



Episode 369 – Who was the Real James Madison?

Guest: Kevin Gutzman

March 30, 2015

WOODS: James Madison served in various capacities over the course of his career, but what he's known as among the general public is the father of the Constitution. In your book you use rather a different term to refer to his relation to the Constitution. What is your thinking about this? Is this myth or reality?

GUTZMAN: I think it's a complete myth, and so I call him an unhappy stepfather. Basically, Madison went to the Philadelphia convention with an idea of a national government giving a general legislative authority to the federal Congress and a veto over state laws to the federal Congress. He wanted to remove from the states their role in choosing members of Congress, and he was defeated on all these measures. In fact, the one he called his favorite proposal was the congressional veto over all state laws, and although he kept bringing that up over and over again, he kept being defeated on it. He also insisted through the convention that both houses of Congress ought to be apportioned by population and this, despite the fact that he was repeatedly warned by small state delegates that if he didn't seize insisting on this, it was possible he would just break up the convention without anything being accomplished, and finally, he was voted down on that, too. As we know, the Senate entrenched the principle of state equality. So Madison left the convention complaining about the Constitution and sure that it would lead to the breakup of the Union within a few years.

WOODS: Now you may be the most knowledgeable person about the Virginia ratifying convention of anybody around today. We're talking about the conventions by which the states decided whether or not they wanted to ratify the Constitution. What you dig up in this book regarding what went on at that ratifying convention is of great significance, but it sounds—when I describe it right now—kind of technical and like a historical curiosity. What went on at the Virginia ratifying convention that would be of interest to us today?

GUTZMAN: Well, listeners need to know that the Constitution was implemented by the separate states, each agreeing for itself to live under it. Or another way of putting that is that they each agreed to ratify it. And what happened in the Virginia ratification process is contrary to what we've always been told about the way the Constitution was understood when it was

adopted. And why is this important? The reason is that as Madison later said, it is to the ratification conventions that we are to look for the actual meaning of the Constitution. Because it wasn't among the delegates meeting in secret in Philadelphia that the people's understanding was hashed out. That was hashed out in public discussion in each of the states. So what happened in Virginia was that the people were told, if you agree to this Constitution, it will give the federal government only a few carefully enumerated powers. The understanding of it that we're giving you right here is going to be binding as if we were one of 13 parties to a contract, and in case the federal government should pervert the powers we're granting it to your oppression, meaning Virginia's oppression, you could reclaim the powers you're granting it.

Another way of putting that is, and of course, a later term, in case you find that this government doesn't suit your purposes, you can secede. This was the Federalist position in Virginia. Now, we've always been told that this was a radical states'-rights centered, anti-Federalist position taken by people who didn't like the Constitution in the first place, and what I show in this book is that, no, it was Madison's chief two fellow proponents of ratification, the governor of Virginia, Edmund Randolph, and the delegate from Jefferson's home county, George Nicholas, who laid out this position for a five-man committee of which Madison was a member, and nobody contradicted this. In other words, Virginia went into the Union with the understanding that the central government would have only a few powers that were listed, and in case they decided it didn't suit their purposes, Virginia could withdraw from the Union.

WOODS: Well, this is not the sort of history that one reads either in the mainstream take or in the neoconservative take on things. Why do you think it is that if you talk to people from, let's say, the Federalist Society—which for people who don't know, that's a society of conservative lawyers at law schools, and they promote lectures and debates on law school campuses—and Washington, D.C. think tanks, why do they overwhelmingly seem to prefer Madison to Thomas Jefferson?

GUTZMAN: Ah, well, because they associate him with *The Federalist*—the 85 newspaper essays that Hamilton, Madison and Jay wrote in trying to sell the Constitution, and they've equated *The Federalist* with the Supreme Court decisions of John Marshall, so what we have here is kind of—I think of it as guilt by association, that because Madison was involved in *The Federalist*, and Marshall cited some of the *Federalist* essays in Supreme Court decisions, therefore, Madison must have agreed with Marshall. But actually, one thing I show in the book is that Madison disapproved of some of the seminal Supreme Court decisions handed down by John Marshall, most notably, arguably the most important decision in Supreme Court history, *McCulloch vs. Maryland*, which was based by Marshall on the idea that not 13 separate states, but one American people had agreed to the Constitution. The implication of this was that no state could resist whatever the federal government decided to do. Well, the interesting thing about that, as I show in this book, is that Marshall was another one of the members of that five-man committee that I just mentioned of which Madison was a member and of which two

members explained the significance of ratification by saying, again, we're going to be one of 13 parties to a compact. The federal government is going to have a few powers, and in case it abuses the powers we're giving it, we can reclaim them, which is another way of saying, we can secede from the Union.

