The Supreme Court and the 3x5 Card
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WOODS: Let's talk about *McCulloch vs. Maryland* in 1819. Can you set the stage for us with regard to what was the case about, what the facts of the case were? And then secondly, what's so important about the way John Marshall decided it?

GUTZMAN: Well, the facts of the case were that in 1816, Congress passed a bill into law that was signed by President Madison chartering the Second Bank of the United States. And although President Madison had changed his position on the constitutionality of the congressional law chartering banks, not all Republicans had, so several states adopted kind of protest measures, including Ohio and notably Maryland, doing things like saying that if your bank is chartered outside our state, you can't operate a branch of it within our state. Or the Bank of the United States can't operate within the bounds of this state. That kind of thing. So the cashier, what we would now call the branch president, of the branch in Baltimore, brought suit, saying that the $15,000 fine he was being assessed for violating this state statute was unconstitutional. The reason was, he said, that Congress had power to charter a bank and the state governments had no constitutional right to interfere with a legal instrumentality of the federal government.

WOODS: What does John Marshall say, and more significantly, how does he say it? What's the argument behind his decision?

GUTZMAN: Well, he addresses a couple of issues. One is that question of the bounds of Congress' power. And the other one is about the right of states to tax instrumentalities of the federal government. First, when it comes to the bounds of Congress' power, he gives us a full Hamiltonian reading, essentially cribbing from Hamilton's memorandum on the 1791 bank bill, the one that chartered the First Bank of the United States. What that comes down to is that anything that the Constitution doesn't say Congress can't do, it can do. Which is, of course, the exact opposite of the way that the Constitution was sold to people—as empowering Congress to do only the things that it expressly said Congress can do. So here you have a Constitution that lists only a very few things expressly that Congress can't do now. It can't adopt an *ex post facto* law, for example. But beyond that, essentially Congress can do anything. And then the other issue was whether Maryland had a right to tax the branch of the Bank of United States in Maryland. And Marshall said no. A state can't tax a federal instrumentality at all—again, basically negating any role of the states in this area. What this amounted to was essentially saying that Congress could do basically anything it wanted to do.

Here we see the classic Hamiltonian position, 15 years after Hamilton had died, well after his party had ceased to be a viable national party and even as the people had repeatedly voted Republican because they rejected Hamilton's take on the Constitution. So when James Madison, in retirement, was sent a copy of *McCulloch vs. Maryland*, his response was: if the people had known that the Constitution would be read that way, they would never had ratified it. This was not hyperbole. If you check the discussion of Virginia's ratification convention in my Madison biography, you'll see that people were assured repeatedly, because they insisted on it, that the Constitution was only going to give the Congress a few powers. Basically, *McCulloch vs. Maryland* stands for the opposite proposition. So Madison was exactly right.

WOODS: You know what's funny, Kevin? There's a George Soros front called ThinkProgress. It's a website, I guess. And it's all left-wing and it's all predictable. It's the worst left-wing too. It's like Hillary Clinton. She was kind of part of the counterculture, but then when she realized she could make more money by combing her hair and looking respectable, she joined the establishment on the left wing. It's that kind of left wing. And every time there's somebody who makes a Tenth Amendment sort of argument or who argues the way you do about the Constitution, ThinkProgress will trot out *McCulloch vs. Maryland* and they'll trot out John Marshall and they'll sternly lecture everybody for not understanding how to interpret the Constitution.

Now what I find funny about that is that these are the same people, spiritually anyway, who 30 years ago were saying, hey, hey, ho, ho, Western civ's got to go. We're tired of learning about dead white males. But they make an exception for John Marshall. That's

one dead white male they are glad to suck from the teat of.

How do you respond when somebody says look, Gutzman, it's all well and good for you to spin these theories, but what matters is that John Marshall is the most illustrious chief justice of all time and these are canonical cases. Are you saying, nearly 200 years later, that a canonical case of this sort was wrongly decided and we need to rethink everything in light of that?

