Episode 1,132: Conservatives Who Yield Everything to the Other Side, Example #43,366

Guest: Kevin Gutzman

WOODS: This column by Carson Holloway, I was just saying to you it reads like a ten-year-old wrote it. Then I realized that's not fair. It would have to be a really, really precocious ten-year-old, I'll grant you. If I had a ten-year-old who could write like this, I would be quite happy. But that's not the point. It's at such an elementary level, but it's like the writer is so little self-aware that he doesn't realize how elementary it is. So for example, this is actually how it's written: "Conservatives tend to be originalists" — that is, in interpreting the Constitution — "and liberals tend to be living constitutionalists. This is not very surprising, given the general dispositions of the people in question. Conservatives are inclined to revere the past...Liberals are interested in progress..." I mean, what the heck? And this is a guy at the Heritage Foundation. He's a visiting scholar at the Heritage Foundation, and he's actually a professor at the University of Nebraska—Omaha. And he writes like that. So all right, but that's not our point. I didn't bring you on here to talk about what a crummy writer this guy is.

The key thing is to talk about how it's possible that an article like this can be written by a guy from the Heritage Foundation, a guy who presumably is on the write to some degree, who associates with conservatism, and yet what he's saying really doesn't — I just want to know how it's possible that a conservative who professes to believe certain things could look at the American constitutional tradition and look at the history of the Supreme Court and just blandly conclude that the conservative in all this is John Marshall, and that if you don't rally to John Marshall, you probably hate the American constitutional tradition. This is wrong. This is just as wrong as wrong can be, and yet I would say the overwhelming majority of conservative intellectuals have bought into this narrative.

And so when you came out with your book *The Politically Incorrect Guide to the Constitution*, it was bought by a lot of conservatives because it said, *"Politically Incorrect Guide to the Constitution."* They love that. Sure, they want the real Constitution. And most of them didn't notice what you were doing because they don't know about the ins and outs of all these debates. But I'm sure a few conservatives here and there picked up on what you were doing, that you are trying to undo all the damage that these idiots have done by hitching our wagon to John Marshall.

GUTZMAN: Well, it is kind of perplexing to me that people just take him as a given, and so this essay, which appears on the Witherspoon Institute's website and was sent out as part of their weekly newsletter, reflects the same attitude towards Marshall as was reflected by Matthew Frank, who wasn't then but is now the head of the Witherspoon Institute's effort here. So when my book *The Politically Incorrect Guide to the Constitution* came out and I essentially traced American constitutional history from the Imperial Crisis of the 1760s down

to the present, which then was 2007, I was trying to show it from an originalist point of view. How did people understand the constitution they wanted, how were they sold the Constitution that was written in Philadelphia, how [inaudible] since? And that meant of course a lot of criticism of John Marshall, who in their lifetimes, both James Madison and Thomas Jefferson saw as sapping the foundation of the Constitution.

But people like Frank, Frank actually was the fellow who wrote the only published review of *The Politically Incorrect Guide to the Constitution* that was critical. And besides calling me a neoconfederate — which, you know, there's a five-point definition of that and I click one box out of five, so that was an idiotic thing to say. But besides doing that, he also said something to the effect of: Gutzman criticizes John Marshall; clearly, he doesn't love our constitutional tradition.

And this guy does more or less the same thing. So when he gets to the issue of John Marshall or he's trying to explain how originalists approach reading a particular snatch of constitutional text, he says: "It is evident, for example, that John Marshall — the 'Great Chief Justice,' who led the Supreme Court throughout its formative period — sought the original meaning of the words of the Constitution in his celebrated opinions for the Court."

Okay, now, anybody who knows anything about even the historiography of — that is, even in what professional historians say about John Marshall's opinions — know that John Marshall did not seek "the original meaning of the words of the Constitution in his celebrated opinions for the Court." That was not the enterprise he was embarked on. He was a Hamiltonian who was always trying to find a way to find that the federal government had more authority, and he used his position constantly to do that, just as Jefferson lamented.