Now, Marshall in *McCulloch vs. Maryland* said exactly the opposite of all that, and Marshall knew what he was doing. I once asked a friend of mine, Kent Neumeyer (who is a very prominent legal history professor at the University of Connecticut and a biographer of John Marshall): did John Marshall ever once cite the ratification conventions in any of his Supreme Court decisions? And Neumeyer's answer was no. So on one hand, Madison says that the place you're to find the meaning of the Constitution is in the ratification conventions, and on the other hand, Marshall never cited the ratification conventions. Why didn't he? Well, one reason might be that in the Virginia ratification convention, again, the version of the Constitution that the Federalists, Marshall and his people, gave the Virginians was the opposite of the one that Chief Justice Marshall gave us in his Supreme Court decisions.

WOODS: So Kevin, basically to sum up, what we've said so far is that you look to the ratifying conventions to understand the intentions behind the Constitution because this is where the people themselves hash the whole thing out. Rather than relying on a closed-door session in Philadelphia, we rely on these open debates at these ratifying conventions. But you've got somebody like John Marshall who was there in Virginia, who was there in Richmond at the ratifying convention. He knows what was said. He knows that the people were told the federal government would have only the powers expressly delegated to it. Then he gets on the Court and says, well, I don't see the word *expressly*. But the point is, that is how it was sold to people, so at some level, do you think there is some—there's just something fishy about this. Already by the early 1790s, Madison is concerned that the very complaints that the opponents of the Constitution had are being vindicated right before his eyes. He's already concerned that it's being interpreted too broadly. Walk us through this.

GUTZMAN: Well, that's exactly right. My mentor in law school, Lino Graglia, at the University of Texas Law School, says, constitutional government presumes that people in office will behave in good faith. That is, if somebody is just an out-and-out liar like John Marshall, then the project falls down. Requiring the guy to take an oath to uphold the Constitution was supposed to ensure that people wouldn't behave this way, and if you wanted the federal government to have power that the people had not willingly consented for it to have, you would seek an amendment, not just say the opposite of what you had said in the ratification convention. And so essentially that's what people like Marshall were in the project of doing. Madison, of course, had sold the Constitution in this way, as had people in several other states, and it wasn't only in Virginia that this reading of the Constitution was sold. Very prominent Federalists, including James Wilson and Alexander Hamilton, sold it that way in other states, and I can name you seven states besides Virginia where prominent Federalists said that the federal government was only going to have the enumerated powers. And yet, virtually the minute Congress came

into being they were doing things that they hadn't been delegated power to do. So Madison ended up being at the center in the 1790s of a constellation of people in Congress who were opposing this. It's not that they thought, okay, we're going to create a party. They just began to vote together because they all had the same perception of what the Federalists, Marshall's party, Alexander Hamilton's party, were doing.

WOODS: In the 1790s we get a fairly interesting development because on the one hand, as you said with Madison, he goes to the Philadelphia convention with the idea of creating a kind of national government, and he's got proposals that are shot down, and we wind up with a federal government afterward, but then in 1798 he pens the Virginia Resolutions of 1798, which he spends his old age trying to explain away. Is there an inconsistency here, that in 1798 he's taking a radically decentralist position instead of the nationalist one he had held 10 years earlier?

GUTZMAN: Well, it's been the classic approach to say that Madison did a *volte-face* at the end of the 1790s, and this was entirely based on the fact that his partisan opponents were in power, and he wasn't. I tend to see it a different way. I think that Madison acted in good faith. That is, he went to Philadelphia. He argued for a national government. He was defeated. He went back to Virginia. He explained the Constitution as it was, not as he would have liked it to be, and then once he was in federal office, he was aghast at the fact that some of his co-agitators in bringing the Constitution into being were behaving as if despite the fact that they had made these promises about enumerated powers, they had been given unlimited power to do whatever they wanted to do, and so he opposed that because he thought it was illegitimate. In some sense what Madison's career was about was the idea that through written constitutions, people could consent. They could have the kind of government they wanted and only that kind, and even if the people didn't agree to Madison's own proposals, he wasn't going to pretend they had, or he wasn't going to ignore what they had decided, as John Marshall or Alexander Hamilton would do. Then at the end of the 1790s when he staked out this states' rights position, it's not that we should see it as being contrary to what he had proposed in Philadelphia. It surely was different from what he proposed in Philadelphia, but I think what we should do is we should see it as consistent with the way the Constitution was sold in the Virginia ratification convention. So there's nothing really different between the Federalist explanation of the Constitution in the ratification convention and Madison's statements in 1798 about the limits on federal authority at all.

WOODS: I don't want to take for granted that everybody knows what the Virginia Resolutions of 1798 was. I think the education establishment has done a pretty good job making sure that nobody knows what that document is. So can you just flesh that out a little bit so that people know what we're talking about?

GUTZMAN: Well, I tend to assume that there are a lot of people out there who have read Tom Woods' book *Nullification*.