GUTZMAN: Well, Madison distinguished between the holding in the case and the reasoning. Madison had come by 1816 to the conclusion that, due to a long history of everybody else of any significance in federal politics accepting the law that chartered the First Bank of the United States, they have precedent establishing that Congress can charter a bank. Now I don't approve of that myself, but that was his way of understanding He still continued to insist on the original Jeffersonian reading of 1791, which, again, was also the Federalist position during the ratification discussion, that said that Congress was only going to have the few enumerated powers. And of course, in the Richmond ratification convention, Governor Randolph repeatedly spoke of the powers that were "expressly" delegated. Now Marshall did not contradict Governor Randolph in the ratification convention. That is, Marshall was one of the second-rank Federalist proponents of ratification in the Richmond convention in 1788, but he talked basically about the judiciary. He didn't say anything about the nature of the Union or the limits of the powers of Congress to indicate that the Constitution would be read the way that he would one day read it in *McCulloch vs. Maryland*. And what Madison was writing about in that letter were he bemoaned Marshall's reasoning, was that what this amounted to was saying, well we have a Constitution. We have a Congress. We have an executive and courts and now they can do whatever they want. Really the only check on their behavior is the suffrage. That was, again, not what people had been told. So it's true that statists, people who favor unlimited federal authority, do tend to point to John Marshall, I think mainly for ends he wouldn't have approved of personally, but he was not representative in any way of Federalists in 1788 in arguing in *McCulloch* that Congress had more or less unlimited authority. That was the opposite principle from the one that people were told they were getting.

WOODS: You know, Kevin, on the other hand, isn't it interesting how many conservatives, too, seem to like John Marshall? On the one hand you've got the ThinkProgress people who like him, and on the other hand you have conservatives who think he was a man of property and tradition and opposed the rabble, the crowd. He was against some populist or otherwise undesirable measures of the state governments and so, warts and all, we've got to embrace John Marshall as a great conservative.

GUTZMAN: Well the reason you hear a lot of conservatives make this kind of argument has to do with the way that lawyers are educated in the United States. They way you're educated in the United States to be an attorney is, nowadays in every state it's required that you go get a law degree. And the school from which you get a law degree has to be certified by the American Bar Association. In every one of these schools, they require you to take a course in constitutional law. No, not constitutional history but constitutional law, which means you have to absorb the great body of mainly Supreme Court precedents about the Constitution. And so you start with the first time you meet, reading Marshall's opinion in *Marbury vs. Madison*. And then class two you read *McCulloch vs. Maryland*. And the next thing you know, you're echoing John Marshall.

Now I'm not saying there's anything wrong with this as far as training lawyers goes, because law school is trade school and you're learning how to speak judgespeak so you can win a case in court. Clearly that's what you have to be able to do. But you shouldn't confuse that with actually being informed about the Constitution or about the way the system should work. So lawyers tend to think that since they have their JD they're some kind of great authorities about the Constitution, when really, you know more about the Constitution by reading it without reading John Marshall than you do by reading it and then reading John Marshall, or by reading John Marshall and then reading the Constitution, because he, as Madison bewailed, reached different conclusions from the ones the people were told they were getting when they agreed to the Constitution. So this is basically an insuperable obstacle to the goal of restoring constitutional government in the United States or arriving at any kind of legal regime that says the federal government has limited authority.

WOODS: We could do a whole program on John Marshall, but let's mix it up a bit. Instead of going right to the twentieth century, though, let's skip to a postbellum case: the Slaughterhouse Cases. Tell us what the Slaughterhouse Cases were and why they are important.