In fact, at one point, James Madison — actually, this guy's essay takes *McCulloch vs. Maryland* as a key bit of evidence that Marshall took this approach. When James Madison read Marshall's opinion in *McCulloch vs. Maryland*, he wrote back to Spencer Roane, the chief judge of the Virginia Court of Appeals, now the Virginia Supreme Court, who had sent him this opinion from Marshall — Madison read *McCulloch vs. Maryland* and wrote back to Roane: if the people had known at the time of the ratification conventions that this was the way that the Constitution was going to be read, they wouldn't have ratified it. Now, how you can call yourself an originalist when you say that your lodestar of constitutional interpretation is John Marshall, even as James Madison says — and I think it's flatly true. One result of reading my book on Madison ought to be that people realize this is true, that what Madison said about Marshall and McCulloch was exactly on point. If the people had known that that was the way the Constitution was going to be read, they wouldn't have ratified it.

In fact, the main thing that the ratification conventions that were contested in 1787, '88, '89, and '90 centered on was the question: how are we going to read the grant of congressional power? And Madison took one position: this government is going to have the enumerated powers, or as the governor of Virginia put it, the expressly delegated powers. And the other possibility was: we'll read the Necessary and Proper Clause as essentially allowing Congress to do whatever it thinks is a good thing to do.

And the Federalists, none of them said that was the way the Constitution was going to be read. In fact, they were at great pains to deny it, and not just kind of miscellaneous people: the leading Federalist of North Carolina, the leading Federalist in Massachusetts, the leading Federalist in South Carolina, Al Hamilton himself in New York. But they all said this was not

the way to read the Constitution. And then John Marshall gives us *McCulloch vs. Maryland* and says basically that is the way to read the Constitution. If the Constitution doesn't prohibit it and the ends are legitimate, then what Congress has done is legitimate. This is just not — that is, endorsing this opinion is not originalism. If that's what originalism is, it's a misnomer. So I'm constantly befuddled by these people who consider themselves to be originalists or conservatives or whatever they think they are who admire John Marshall.

Another institution that does that is the Federalist Society. The Federalist Society, besides the fact that it uses James Madison in its logo, also has recently named a new award for the 19th century New York State chancellor who took the Marshallian — if we want to use that word — Marshallian approach toward constitutional interpretation. And they also have repeatedly featured people who had positive things to say about Joseph Story's *Commentaries on the Constitution*. Well, those are anti-originalist readings and those are anti-originalist figures. They are people who thought essentially as Marshall did, where you have an alternative where your choice is between saying that Congress doesn't have authority and saying it does, you always say it does. Where the choice is between federal and state authority, you always find for federal, even though this is again the absolute opposite of the way that people were told the Constitution would be read. So it's just too much for him to say it's evidence, for example, that John Marshall sought "the original meaning of the words of the Constitution in his celebrated opinions for the Court."

And I'll give you an example of a case in which he didn't do that, in which he did not seek the original meaning of the words of the Constitution in one of his celebrated opinions for the Court, and that was the 1810 Supreme Court opinion in the case of *Fletcher vs. Peck*. *Fletcher vs. Peck* was the ultimate legal culmination of what's called the Yazoo scandal, and what happened there was that in the old days, Georgia was not just today's Georgia. It extended all the way to the Mississippi River. So basically all of Mississippi and Alabama except for the coastal areas, plus the part of Louisiana that's east of the Mississippi River, all of that was part of Georgia, more or less. And the state of Georgia decided, well, we'll auction this land off.

So they had an auction, and then people realized the legislators had been bribed to sell all this land for three cents and acre. They'd been bribed. How many of them had been bribed? All but one member of the state legislature had been bribed. So at the next election, all but one member of the Georgia legislature was defeated, but this is like the biggest bribery scandal in American history.

And ultimately the people who had bought the land in the auctions, some of them had sold their titles to other people, and those remote buyers then sued Georgia and said: you can't repeal this law. We're innocent takers of this lands. We didn't know that there had been this scandal. And Marshall when the case of *Fletcher vs. Peck* came before the Supreme Court said: the buyers are right. You can't repeal this fraudulent sale, because the Contract Clause of the U.S. Constitution says that no state can adopt a law that impairs the obligation of contracts.

And I know some listeners' eyes may be glazing over, but here's the short of this: Marshall, in order to find that Georgia couldn't rescind this fraudulent land sale because doing so would impair the obligation of contracts and thereby violate Article 1, Section 10 of the Constitution, Marshall had to find that that land sale constituted a valid contract. But of course in American law and in English law before it, a fraud is not a contract. That is,

somebody scams you into buying something, into signing a contract, or otherwise tricks you into making a purchase that you wouldn't have made if he hadn't deceived you, that is not valid. And Marshall knew that that was not valid. He knew that that was not a contract.

