

## States' Rights and the Founding

Guest: Kevin Gutzman

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**WOODS:** Your most academic book is *Virginia's American Revolution*, and I think people who aren't attuned to the issues at stake might not realize the significance of your findings there. You are very knowledgeable about Virginia, particularly around the time of the ratifying convention, but including the whole period from the latter part of the eighteenth century into the early nineteenth century. I want to start there, because you happened upon some findings and research that seem to run counter to what you would hear from, say, a Straussian. Let's first explain: what is a Straussian? What does a Straussian say about the founding period of American history, and what does Kevin Gutzman say?

**GUTZMAN:** Oh, boy.

**WOODS:** We can do that for the rest of the show if you want.

**GUTZMAN:** There was a German expatriate philosopher named Leo Strauss who carved out a small niche on the Right in academia. There are people who consider themselves Straussians who follow his line of thinking and writing about some of the great philosophical figures like Plato and Socrates and Machiavelli and so on. But the ones who were of more immediate interest to American historians are what are called the West Coast Straussians, who are followers—really kind of a cult—of one of Strauss's students, a fellow named Harry Jaffa. And Jaffa is essentially an idolater of Abraham Lincoln. He said Lincoln was the ultimate Aristotelian. That he was this wonderful philosophical statesman who penetrated to the essence of republican self-government in a way that nobody else ever had. So there's an attempt by Jaffa, and following him various lesser and far lesser lights, to cast the entire American revolutionary experience into such a way as to make Lincoln's statesmanship a fulfillment of it.

So what that entails often is downplaying or just ignoring contrary evidence, and they also are prone to personal attacks. Most famously in the instance when the Reagan Administration contemplated elevating Mel Bradford to a position at the head of the National Endowment for the Arts. Straussians were central to killing that effort.

Essentially what they've said is that the Union of the states preexisted the Revolution. It started really at least as early as 1774 and perhaps earlier than that, and that thereby, one American people made the Revolution. One American people established its independence instead of 13 discrete North American former colonies. And that these people set up their new nation on the basis of the single philosophical proposition described by the Continental Congress in the words of Thomas Jefferson and Benjamin Franklin, the second paragraph of the Declaration of Independence. Anything that happens in the American government or politics that's inconsistent with the second paragraph of the Declaration of Independence, as interpreted by Lincoln and understood by the Straussians, is foreign, hostile, to be downplayed, denigrated, and stamped out.

Bradford was disliked by some of these people, because he pointed out forcefully in essays in leading conservative outlets like the old *Intercollegiate Review* and the William F. Buckley-era *National Review* that equality, mentioned in the second paragraph of the Declaration of Independence, is not a conservative principle. It's actually a social solvent. You can't ever have any kind of stability if any institution or folkway is

subject to the criticism that “well, we don’t have equality as a result of this.” No human interaction leads to equality of treatment or equality of conditions, certainly, and so you can always criticize any society or any social institution on the ground that it violates this quote, unquote, principle of equality.

The idea that the country was founded on the claim that “all men are created equal,” and the further claim that this principle was one that the federal government was empowered to be enforcing to an unlimited extent is, as I mentioned before, an attempt to vindicate Lincoln. Straussians actually have written books with titles like *Vindicating Lincoln* or *Vindicating the Founders*. Here again, the Founders as understood in these books are not Founders that the Founders would have recognized. They are essentially people who are mythologized by grabbing isolated quotations from here and there and trying to make them seem like 1960s social liberals and 1860s governmental statist.

**WOODS:** Let me jump in a minute here, because I think you’ve already hit on quite a few important issues. I want to focus in on one of them for now. The Straussians have latched onto this idea of the United States as consisting of one people, so they are inclined to accept—more than accept, proselytize for—the nationalist theory of the Union. They don’t admit contrary evidence. Their whole scholarship is intended to culminate in and show that the American experience culminates in Lincoln. Then they have to hold to the view that secession is unconstitutional, because America is one people, and it’s one country. It’s one big blob. That’s the way they’re going to tell the story, and they’re going to portray the Founding as being all about that. What is there in your corpus of work that would run counter to that?