GUTZMAN: There's actually a very good book about this by two professors from Louisiana named Labbe and Lurie and it's called the Slaughterhouse Cases. The Slaughterhouse Cases involved a situation in Louisiana that had arisen due to the pestilential environment, the natural environment of New Orleans. New Orleans, essentially, sits in a big bowl, and in the nineteenth century, this bowl was kind of like a huge toilet. So it very difficult for waste to be removed from the city, and it was very unlikely that it would make its way out to the ocean. So when there were slaughters, there were a large number of slaughterhouses around the city and many of them upriver from the city, and you ended up with animal carcasses and animal offal in the river. Every few years, there would be a major wave of yellow fever or cholera, typhoid—all kinds of things would ravish the city of New Orleans. New Orleans perennially had the highest death rate in America.

So finally, shortly after the war, the city and the state decided that they would require that anybody who wanted to practice butchery in the area around New Orleans had to do it at one designated site. You could not have a slaughterhouse; there was going

to be this one a place where butchers could work. And so some people who were deprived of their livelihood by this law, who couldn't get access to this place, sued and they said several things. One was, they were being put into an involuntary servitude position because they were being made to work for these particular people, which they didn't want to do. Another was that they were being denied the equal protection of the laws because the favored owners were being given a monopoly, and this was unjust and contrary to Section 1 of the Fourteenth Amendment. I should've said the involuntary servitude accusation was about the Thirteenth Amendment's ban on involuntary servitude. But the second one about the equal protection was about Section 1 of the Fourteenth Amendment, which has a clause saying that no state can deprive any person of the equal protection of the laws. Ultimately, they said they'd been deprived of due process. They'd been deprived of property without due process because they didn't get any kind of a hearing before they were made to give up their old positions and apply for work at this state-designated slaughterhouse.

Ultimately, the Supreme Court took this matter up. The court said, first of all, in regard to this involuntary servitude, really? Are you serious? You guys are white. You're not involuntary servants. Nobody is ever going to think the Thirteenth Amendment applies to anybody who's not black and a former slave. So go away. When it comes to the equal protection clause, they said, again, you're a bunch of white butchers. This idea that you have that we should use the Fourteenth Amendment equal protection clause to weigh every enactment of an American legislative body would make us a kind of super legislature, and we don't think that in adopting the Fourteenth Amendment the people were saying they wanted to abandon their traditional federal model of government, the model that says that most questions will be decided on the local level, mainly through elections. And here you're saying that we, the Supreme Court, should have a kind of censor's role over everything that happens in any American legislative body. We're not going to do that. The due process argument, well, you're not really being deprived of property. You don't have a property right to be dumping offal in the Mississippi River upriver from New Orleans.

Oh, the one other thing was: the other clause that was implicated in this case was the privileges and immunities clause of the Fourteenth Amendment. There the plaintiffs said, we're being deprived of the privilege or immunity of American citizenship, which is the right to practice your lawful trade in order to make a living. And the courts said, well, that's an interesting way of reading that clause, but we have a privileges and immunities clause of Article 4 of the Constitution, which applies to the federal government, and we know that in *Corfield vs. Coryell*, Justice Washington said that the only privileges or immunities of American citizenship are the right to be protected by the U.S. Navy at sea, the right to go to an embassy if you're in a foreign country, the right to travel to the federal capital, the right to use the inland waterways. These are all rights of being an American citizen. But most of your rights have always been, or are still going to be, protected by your state governments. So your state government is responsible for ensuring that you're treated as a free person in basically every other way, and obviously, your claim that you have a right to practice butchery someplace other than the designated place right outside New Orleans is not a federal right.

So the chief significance of the Slaughterhouse Cases is that the Court's hesitancy about becoming the grand censor of American legislative behavior and the court's relegation of the privileges and immunities clause to a little corner in which a very small number of privileges and immunities were going to be enforceable through it, meant that that the Fourteenth Amendment was treated for a long time as a not very significant provision.

