

BOISI CENTER INTERVIEWS



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MARY SARAH BILDER is a professor of law at Boston College, where she teaches in the areas of property and American legal and constitutional history. She spoke with Boisi Center associate director **Erik Owens** before her presentation on James Madison and the legacy of the Constitutional Convention at the Boisi Center.

OWENS: I wanted to start by asking you about the project you're working on in particular. What inspired you to think about James Madison, and what was interesting in particular about the Convention and his work there that led to this book project?

BILDER: I've been interested for a long time in cultural history and particularly, the History of the Book, and the way in which thinking about how people take notes—to use Walter Ong's phrase, the way in which technology structures thought—allows us to think better about the relationship of memory and experience to our own understanding. And that's been a theme that's mediated a lot of my own work.

I originally was going to write a project on founding lawyers. It was going to be my best seller and I was going to sell out! I started becoming obsessed with whether or not Madison actually was a lawyer, and I had a long list [of lawyers]. He was the first one, and I never moved beyond Madison.

After that, I became very interested in Madison and very interested in his note taking and the way in which there's been no significant work on the notes of the Convention as a product of history. There's been a lot of work on constitutional interpretation, but interestingly,

very little work on how do we think about the notes in the way we might think about other important texts, for example, the Bible.

The more I became interested in this topic, the more I began to understand that Madison mediates the Convention for us in ways that we fail to appreciate.



OWENS: Say a bit about that. Why are the notes, his personal notes, relevant beyond a concern for his own work and the technology factor? What public impact have they had?

BILDER: The notes are the most significant way that we understand the Convention. He took the best notes, he took the

longest notes, and then he was the only one of the framers to make sure that his notes would be published. In fact, they're in his will. It has directions as to how his notes should be published.

OWENS: And they were published in his collected papers?

BILDER: They were published in his collected papers. He didn't want them published separately. The way that we understand the Convention is largely through Madison's notes. But nowadays, we forget they're Madison's notes. Beginning in the mid-19th century, people began to understand the notes as if they were an official record of the Convention, something Madison himself was very adamant that they weren't. He insisted they were just notes taken by a member. But we read them as if he were a reporter taking shorthand notes, like a stenographer. We read them the way that we might read the Congressional Record.

OWENS: And there's no equivalent official record?

BILDER: There was an official record, but the official record was, from a modern point of view, kept problematically. In fact, the reason that record was published was, in part, due to Madison. Madison ensured that notes taken at the time were not destroyed. Then he ensured that they were published. He worked

hard to criticize other people's notes, so he ensured that certain ideas about what were legitimate notes and what were not legitimate notes also became part of our understanding.

He forms, in this way that we're not conscious of, our understanding of how we should experience the Convention.

OWENS: What was his complaint about other people's notes?

BILDER: First, he thought he had been badly represented. The most famous person whose Convention notes were published in Madison's lifetime was Robert Yates. Yates' notes were published by Genet, who was sort of Madison's enemy. It is a little bit like thinking that of Karl Rove publishing Hillary Clinton's notes in the White House. Automatically, there's a problem.

And we know Genet changed the notes. In these notes, Madison is portrayed as being very much of in favor of consolidation of the states into a national government. But at the time the notes are published, Madison's aligned with Jefferson, and being portrayed as a states' rights person. So, the Yates notes make Madison look disingenuous.

Madison actually had changed his position. His own notes supported the more nationalistic interpretation of the Yates notes, although perhaps not to the extreme of the Yates notes (perhaps the truth lies somewhere in the middle). But Madison was extremely upset and felt that the Yates notes had been manipulated, which they had been. He himself was conscious of the way in which people did manipulate notes. For example, he never wanted an official Congressional Record. He made sure that that motion lost early on in the House of Representatives because he felt that members would have to worry about whether notes were correct if they were official.

OWENS: Were these notes published or made public during the period of ratification, or were they well after?

BILDER: No. There was actually no strong tradition of taking notes of legislative debates. The American tradition of taking legislative notes comes out of the ratification debates. In England, it was illegal to take notes, and the colonies felt it was illegal to take notes. Journalists and early stenographers begin to take notes in some of the ratification debates. And so, some of the earliest forms of what we consider to be legislative reporting are actually from the ratification debates, and Madison criticized those also.