WOODS: I like to presume that, too. (laughs)

GUTZMAN: What happened was in 1798, the Congress adopted a law called the Sedition Act, and it basically made it illegal to have a free election in the United States, because it was criminalizing any criticism of incumbents, and so Jefferson and Madison along with their fellow leaders in the Virginia Republican Party decided that if they couldn't rely on the federal executive legislative or judicial branch to abide by or enforce the Constitution, what they'd have to do is fall back on the states, which again, as I said before was what people in the Federalist movement—people who were advocating ratification had told the Virginia Ratification Convention they would be able to do. You were going to be one of 13 parties to a compact, and in case the federal government doesn't live up to the description of the Constitution we're giving you here, you'll be able to reclaim the power you've given it. It was going then, ultimately, to be the state as a party to the compact that would be responsible for insuring that the creature of the compact—the federal government—didn't abuse people in that state.

So ultimately, what the Virginia and the Kentucky legislatures threatened to do was as Virginia's version written by Madison said to interpose and as Jefferson's draft for Kentucky said, nullification was a rightful remedy. They didn't actually come out and say what these words meant, but it was clear to people at the time that they were talking about some kind of resistance because Virginia finally in that same year concluded a longstanding dispute over whether to build a new armory in Richmond, and they did do that. They began drilling and outfitting their militia units. Actually, some of the people just below Jefferson and Madison in Republican leadership publicly spoke of secession in 1798, and again, I think this was perfectly consistent with the model of the federal Union that the Federalists laid out in the Virginia ratification convention.

WOODS: Kevin, given the expanse of Madison's career—he does stuff that's important before the ratifying convention, but we've got him at Philadelphia, the ratifying convention, he plays an important role in the 1790s, and he's president for two terms, and then, as you say, he comments negatively on some important Supreme Court decisions. He's an incredibly significant figure, but I find that when you look at Madison studies, sometimes it's—there are lot of studies of him that don't look at him warts and all. I remember the Lance Banning book, *The Sacred Fire of Liberty*, something like that, and it was just every single thing he did was perfectly consistent, and there was not a blemish to be found. What I liked about your book is that you're willing to give the man his due, but yet not treat him like a demigod. So what overall is—what's the significance of Madison? What is his ultimate legacy? When you look at all the different things he did, what does it all add up to?

GUTZMAN: Boy, I don't know about adding it up, because he was certainly central to creating the American federal system, but it seems to me, and here I am virtually on an island by myself, that his most important contribution to American government and political science in general was in regard to the principle of separation of church and state. This is something that Madison was concerned with from even before he became involved in politics. He was unwell, and so

unlike virtually anybody else in the Virginia political elite, he skipped William and Mary and went off to Princeton to college. He thought that Williamsburg was unhealthy, and so he went to New Jersey, and what made New Jersey radically different from Virginia was that New Jersey was one of three colonies that never had a state church, well, unless you count Delaware as separate from Pennsylvania, and then there would be four, but in any event, Madison observes the effect of this, and then he went home from Princeton in his early 20s and saw that Baptists in his region of Virginia, the Piedmont, were being persecuted with whippings and jailings and being put in stocks and having people lock the doors in their churches and through beehives through the window and all kinds of absurd mistreatment, and Madison decided this was the central question when it came to liberty. He even actually wrote to a Pennsylvanian friend of his and said, I think that if we had all agreed on the established church we ought to have, and even if it had been the right one, it still would be undesirable to establish it because where you have an establishment of religion, you just have unfreedom generally.

People get used to the idea of being imposed upon. And so from the very first time he held elective office in a parliamentary body in 1776, Madison was thinking about how to give people religious freedom, and he was 25 years old when he coined the phrase “free exercise of religion” as an alternative to the traditional British liberal position—toleration. Toleration, of course, implied that the government knew better than you, stupid citizen, but we’re going to put up with you for now, and Madison objected to that. And when he made his argument against it, George Mason, the chief constitutional thinker in that body, agreed with him, and then the convention adopted that position unanimously. So it became part of the first American declaration of rights, the Virginia Declaration of Rights of 1776, and of course, we know that Madison later played the lead role in writing the First Amendment to the federal Constitution and used the same language—that wasn’t it. He worked throughout his life on this idea. He had the famous Virginia statute for religious freedom adopted by the Virginia Legislature. Here we see Madison’s personality in full flower, because if you ask any historian who was responsible for the Virginia Statute for Religious Freedom, he will say, as a matter of course, well, Thomas Jefferson, and the reason he’ll say Thomas Jefferson is that Thomas Jefferson had the foresight to draw a little sketch of his own gravestone, and among other things he wanted it to say that he was the author of the Virginia Statute for Religious Freedom, but we don’t usually credit the draftsman of a bill with it. We don’t usually say the Voting Rights Act of 1965 was the responsibility of some obscure lawyer in the Senate Judiciary Committee, right? We credit Lyndon Johnson for that.