There's a really outstanding book about this general question of the Fourteenth Amendment's meaning by Raoul Berger called *Government by Judiciary*, and he more or less entirely agrees with what the Court did. That's a very brief summary, obviously, but what Berger does is to go through the legislative discussion of the Fourteenth Amendment and treat seriously the idea that technical language in the Amendment should be treated the way the same language had always been treated before, and arrives at more or less the same conclusion as the Court came to. So the Fourteenth Amendment, then, even if it was validly ratified, which I don't think it was, still should be understood as having very little significance and, more or less, was understood that way for about 45 years after the Slaughterhouse Cases.

WOODS: You know, when you made that aside about the Fourteenth Amendment not being validly ratified, I could imagine a hostile listener saying, oh my gosh, what kind of crank is this? But even in the 1950s, there was a piece, I think it was actually in *U.S. News and World Report*, that basically said, yeah, we all know it wasn't validly ratified but, you know, too late to go ahead and change it. We'll just try and be more careful next time. This isn't actually a crazy view. Forrest McDonald, who is not considered a crazy historian, has a very good summary of the evidence. Unfortunately, it's in an obscure outlet, the *Georgia Journal of Southern Legal History*. Most of you don't have access to that. But he summarizes the evidence there. Now what percentage, would you say, today of law professors are sympathetic to the Court's decision in the Slaughterhouse Cases?

GUTZMAN: Vanishing, a vanishing percentage.

WOODS: Do we need to use scientific notation to indicate it?

GUTZMAN: Well, there's a very good, I think Pulitzer-winning book that came out a few years ago called *From Jim Crow to Civil Rights*. It's by a professor named Michael Klarman, who, while he was writing it, was a professor at the University of Virginia Law School. Actually, a colleague of mine in the history department at the time was one of his research assistants on that book. And he

later moved to Harvard after the book was so well received. But Klarman says in the introduction that when he became a law professor, one of the first things he had to do was to figure out why he agreed with *Brown vs. Board of Education*. He kind of understood that there's a political test in legal academia. You must accept certain cases as being incorrect and you must hold that other cases were incorrectly decided. Slaughterhouse, more or less, falls into the "you must disagree" category. So if somebody had said publicly in a prominent place before being interviewed at Columbia Law School or at Penn or wherever that he approved of Slaughterhouse, he'd be very unlikely to end up on the faculty there. And that's essentially why, despite the fact that, as you say, we all know it wasn't ratified and anybody who's ever read Berger's books knows that it didn't mean that, you know, sodomy was marriage or whatever they're making it mean now. Still you're not going to hear any law professors say these things.

WOODS: All right. We won't hold you to this permanently as if it is your final answer for all time, but let's just say, at this moment, what are the two twentieth-century cases that are most eating away at you, that eat your heart out? What would they be and what was so bad about them?

GUTZMAN: Oh, boy. Well, right off the top of my head. There was one in 2008 called *Kennedy vs. Louisiana*. It had to do with the ban on cruel and unusual punishments in the Eighth Amendment. And actually it was really about the due process clause of the Fourteenth Amendment because it's true, the due process clause of the Fourteenth Amendment, that the Supreme Court always claims to be enforcing the cruel and unusual punishment ban against state governments. But what happened within this case was that Justice Kennedy, on behalf of the majority of the Court, declared that it was unconstitutional to give capital punishment for somebody who raped a small child. And the reason it was unconstitutional to give capital punishment to somebody who raped a small child, he said, was that, well, we Americans have thought about these things and we've decided that raping a small child just isn't really that important an infraction. So we'll have capital punishment for the really important things, treason and murder, but raping a small child just really isn't that important. And he also went on to say that, of course, there was a small minority of the states that still did this and Congress didn't do it and therefore we could see that the kind of the tendency in the culture was to decide that capital punishment for people who raped small children was just cruel and unusual. And it turned out that what he claimed about that was entirely incorrect. In fact, Congress had adopted such a statute only a couple years before, and there were several states that still had these punishments. And to my mind, this was entirely gag-inducing. I mean, you do sometimes get the impression from reading what people on the Supreme Court say that they just have no experience of real life. If they'd ever had any relatives who were raped or robbed or somehow otherwise mistreated, they would be far less flip about letting people off on invented technicalities like this bogus incorporation doctrine holding about the Eighth Amendment in Justice Kennedy's words. So that's one.