**GUTZMAN:** First let me say that I did not go into doing work in the era of the Revolution with the idea that I would try to disprove the Jaffa thesis or the West Coast Straussian view of things. It just happened that I came upon evidence that showed that they were completely mistaken or if not mistaken intentionally trying to mislead people. For example, in 1776, the Virginia Convention, which was the ruling convention in Virginia, the ruling body in Virginia after the governor fled—after the last royal governor decided, “Things aren’t looking good for my health if I stay here in Virginia”—the ruling convention wrote the first American declaration of rights in their constitution.

In the process of adopting the Virginia Declaration of Rights, they considered a proposal by George Mason’s committee saying that “all men are born free and equal,” and government is responsible for protecting their rights. An objection was made to this proposal to the effect that if we start by saying “all men are born free and equal,” and government is responsible for protecting their rights, then we’re going to have either to have a social convulsion in the middle of the Revolution we’re now fighting, or we’re going to have to ignore our own stated principles. Because, of course, we know in Virginia all men aren’t born free and equal. In fact, half of them are born slaves.

So what happened was that the Virginia Convention decided unanimously, with nobody arguing to the contrary. that they would say that when you enter into a state of society, government is responsible for protecting your rights. The point is that they were deciding that the African slaves among them were not part of the society. Here from the beginning, we have a complete rejection of what later would be the Straussian idea that the North American former English colonies, now states, were dedicated to the proposition that “all men are created equal,” and the governments of these states were responsible for pushing this thesis wherever it might lead.

Another part of the story that contradicts the West Coast Straussian version is that these people in Virginia—and I’ve done my work on Virginia; that’s why I keep mentioning Virginia solely, but there are other states that have similar evidence—when they ratified the federal Constitution understood that theirs was one of the—three leading Federalist spokesmen in the Virginia Ratification put it—“13 parties to a compact.” Not one part of one party. In other words, the Federalist spokesman for the Constitution in summer of 1788 in a Richmond meeting, to decide whether their commonwealth in Virginia would agree to live under this new federal constitution, told the other delegates that we are one of 13 parties, and of course these 13 parties

were the states. The separate, sovereign peoples of the individual states, and not, “We are part of one great American people deciding here whether the Constitution will be ratified.” Not only that, but the Federalist spokesmen also said in case the federal government abuses its powers we can reclaim them. What does that mean? Well that means, in other words, pulling out of the Union, taking back the powers we’re giving them and saying, we’re not going to agree that you have any powers anymore.

This, too, is contrary to the Straussian idea that was invented by Lincoln, as far as I know, that the Union existed even before independence, even before the Revolution started. His theory was that there already was this Union of the states—one people. It’s just balderdash. There’s nothing in the record of the ratification dispute in Virginia to indicate that anybody thought that the measure of goodness of the proposed federal Constitution was the extent to which it was consistent with the second paragraph of the Declaration of Independence. Nobody mentioned this notion. Nobody thought that. Literally there is no record that anyone thought what the Straussians say everybody agreed to.

There are many junctures in the story of the early republic at which one can ask oneself, “Well, is what’s going on here in Virginia consistent with the Straussians’ explanation or account?” And the answer is always no. No, never did the Virginians agree, “We’re one of 13 parts of one American people,” but instead they repeatedly came back to this idea that the sovereign unit in American federal politics was the state. This claim was made over and over and over, and there were people who were saying, “No, we don’t like this idea,” in the 1780s, 1790s, 1800s, 1810s, 1820s. Commonly they would intentionally confuse the issue by saying, well no, in America we know it’s not the state governments that are sovereign. It’s the American people, but the claim that was being made was not that state governments were sovereign; it was that the states were sovereign, as Madison explained in his Report of 1800.

The word “state” here meant the sovereign people of each state, so it wasn’t that Virginians said the government in Richmond had unlimited authority. What they were saying was that the sovereign people of Virginia had ultimate authority. Actually, one notable Virginia political philosopher objected to that idea, too. He said ultimate authority is in God, but in politics ultimate authority is in the people. In any event, for Jaffa and the Straussians, ultimate authority was in one national people. And how do we know what one national people thought? Typically the way they would answer that question would be by interrogating the scattered writings and speeches of Abraham Lincoln, so you essentially start with whatever Lincoln said, and you know that that’s accurate.

