes to mind, but there have been others. Even sometimes a comparison of the writings of Thomas Paine with Edmund Burke, of all people, plays that dichotomy. In your view as a jurist, are there nuances there that might come into play in the dilemma?

JUDGE SMITH: I am probably not educated enough to deal with the question. I can only say that I could imagine a difference between liberty and freedom. I am used, of course, to the religious idea that to serve God is perfect freedom.

But I tend to stick to what, for me, is the simpler idea. I prefer the word “liberty” because it seems more explicit. It is just not being forced to do what you do not want to do. It certainly—yes, people do sometimes have to be forced to do what they do not want to do. I am not a lunatic or an anarchist. But when I use the word “liberty,” that is what I am talking about.

QUESTION: In your previous experience before you were on the court, you had not been a judge, a legislator, or a member of the executive branch. I am curious as to whether you, during your time on the bench, have changed your opinion at all about either the meaning of “liberty” or the meaning of the dilemma . . . by virtue of your deeper understanding.

JUDGE SMITH: I guess the short answer is I do not know. I certainly think about those questions a lot more since I became a judge. One of the nice things about the job is you can, and have to, spend a good deal of time thinking about more intellectually profound questions than the ones that come up in law practice. But I did think about those questions before I was a judge.

The question really is, if I had given this speech ten years ago, would it sound different? The answer is I am sure it would, but I would be very hard-pressed to say how. I think the general ideas that I have articulated have probably not changed, but I guess I understand them better. I hope I do.

28. *See* U.S. CONST. amend. V.

QUESTION: This may be a definitional question, Judge, but I hope it is not just that. The way you began with your definition of liberty was very much liberty against government and the coercive power of government. If that is true, why, when you intervene as a judge to prohibit the government from asserting its coercive power, do you think you are actually interfering with those governmental offices' liberty or the majority's liberty? It seems to me that yes, you are interfering in a way, but it is not with liberty as you defined it in the first instance.

JUDGE SMITH: Well, you may be right. Certainly liberty and democracy are not the same thing. When I, as a judge, prevent a democratically elected government from doing something that it wants to do, I am certainly more directly interfering with democracy than with liberty.

As between the two, I put a higher value on liberty. I am not a worshipper of democracy. But I do not think they are unrelated. I do think that a democratic state, for all its disadvantages, is a much freer society than any other kind they have come up with.

I do think that if, in the name of liberty, I were by some magic to create a community in which judges made all the decisions, and nobody got to vote, and all they had to do was take orders from us—I am absolutely convinced that, whether all my decisions were pro-liberty or not, after that state had settled into its existence, it would be a much less free community than what we started with.

QUESTION: I know you did not want to talk about precedent, but I think when you talk about originalism, the main criticism that people end up having is that the originalist seems to take all this authority unto himself, meaning there are 200 years worth of judges saying things over time, maybe making incremental changes to the law, and one guy comes along and says, "You know, I was reading this history book, and it says that in 1787 the Confrontation Clause said something completely different than the way we are interpreting it now." It appears, maybe, to the practitioner that this judge took a lot of power for himself and maybe—I don't know—confused everybody else in the process.

JUDGE SMITH: I think it is a legitimate point. One reason I did put precedent and stare decisis aside was that I would very often be inclined to respect stare decisis even where it had totally screwed up the original meaning of the Constitution—but not always.

My favorite example is actually the Double Jeopardy Clause.²⁹ If I hadn't left my copy home, I would take it out and read it to you. But I believe it says that no person shall twice be put in jeopardy of life or limb.

It could hardly be clearer that that clause is limited to cases of capital punishment and mutilation and has no application where the only thing at stake is imprisonment. It was decided, I think, somewhere in the 1870s that it should be extended to cases of imprisonment.³⁰ In case you think judicial

29. *Id.*

30. *Ex Parte Lange*, 85 U.S. 163, 170 (1873).

activism is new, the opinion says little more than just, “It looks like a good idea to us.”

I do not suggest, and I do not think anybody suggests, that we correct that error and limit the double jeopardy clause to capital cases. There are some decisions that may well have been errors when they were made that seem to be so benign and the community becomes so happy with them that we stick with them.