The other one, I think, is probably *Everson*, from 1947, where the Court invoked Jefferson's metaphor of a wall of separation between church and state. Since then they've been using this metaphor to drive any mention of God out of the public square. It seems to me that this, too, is entirely unfounded. Not only is the incorporation doctrine, which supposedly they're using to make the First Amendment enforceable against the state governments, not only is that bogus, but the claim that Jefferson was somehow representative or that there was a general understanding in America in the early, in the late eighteenth, early nineteenth centuries that government shouldn't say anything about God or shouldn't have any symbols that refer to Christianity or anything like that, that's just totally inaccurate. So under the guise of this nostrum, we've had various acts like making towns take the crosses out of their city seals and making school districts stop having invocations at the football games and baccalaureate exercises and those kinds of things, which again, has no basis in history at all but is ultimately about the preferences of people on the Supreme Court. So that's entirely ridiculous, too, and offensive to a lot of people. You said you wanted two, right?

WOODS: I think that's pretty good. When you're talking about the first of the cases, I like the argument that there's obviously been a shift in our understanding of these questions and there's been a kind of moral evolution among the people, and we had to take that into account. I always am interested in citing in response to that, this fascinating passage from Federalist 78, and I know maybe you cringe if I mention that, but Hamilton does say in there that, regardless of whether you say that there's been some kind of change among the public in their sentiments, none of that matters and none of that should change a legislator's, or anybody else's, interpretation of the Constitution until such time as the people have solemnly changed that instrument. That is to say, if they've amended the Constitution to reflect their allegedly new understanding of things, that's one thing. But to just say, look, we all know there's been a cultural shift so we're just going to go ahead and treat the Constitution as if it's different now, he rejects as completely illegitimate.

GUTZMAN: Right. Well, of course, when the judges start talking this way, what they're doing is they're making a legislative argument. This is a good law to adopt because people have changed their minds. That's the way a legislature ought to talk. But you're right that the Constitution is supposed to be a kind of framework. It's not supposed to mandate the latest whim of the people, even if, as often is not the case, what the judges are saying about the people's will is accurate. I mean, one thing you have to remember when they start talking like that is that, if the people actually all agreed with what they're saying, there wouldn't be this statute to strike down. So how could it be that seven or eight states still have these laws if everybody agreed there shouldn't be such laws? And as I said, beside that, Congress had recently adopted such a law, too. It's my own personal feeling that raping a kid is about the worst thing in the world. That, to me, is worse than killing Justice Kennedy or me. So I just find myself in complete divorce from the whole moral universe these people live in, I guess.

WOODS: Well on that note, I want to close. Although I guess I want to give you a moment to say something about this course you've done. Right now you're working on a course for us at LibertyClassroom.com on the American Revolution, but you've also done a lot of the lessons in U.S. History to 1877 and you've also done a lot of them in our constitutional history course. Just take 60 seconds to explain: somebody who subscribes to LibertyClassroom.com is driving around in his car listening to Kevin Gutzman's talk about the Constitution, how is your course on U.S. constitutional history different from, well, I don't know, anything? I don't know, any comparable course, any comparable book? What's different about what you're saying?

GUTZMAN: Well the difference is that virtually all law professors or college professors, high school teachers of these subjects, are going to give you the straight John Marshall, Hamiltonian spin, and I take the opposite party position. I look at these things from the point of view of the majority during the ratification process, later called Jeffersonians. So I have an outlook that depends on fealty to federalism, republicanism, and limited government, which used to be called the Constitution, coming from me and that has almost nothing in common with what you're going to get at your local law school seminar in the ongoing legislative career of federal judges. And I think that it's a bracing experience, even for people who think they're educated about the Constitution, to encounter this Jeffersonian take on things for the first time.