So Jefferson was analogous to that obscure lawyer. It was Madison who took the Johnson role and got the bill passed and made Virginia the first officially secular government in the world. And when he was president, Madison twice had occasion to veto laws that he thought transgressed upon the establishment clause of the First Amendment. Yesterday I did a book signing at my university, and people asked me, actually, one very young very woman asked me, well, how is Madison’s story relevant today? And I said, well, turn on the news and watch the way women are treated in Muslim countries, right? Watch the sectarian violence that’s going

on all over the world. We don't have this problem in America in general, and the main figure who is responsible for the fact that we don't have this issue as a live issue in the United States is James Madison. So it seems to me that although he held all the ritzy offices, and he has the, I think, exaggerated reputation as the father of the Constitution. The far most important thing that he did was that. In fact, I think there would be something like our current system of government in America even if James Madison had never lived in terms of the structure of the central government, but as for this principle of separation of church and state, I think Madison was largely responsible for that.

WOODS: Now, I guess the last thing I want to raise is when we look at Madison's career, we look at the Constitution. We look at the situation that we're in right now, where as you and I have documented, they don't care about the Constitution. Madison seemed reasonably confident that people would elect people of virtue to office, and this way, the Constitution would not be abused. It's clauses would not be interpreted in broad and absurd ways that were obviously counter to the original intent, but yet, given that this project that he worked on that he wanted to give more power too, and he treated opponents of the Constitution quite contemptuously. Given that already in his lifetime there were major problems with it—with some of the clauses being exploited and used badly. Does this not reflect badly on him that he either did not anticipate this or didn't favor building in enough safeguards to stop it, or are there safeguards that can stop it?

GUTZMAN: Well, I do think that it's true that during the ratification process, Madison was contemptuous of people who didn't want to ratify the Constitution, yes. However, I think that he realized shortly thereafter that not only had Virginians adopted the Constitution on the ground that it was going to grant limited power to the central government, but this was a good idea, so he became persuaded that that was a good idea. He had been wrong, I think, and I think he thought he had been wrong about that. Now, when he was an old man, he denied that he had ever taken that nationalist position, and there he was perhaps behaving as an old person will in remembering things in a more kindly light than he ought to have done, but as to his foresight, well, I don't think you could say that he was sanguine about things. He was one who said things such as, well, if republican government is going to succeed, then people have to be understood as general electing wise rulers. He didn't say that republican government will succeed people because people elect wise rulers. He really had the attitude that is famously captured by Winston Churchill's saying, well, you know, democracy is the worst form of government except for all the others. That's a very Madisonian kind of sentiment. He didn't have any allusions about human nature, and here is different from Jefferson, who was kind of beholden to Enlightenment French ideas about the perfectibility of man. Madison was strongly influenced by the Protestantism of his own home and of Princeton, which was run by a Presbyterian divine when he went there and always thought that people were just inherently corrupt and selfish and sinners, essentially, although he wouldn't have used that word.

WOODS: Well, folks, I have read Kevin's book, and in fact, I will be reviewing it for an online outlet pretty soon; *James Madison and the Making of America*. And I will tell you something, you're not just going to learn about James Madison, but of course, you will. You're going to learn an awful lot about American history because obviously if you study somebody as significant as Madison, that's unavoidable, and if you're interested in a lot of these issues of government, the Constitution, liberty, states, federal government, then I think Kevin has got a knowledge of the primary sources and the secondary literature that is just second-to-none, and so I think frankly, you'd be crazy not to read this book; a very, very important addition to your library. One last thing, Kevin, I know you're working on—you have a follow up to this coming up on the conflict between Jefferson and Hamilton and how it helped make America, but in just one minute, why did you say to yourself the world needs another Madison biography? You've got at least a dozen major changes, I think, to the perceived wisdom on Madison, and I am being unfair in asking you to summarize that in a minute, but why did you decide to do it?

GUTZMAN: Well, as you said, I found several different places at which I just radically disagree with what we've been told about Madison; notably the one that we were talking about earlier in regard to the way that the Federalists sold the Constitution in the Richmond ratification convention, and that's just emblematic of several other places where I thought over time as I was writing about various other questions and kept having them intersect with Madison. You know what? That's not quite right. What people are saying about Madison and nullification isn't quite right. What people say about Madison and the Constitution isn't quite right. The Madison taking the back seat to Jefferson in regard to this establishment in Virginia, that's not quite right. And so Madison's inflated reputation as an author of the Federalist whose significance is really inflated today. In its own time, it was not very important at all. That's not quite right either, so once there had come to be enough data points like that, I realized I needed to write a book about him.

WOODS: And we're very much in your debt that you did so, and I am glad that it's won so much praise from so many people of significance.