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OWENS: Are these notes his own reflections or are they merely in scare quotes, an account of events and debates as he heard them?

BILDER: I would argue that he was incapable of not having the two intertwined. James Hutson, who is the librarian at Congress and the person today who's has worked the most on this issue, did an estimate where he suggests that the notes represent only about 10% of what was actually said at the Convention. If you think about anybody's notes that are not using a tape recorder like we are for this

interview, what someone chooses to write down is obviously mostly what they're interested in. An interesting thing about the Madison notes is that Madison himself looms very large in the notes. Now, anyone who's tried to take notes while they're speaking knows that's impossible. So what's interesting is that the part of the Madison notes that have become more significant—which are his own portions—are the parts that we should be more suspicious about, “Did he really say it in this precise format?”

OWENS: Madison's credited with, at least in the popular imagination, as writing a large chunk of the Constitution. Can you disabuse us of the popular notion or say a bit about, in terms of writing metaphorically, how much his voice is present in the actual words of our Constitution?

BILDER: Well, he was called the Father of the Constitution. This was a phrase that began in his own lifetime—he didn't agree with it—but it's probably most famously identified with Madison from a funeral oration John Quincy Adams gives with Madison. Madison would not have perceived himself to be the Father of the Constitution in the way that we think about the term. The thing he perhaps most cared about—that the states were controlled in their legislation by the federal government—loses. In fact, a number of his ideas lose at the Convention.

He was terribly important in terms of being a very good politician. Behind the scenes, he clearly was responsible for a plan that initially gave popular representation more weight than the states. But probably he's the Father of the Constitution mostly because he wrote the number one account of how the Constitution was formed. In fact, John Quincy Adams' understanding of Madison's role is also a bit biased because John Quincy Adams was responsible for publishing the official journal of the Convention. He couldn't figure out the official secretary's notes, so

Madison helps him do it. So, Madison is behind the scenes in many respects.

Madison is also the last of the founders to be alive. He outlives Jefferson, who wasn't at the Convention, and Adams. He outlasts a couple less famous people by a number of years, and he knew this. By the end of his life—there's a wonderful book by Drew McCoy about this—everyone traveled to see him as the last founder. And so he becomes identified with the Constitution because, quite frankly, he outlived the rest of the Framers. If somebody else had lived longer, maybe they would be more famous.

Madison is the primary author of the Bill of Rights, and that's probably, as a drafter, his more central contribution to the Constitutional tradition.

OWENS: Contemporary civic Republicans of the kind of neo-sort have sometimes claimed Madison as a Republican forefather. As Madison represented a sort of blend of liberal and Republican thought at the time—especially in his concern for deliberation and his representation as opposed to direct democratic

votes, etc.—how do you respond to that kind of reclamation? Is it more nuanced in your opinion or somehow taking away from an appropriate view?

BILDER: Madison is fascinating because everybody claims him. His silhouette is the central motif of the Federalist Society. That's the little image people probably don't know as Madison. Robert George's Institute at Princeton is the [James Madison Program in American Ideals and Institutions] and there are a number of modern, liberal constitutionalists who claim him. What's interesting about him is many people claim him. In part, this is because Madison often held ideas that were in tension with each other, and his writing is in tension. He has sentences in which the first part and the second part are in opposition in and of themselves. Many of his beliefs were in opposition. He also, during his lifetime, goes through two great relationships. The first with George Washington, who was a Nationalist, arguably a very strong Nationalist, and then later, Jefferson, who at that point in his life was a state sovereignty person. Then Madison becomes

President himself, and as an Executive, moves to combine these.

I think one of the interesting things about Madison is if you go looking, you can find something in which Madison sort of seems to imply what you want him to believe.

OWENS: Is this more true for Madison than some of the other founders?

BILDER: That's an interesting question. I think Jefferson was a more of romantic thinker and Madison even often said that of Jefferson. He talked in a grander way. Washington was very, very careful about what he wrote. Hamilton had a very strong point of view, and so in some ways, Madison was a much more cautious person. Because Madison was a cautious person, he often said both things. He was a person who perceived himself to be a great compromiser, and so again, he sort of positioned himself in ways that he supports both traditions.

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