So this is just one of many examples of Marshall not trying to find the original meaning of the words in the Constitution in his landmark Supreme Court cases. There are many other instances in which he would twist, he would turn, he would flip upside down the facts he found before him or the order in which legal questions are supposed to be considered or the meaning of particular legal provisions and so on, always to do what? Always to find on behalf of federal authority. Or actually, there are several cases like this *Fletcher vs. Peck*, where he constantly found on behalf of land speculators, and he himself at various times had owned about 300,000 acres in land speculation, so he had a real soft spot for speculators too. In other words, this guy Holloway, when he says we should understand that originalism means trying to find what people thought the Constitution would mean when they adopted it and then looking to John Marshall as some great lodestar, he is completely off the rails.

WOODS: And you know, I realize that my little thing at the beginning about how elementary and pedestrian his writing style is, you might say that's just nasty and not relevant. But I think it's — I hate the expression "it speaks to," but I think it does speak to the general just degradation and quality of intellectual life among conservatives that we've reached that. They started off pretty well. If you've got Russell Kirk and Robert Nisbet and Richard Weaver, I grant that's a tough act to follow, but you've got to follow a little bit better than this.

What's also interesting about the column is that he writes without any consciousness of the fact that what he's saying is controversial. He acts as if this is the conservative position and that the controversy in the article is his argument with liberals, because liberals want a living constitution and we conservatives want to stick to the original intent. And so he just goes off and starts arguing that without even acknowledging or even apparently being aware of the fact that his own position is quite debatable, to say the least.

And then secondly, I did a search in his column for "ratify" or "ratification." Now, he does say "ratify" just as a throwaway word a couple of times, but he nowhere mentions the ratification debates in a big article about how we ought to interpret the Constitution correctly. Ratification debates is not mentioned. Now, explain why that is relevant.

GUTZMAN: [laughing] Well, because it's a common pitfall of political scientists to think that in order to understand the Constitution as people who adopted it understood it, you just need to read *The Federalist* and the opinions of John Marshall. I mean, this is a reality I've been decrying for over a decade now. People think if they read *The Federalist* or what's commonly called *The Federalist Papers* these days then they know how people thought they were going to be governed if they agreed to this federal constitution.

And the reality is this is completely untrue. We don't know that *The Federalist Papers* had any discernible effect at all on the ratification campaign. It's not that they weren't the primary thing, it's not that they weren't prominent; it's that we can't prove they had any effect at all. And if we had time to go through it, I could explain to you how that's true, but what I'm saying about that is not controversial. Prominent scholars like George Carey at Georgetown and Albert Furtwangler at Cornell and Pauline Maier at MIT have said that we don't know that *The Federalist Papers* had any effect on the ratification campaign. So I think the reason why

especially judges tend to turn to that is it's very easy. You don't have to spend very much effort in learning about ratification if all you need to do is read one 400-page book.

And one prominent figure in American intellectual life these last 35 years who was central to giving people to the movement that gave people this idea about how to understand ratification was Antonin Scalia. Scalia's mentioned in this article, and I think, frankly, where Holloway gets to saying one way that liberals have criticized originalism is by saying it's just a kind of cover that conservatives can give to their own outcomes-based juris prudential hijinks, there's some truth in that. Actually, somebody like Scalia did do that.

So for example, famously in the case of *Johnson vs. Texas*, he held that there was a constitutional right to burn a flag in public. And people often point to this in saying Scalia was a man of his principles. Even though he didn't like the idea of flag burning, he held the that the Constitution required that states permit it. And this overlooks two things. One is that of course the application of the speech clause of the Constitution against the state of Texas or the city of Dallas depended on the incorporation doctrine, which Scalia knew was unfounded. In fact, at one point, he famously said we're not going to refight the incorporation doctrine. And you could ask: Justice Scalia, if you're an originalist, why wouldn't you be refighting that? Why wouldn't you fight every false doctrine? And the answer of course was, well, he liked it. And then on other occasions, he actually said: who would want to live in a society where some guy could be punished for flag burning? So this actually was outcome-based non-originalism by Antonin Scalia, and ironically it's the case that people point to in showing how devoted he was to his stated principles.