**WOODS:** Let me play devil’s advocate here. The Straussians would respond that when we read Virginians saying that in extreme cases, or whenever the Constitution shall be perverted to their injury or oppression, they may recall the powers delegated, they’re not speaking of withdrawing from the Union, since that’s metaphysically impossible. They were speaking, rather, of their reserved right to exercise the right of revolution, which nobody disputed at that time. Sure, Virginia or any other state could rise up and have an extralegal revolt, and that’s what the Straussians take the Virginians to have been saying. But the Straussians would insist that those Virginians weren’t saying they could have a constitutional secession. How do you answer that?

**GUTZMAN:** Well it’s a funny idea, because this notion of a right of revolution that’s distinct from a right of secession was first elaborated in the nullification crisis chiefly by James Madison but not solely by him. This was to try to downplay the fact that Virginians had been told, “You’re one of 13 parties to a compact.” In one of the major speeches in the Virginia Ratification Convention, in which the Federalist leadership said that Virginia was going to be one of 13 parties to a compact, the orator was George Nicholas, who was a notable state-level politician at the time who came from a family notable for several generations of prominent politicians. His brother was a senator, for example, who ended up being an in-law of Jefferson’s. His father was the last colonial treasurer of Virginia.

Nicholas said: when you have a compact, the interpretation given to the compact at the time of its signing

by one of the parties is binding on the other parties if one of the parties in signing says, "Here's what I understand this to mean," or if it makes clear that it understands the words to mean what they clearly import, then that's binding on the other parties. In case the other parties refuse to live up to that understanding then that party is absolved of its responsibility under the compact. So it's not that these people were saying, "In case we think the central government is becoming oppressive, we are free to throw off government." What they were saying was, in case the federal government abuses the powers we're delegating to it, we're able to take them back. The phrase he used was, "reclaim them." So for Virginia to reclaim the rights it was granting to the Congress or to the federal government would not mean Virginia was now going into a state of nature entering into a state of revolution. Rather it would mean that it was putting out of a federal agreement.

In the late eighteenth century, the leading authority on these matters, the leading expositor of the idea of a federal union, was a Swiss named Emmerich de Vattel. Vattel said that a federal union was one in which you had an agreement among the parts. He basically explained it the way I've just explained, the way the Federalists sold the federal Union here in the Richmond Ratification Convention. The point is, there was nothing controversial about this explication of the act of ratification. This was nothing unusual, and it did not require revolution for one of the parties to a federal union to withdraw the powers that it had delegated. That was inherent in the idea of a federal union. The ultimate authority would remain. That is, the ultimate authority to elaborate the meaning of the compact through which the federal union had been created remained in the parties to the compact. Of course, you find exactly this same explanation given by leading Virginia Republicans in 1798 when they draft the Virginia and Kentucky Resolutions for the adoption of the legislatures of Virginia and Kentucky, which formerly had been part of Virginia, so it was full of Virginians. This is nothing odd, and it had nothing to do with a right of revolution. They weren't thinking of overthrowing government. They were thinking of withdrawing from a federal compact.

**WOODS:** I think for some people this might seem like inside baseball, but whether they were talking about the right of revolution, or the right of secession *as a constitutional remedy*, is the central issue. Then you hit on the Virginia and Kentucky Resolutions. In the limited time we have left, I want to talk about that. Today, people will say, "In the Virginia Resolutions drafted by Madison, he's clearly contemplating something less extreme than Jefferson was contemplating in the Kentucky Resolutions of 1798, especially in his first draft. Madison is calling for something much tamer." Now you've disputed this in a scholarly article, so how do you dispute that, and can you clear this up for us?

**GUTZMAN:** This is very frustrating. In theory, the way that academia works is you go out and do research, and you write up the results of your research. Then you publish the results of your research in scholarly journals, which people read. Having read the results of your research, they modify their understandings on the basis of what you taught them. I wrote an article about the Virginia and Kentucky Resolutions. I used evidence that has never been adduced by anybody else, which is the record of the discussions of the Virginia Resolutions in the Virginia legislature. People commonly refer to the Virginia Resolutions of 1798 as Madison's Resolutions. Then they go on and quote what Madison said in private, or what he said three decades later, to try to figure out what the Virginia Resolutions meant. But I think it makes more sense to look for the meaning of the Virginia Resolutions of 1798, not to what their unknown draftsman said in 1798, but instead in the discussions in the legislature where the proponents sold them to the majority of the legislature. Remember, Madison's identity as the draftsman was not known to the public for ten years. It was secret even to the people in the political elite for ten years. For ten years nobody knew that he had written them, so it wasn't that people thought, "Well, here we're ratifying whatever Madison thinks of the federal Union."