I do not accept your implication that *Crawford v. Washington*³¹ was an unjustified disregard of centuries of precedent. I find Justice Scalia’s opinion in *Crawford* pretty persuasive in saying that the result of departure from the original text has been chaos no one can understand and a very significant erosion of the values that the Framers were trying to protect.³²

QUESTION: Students should feel free to ask questions also. I am a torts professor and a lover of the common law, as well as a deeply suspicious person at some level. So when an esteemed and brilliant person says “just one little technicality, let’s not worry about precedent,” that [causes me] to worry about something. So I have another question about precedent.

The question is whether the dreadful fear of horrendous judicial activism looks different through the eyes of someone like Scalia, who in his writings, such as in *A Matter of Interpretation*,³³ has a certain amount of contempt for the idea that the common law has a real integrity. He says the common law is a playground that first-year law students learn to play in and do whatever they want.

Some of us do not believe that precedent and the common law present that kind of a playground. The question is: If you allow precedent back in and you imagine that judges behave, for example, like Justice Harlan or Justice Holmes, and have actually a good deal of respect for the power of precedent, does the need for originalism diminish in any way?

JUDGE SMITH: Well, yes and no. You expose a lot of area for comment, so give me a few minutes here.

By putting precedent aside, I did not mean to suggest that it is unimportant. It is very important. I think respect for precedent is important. Maybe someday I will give a lecture named after somebody on when I follow precedent and when I do not.

It does not seem to me directly relevant to the question of whether you have to follow the Constitution or make it up. The question of whether you follow some previous judge when that judge has made it up is a third question, a much harder question, which I was trying to avoid addressing.

Does it give me consolation to know that the same judges who pay no attention whatever to the words the Framers wrote are going to be very respectful of the words their predecessors wrote in decisions? Well, if I believed it, it might.

31. 541 U.S. 36 (2004).

32. *See id.* at 57–69.

33. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998).

But I am inclined to think that one form of judicial arrogance begets another, and that a judge who has no respect for the text he is interpreting or she is interpreting is quite likely to be equally disrespectful of a precedent that he or she does not like.

QUESTION: I take your point that the state constitution has been amended to the point where we should take that into consideration. However, I think part of the reason that originalists have so much material to look to is that there is sort of a fetishization, I would call it, of the Constitution in terms of this respect—so much has been written about the Founding Fathers, about the Constitution Convention, et cetera, which I think makes the democratic process less likely to amend it than they would state constitutions, which are much newer documents and do not have the same historical significance. How would you evaluate that in your argument?

JUDGE SMITH: I think everything you said was true, but I am not sure what the argument is.

QUESTION: You seem to be making a point that for originalists, why don't we look to state constitutions, which are amended all the time, and the outgrowth of that would seem to be—

JUDGE SMITH: No, actually that is not the argument I think I am making. I was trying to refute the idea which is used to attack originalism that a 1787 document which is rarely amended cannot be immutable; we have to be able to update it from time to time.

Between you and me, of course I know that judges update a lot of stuff from time to time. I am not saying this is a perfect world. But as a matter of doctrine and principle, I do not think that the age of the Constitution is a sufficient reason for deciding you are not bound by its text.

To illustrate that point, I mentioned the state constitutions, which do not have that age and do not have that immutability, and which everyone who is not an originalist reads exactly the same way as the federal Constitution.

DEAN MARTIN: One more question.

QUESTION: You began with what was an interesting and deeply grounded—I'll say riff—on liberty, and you cited Jefferson, among others. But, of course, Jefferson was also a lover of equality. I guess I am wondering about the connection between beginning with liberty and moving to originalism, and whether you see it as a different proposition for a more equality-oriented originalist judge—in the *Lochner* example, for those who might think that the worker negotiating with the boss is free in one way, but certainly not equal, whether the judge who is—and perhaps the opposition is wrong—the judge who is more sensitive to the equality piece than the liberty piece, but still thinks of himself or herself as an originalist, will come out differently. How often does text bind both judges, regardless of which Jefferson they favor, to the same result?

JUDGE SMITH: Look, there is no doubt that judges are going to come out differently depending on their biases. That is true whether you are interpreting the Constitution or the Internal Revenue Code or the

Affordable Care Act. Judges are human, and nothing, really, is going to succeed in utterly binding them.

So I have no doubt that what you would describe as a liberty-oriented judge and an equality-oriented judge would look at the same text and draw very different conclusions from it. But I take some comfort in the fact that they at least consider themselves bound to look at the text and to maybe pretend—or maybe, indeed, really mean—that they are trying to figure out what the people who wrote it meant. I do understand that they will not always reach the same conclusions.

DEAN MARTIN: Thank you very much, Judge Smith.

[Applause]