And there are other examples of that too. In the case called *Carhart*, which is the one in which the Supreme Court said, yes, the Congress does have constitutional authority to burn partial-birth abortion, there's a concurring opinion by Scalia joined by Thomas — or maybe it's by Thomas joined by Scalia. Anyway, Scalia's party to this concurrence. And what they said in the concurrence, joining the majority that upheld the congressional ban on partial-birth abortion, what they said was: well, we understand that this decision rests on the court's current Commerce Clause doctrine of which we disapprove, but as long as it's still in effect, then we can uphold the partial-birth abortion ban. Of course notice what they had actually done here was extend the Commerce Power to giving Congress authority to ban partial-birth abortion.

So in other words, they took advantage of this non-originalist line of cases when it suited their preferences in terms of a case's outcome. There are other cases in which Scalia did this kind of thing too, and you're also virtually never going to find him actually citing ratification convention material. I don't think that he was very learned when it came to these kind of things either. He did talk a lot about how to read statutes when he wrote about that question. That had some value. But when it came to the Constitution, he was kind of a stunted scholar, I think.

WOODS: I want to read one or maybe two sentences from the Holloway piece to you, because the second of these sentences gives the whole game away. So the first of the sentences is: "Marshall was clearly not calling for later generations of judges to read new meanings into the Constitution." And I say parenthetically: they didn't need to. He already did it for them [laughing]. He didn't need to do that.

GUTZMAN: [laughing] That's right.

WOODS: But then the second sentence, I mean, here it is. I could imagine a progressive saying this. Well, maybe not the first part, but he says: "He was instead defending a fixed interpretation of the federal power" — and then here we go — "capacious enough to let future Congresses address the nation's changing problems through the exercise of the legislative power." That's the living Constitution, isn't it?

GUTZMAN: Well, that actually is the living Constitution, you know? That's an alternative to the idea that you have a legislature that has a few enumerated powers, and because of that, if you want it to do something that people hadn't envisioned, you might find yourself having to amend the Constitution to give it more powers. And actually, of course, in the first two decades of the 19th century, first Jefferson and then Madison were president of the United States, and of course each of them annually submitted to Congress a State of the Union message, in those days essentially giving Congress information that it didn't have. It wasn't like today's publicity spectacular. It was: here are data about our overseas naval deployments and here are data about the state of the Treasury and so on.

Anyway, Jefferson in two of his eight messages and then Madison after him in two of his eight messages said it would be a good thing if Congress could build roads throughout the country. Especially if you got west of the Appalachians, there essentially were no roads. So we have this money that's going to be left over, about to pay off the debt from the Revolution; why not turn some of that to road building? And in those two of his eight messages in which Jefferson said this, one of them also included the statement: of course, before we could do that, you'd have to amend the Constitution to give Congress power to do that. Madison also twice in his eight State of the Union messages called for Congress to get into the business of building roads, and he also in one of the two instances in which he said you should be in the road-building business, said before you could do that, you'd have to amend the Constitution. And Congress got to the business of doing that without amending the Constitution first. Madison vetoed the bill. That's the way the system's supposed to work.

So if you're a Marshall fan, there's no reason you would ever think that you needed to do that. If you were reading the Constitution the way Al Hamilton advised Washington he ought to do it in the Cabinet debate on the Bank Bill in 1791, you could just say: well, the means are not expressly prohibited and the end is constitutional; that is, promoting economic growth Hamilton said was one of the general goals of giving Congress any authority at all, and so Congress could do this without amending the Constitution. This I think is the way that Marshall's opinion in *McCulloch*, for example, would lead you to read the Constitution. that's why former President Madison could say — the way Madison actually put it was: anybody who had been party to the conventions in which the people agreed to live under this constitution would be hard to persuade that the people would have agreed to it if they had known it was going to be read this way. So Madison didn't come out and make a statement that this is anti-constitutional, except that was what he was saying.

And Holloway seems just unfamiliar with this or maybe if he's aware of it, maybe he hasn't considered it or maybe he's more likely, I think, read Marshall so many times that he's just been kind of bewitched by the logic. If you take for granted that "necessary and proper" means do whatever you want, then sure, it makes sense. But I don't think there's any reason to give Marshall that credit. He knew perfectly well what he was doing. Actually, he had been not a first-rank, but he had been a kind of second-rank Federalist in Virginia's ratification convention in 1788, and he knew this is what the leading Federalists, his fellow Federalists had told people. They were telling people that the constitution was going to be read the way

Madison thought it should be read. That was the whole message of the Federalist campaign in Virginia in 1788, and there were several — as I said before, there were several other states where that's true too.