What happened in the Virginia House of Delegates in 1798 was that people sold an understanding of the Virginia Resolutions as meaning exactly what the Kentucky version meant. That is, the legislative sponsor was a fellow named John Taylor of Caroline, to whom I alluded earlier, and he had added language saying that in case the federal legislature adopted a policy that was unconstitutional and dangerous, it could be the

states had the right and were duty-bound to interpose, and these policies were null, void, and of no force or effect. Well, some people, the Federalists in Virginia, objected to this “null, void, and of no force or effect” language that had been added by John Taylor of Caroline, and so the story goes, Madison heard that this had been done. He told a couple of people he knew that he would like it removed. Federalists in the legislature said that they wanted this language removed, and it was removed, and this shows that the Virginia version was tamer than Jefferson’s version in Kentucky.

But if you look at what people actually said in the Virginia legislature, you’ll see that they remove this phrase “null, void, and of no force or effect,” not because they thought it was too radical, but because as one of the leading Republican spokesmen, one of the leading proponents of the Resolutions, said, and I’m paraphrasing, really this is just redundancy. We’ve already said that these laws are unconstitutional—that is, any law that involves the Congress claiming power in excess of what the Constitution gave it. So I don’t have an objection to removing the redundancy and just leaving it ‘unconstitutional,’ omitting the redundant ‘null, void, and of no force or effect.’” So the other Republicans agreed, “Okay, we can remove that language.” So it doesn’t mean that they thought that this was going to be a tamer statement at all. In fact, they expressly disclaimed the idea that it was a tamer statement. In fact, they thought that removing this language changed the meaning of the resolutions zero percent.

As I said, I published this in one of the leading journals in American history; in fact the second-most cited journal in American history is the *Journal of Southern History*, where I published this article in 2000. People continue to talk about the Virginia Resolutions of 1798 as if they were Madison’s and as if the way to understand what they meant is to ask what Madison said about them 34 years later. Madison wasn’t in the legislature in 1798. As I said before, (1) nobody knew that he had drafted these resolutions that John Taylor was sponsoring, and (2) apparently James Barbour, who lived on the plantation next door to Madison’s, who stood up and said that this was a redundancy that it was fine to remove, didn’t think this meant he was advocating a tamer version. So the ongoing insistence on asking how Madison read these things when he was responding to the nullification crisis in the 1830s I think has got to be tendentious, because I think people are doing this on purpose. I have encountered some people who clearly hadn’t read the material and hadn’t really digested what I was doing in my article, but I think the fact that people just overlook the point has got to be tendentious.

One reason I think that is: the leading account saying that what we need to do is to look to what Madison said about this decades later was published in *The William and Mary Quarterly*, another scholarly journal, in 1948, and it was preceded by a two-page editorial statement from the editor of *The William Mary Quarterly* saying (and again I am paraphrasing), “There’s a bit of a dispute going on within the Democratic Party today between Senator Byrd and President Truman, and we are pleased to be able with the publication of this article to show that Senator Byrd is mistaken, and President Truman is correct.” So the whole thing was done intentionally to buttress the claims of President Truman essentially along a Lincolnian line in 1948, and I think without regard to the question of what the first legislature actually thought it was doing in adopting the Virginia Resolutions. So even today you have Straussians making the same kind of argument, and other scholars commonly make this argument.

Another obvious explanation for why people would come to this conclusion is it’s just much easier to go to the library and get the papers of James Madison than it is to go read through the record of the Virginia legislature in 1798. The papers of James Madison are to be found in every decent college library, and the record of the Virginia General Assembly is available in half a dozen places, so that’s another explanation. But the bottom line is the Virginia Legislature in 1798 was reiterating this claim that I was describing before, that it had been one of the parties to this compact. It had ultimate authority to police the behavior of the constitutional authorities that had been empowered by the Constitution, because Virginia was one of the entities that made this Constitution, so there were several junctures through the early republic when the question how the Constitution was to be read came up and each time leading Virginia figures and the Virginia General Assembly said that the Constitution was to be read the way I’ve just described.