So once again, we have — this is pretty common nowadays. We have very weak advocacy and originalism that would make you think if this is what originalism is, why would I be for that? It seems based on kind of unhistorical scaffolding and it leads more or less to the same conclusion as living constitutionalism anyway, so a) why would I agree to that? and b) why does it matter whether I do?

WOODS: Yeah, that is pretty much what you're left with.

GUTZMAN: Yeah.

WOODS: All right, before we wrap up for today, I just want to make sure — I mean, we've got the gist of the column out there. I just need people to see this. Remember, you and I did an episode some time ago about a free course on the Constitution offered by Hillsdale College online — not on the Constitution, on *The Federalist*, on *The Federalist*, which obviously has to do with the Constitution. But we talked about that because there we want to caution people that you may think: well, Hillsdale has a reputation for being conservative. that'll give me the conservative point of view on the Constitution. And yeah, given again the degraded condition of American conservatism, maybe that is the "conservative" take on the Constitution. It doesn't make it correct. Or if anything, it yields way, way too much to the other side. So we had fun going after that. But I wanted to give you this opportunity.

Anyway, what else is in here that you feel like if we don't hit it, it would be a disservice to everybody?

GUTZMAN: Well, among people who kind of fancy themselves originalists and they're fans of Chancellor Kent and Joseph Story and John Marshall, it's kind of de rigueur that they have to beat on Thomas Jefferson a little bit. And this column includes a passage to that effect, too. So Jefferson said at one point to Madison: what do you think of the idea that every 19 years the constitution should become defunct and that if people want to they should create a new constitution? And Madison thought this is impractical; you'd have a worse constitution than we already have; besides that, you can't really say when a generation begins and when it ends, and so on.

So he didn't really like this idea in the abstract, but the way Holloway describes this exchange is that Jefferson favored periodic retirements of constitutions and Madison wisely advocated the opposite position. This isn't true. That's not what happened. Jefferson was not an anti-constitutional radical. Instead, he just raised this idea as kind of a conversation point with Madison, and in fact, through the rest of his days, he always would continue to insist that the Constitution of 1788 should be read as the people understood it when they were agreeing to it in this way that John Marshall didn't. So I can understand why people who are of Holloway's bent want to bring Thomas Jefferson down a peg. He is if anything the outstanding originalist in American history, closely followed by Madison. And on the other hand, of course he had to do battle with the fellow I would call essentially the father of living constitutionalism.

I guess another way of putting it is: John Marshall didn't come out and say, "I'm a living constitutionalist," but what he was was somebody who used his lawyerly wiles always to get the practical outcome in a particular case that he preferred. So you can't really imagine a President Marshall saying it would be good to have a road network, but you'd have to amend the Constitution before you can do that. He would be one who would always tease out of some provision an authority for Congress to do what he wanted it to do.

And so I think it's good for people to notice that Holloway is doing this. Somebody who just picked up this essay and started reading it could be kind of seduced into thinking yes, this is reasonable. This is a reasonable distinction between liberals and conservatives; this is kind of a textbook definition of originalism and a textbook definition of progressivism. And yeah, here's Jefferson with a flaky idea and fortunately there's wise Madison knocking him down. And each step on this path, however, I think — how does it go? *Caveat lector*? You've got to be careful.

WOODS: Yeah, no kidding. Well, that I think will do, and we're going to link to this column obviously at TomWoods.com/1132. And I want people to check out Kevin Gutzman, of course. You can check him out at KevinGutzman.com, follow him on Twitter @KevinGutzman, and his books. I mean, I already plugged your books at the very beginning before I even brought you on, but — not to mention Kevin and I wrote a book together called *Who Killed the Constitution?* I don't want to prejudice you in favor of one of those titles, but I honestly think the most important thing if you just want to cover the material that we have touched upon in this episode, then you'll want to start with *The Politically Incorrect Guide to the Constitution*, because it is the type of work that no one else had done before. Yeah, there have been conservative overviews of the Constitution, but, eh, they get 30% of it wrong. But a consistently, unrelentingly Jeffersonian overview of the Constitution and constitutional history of the past couple of hundred years, no such thing, really, until you get *The Politically Incorrect Guide to the Constitution*. So check that out, and Kevin, thanks so much for talking to me today.

GUTZMAN: You're welcome.