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JAMES MADISON, VIRGINIA POLITICS, AND THE BILL OF RIGHTS

J. GORDON HYLTON*

The connection between James Madison's service in the Virginia Assembly in the mid-1780s and his commitment to a stronger central government has been frequently acknowledged.¹ A decade ago, Charles Hobson pointed out that Madison's "unhappy experience" in the legislature demonstrated to him that "local efforts by the 'wise and virtuous' to make state government responsible were bound to fail."²

According to Gordon Wood, while serving in the Virginia Assembly Madison "for the first time . . . found out what democracy in America might mean."³ Moreover, Madison's years in the legislature were "perhaps the most frustrating and disillusioning years of his life, but also the most important years of his life, . . . for his experience as a Virginia legislator in the 1780s was fundamental in shaping his thinking as a constitutional reformer."⁴

The general outline of Madison's experience is also well known.⁵ In 1783, upon completing his service in the United States Congress, Madison returned to his home in Orange County, Virginia. Shortly thereafter, he was elected to a seat in the lower house of

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1. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 251 (1990); Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 72-77 (1987).

2. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 225 (1979).

3. Wood, *supra* note 1, at 74.

4. *Id.*

5. See generally R. KETCHAM, *JAMES MADISON: A BIOGRAPHY* 144-73 (1971); Banning, *James Madison and the Nationalists, 1780-1783*, 40 WM. & MARY Q. 227 (1983).

the Virginia legislature.⁶ In 1784, Madison came to Richmond gravely concerned about his state's economic condition and armed with a reform agenda designed to correct many of the defects of the state government established in 1776.⁷

Apparently, Madison believed he would be able to convince his fellow legislators of the worthiness of the reforms he espoused, but he soon learned otherwise. He found many of them indifferent to what he saw as fundamental constitutional principles. His colleagues were inclined to enact scores of carelessly drafted laws, many of which were harmful, while at the same time being anxious to delay truly important matters until the end of the session when they could be addressed only by stopgap solutions.⁸ Writing to Washington in 1787, Madison observed, "The proceedings of the Assembly are, as usual, rapidly degenerating with the progress of the session."⁹ Madison also railed against what he viewed as a steady decline in the quality of legislators. Instead of attracting the wise and virtuous, the increasingly unruly legislature was composed of men who acted out of narrow self-interests, or at most out of the narrow interests of their immediate constituents.¹⁰

6. See Banning, *supra* note 5, at 252-53. Madison had served one previous term in the Virginia legislature in 1776, but had been defeated for reelection, reputedly because of his unwillingness to supply cider for the Orange County voters on election day. R. KETCHAM, *supra* note 5, at 77.

7. N. RISJORD, *CHESAPEAKE POLITICS: 1781-1800* 134-36 (1978); Wood, *supra* note 1, at 74. Risjord characterizes Madison's political program as "creditor-nationalist." N. RISJORD, *supra*, at 148-49. For the story of Madison's return to the Virginia legislature, see I. BRANDT, *THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON* 126-32 (1970); R. KETCHAM, *supra* note 5, at 144-89. The most detailed examinations of the political controversies in the Virginia General Assembly in the mid-1780s are: N. RISJORD, *supra*; A. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* 192-202 (1981); Main, *Sections and Politics in Virginia, 1781-1787*, 12 WM. & MARY Q. 96 (1955); Risjord & DenBoer, *The Evolution of Political Parties in Virginia, 1782-1800*, 60 J. AM. HIST. 961-84 (1974). A different perspective on the same events—that of Madison's foremost political opponent—can be found in the relevant chapters of R. BEEMAN, *PATRICK HENRY: A BIOGRAPHY* (1974).

8. Hobson, *supra* note 2, at 224.

9. Letter from James Madison to George Washington (Dec. 14, 1787) (quoted in 1 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 206 (1916)).

10. See Letter from James Madison to Edmund Pendleton (Jan. 9, 1787), *reprinted in* 9 *THE PAPERS OF JAMES MADISON* 243 (1975); Hobson, *supra* note 2, at 222-25. Madison's poor impression of his colleagues in the Assembly was apparently shared by first-term representative John Marshall of Fauquier County. 1 A. BEVERIDGE, *supra* note 9, at 206-07.

Students of Madison have not always paid attention to the specific experiences in the legislature that provoked him to draw such pessimistic conclusions about the future of republican government in Virginia. Similarly, they have rarely examined the exact relationship between the legislative battles of the period from 1784 to 1786 and Madison's constitutional theories.

To begin with, not all of Madison's efforts in these years resulted in failure. His success in defeating Patrick Henry's proposal for a general religious assessment in spite of what appeared to be a sympathetic legislature is still celebrated.¹¹ As chairman of the Assembly's Committee on Commerce, Madison achieved a number of successes, including an agreement with Maryland that the Potomac River be treated as a common highway and an authorization of commissioners to a future convention on the issue of regulation of interstate commerce, which ultimately resulted in the Annapolis Convention.¹² He also helped secure legislative charters for two river improvement corporations, one for the Potomac and the other for the James River, and he convinced his colleagues to approve a request granting Congress the power to pass navigation acts to protect American shipping for a period of fifteen years.¹³ Furthermore, and despite some widely publicized defeats, Madison's effort to enact the proposed revisions of the Virginia laws prepared by Thomas Jefferson, George Wythe and others in 1779, was generally successful.¹⁴

At the same time, many of what Madison considered the worst "excesses" of the Confederation period were avoided in Virginia. Unlike many of its fellow states, Virginia never attempted to pay off its state debt at anything other than face value.¹⁵ Although the

11. R. KETCHAM, *supra* note 5, at 162-68. This episode provided the occasion for Madison's famous *Memorial and Remonstrance against Religious Assessments*, reprinted in 8 THE PAPERS OF JAMES MADISON 295, 300 (1973). For modern views on the significance of Madison's efforts, see THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 43, 109, 118-25, 130, 148-56, 241-51, 283-96, 315 (1988).

12. See R. KETCHAM, *supra* note 5, at 168-70.

13. See N. RISJORD, *supra* note 7, at 240-47 (internal improvements plan); *id.* at 256 (congressional navigation acts).

14. See *id.* at 181-83.

15. J. MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* 250-55 (1973). Main's analysis of the then contemporary legislative debates and petitions to the legislature revealed a general commitment to retiring the state debt at face value through taxation. *Id.*

Assembly discussed the possibility of paying off the debt at a depreciated rate, it never seriously considered doing so, in large part because of the opposition to such a plan by the otherwise pro-debtor Patrick Henry.¹⁶ Nor did the Assembly ever vote to issue paper money; an attempt to do so in 1786 attracted the votes of only 17 of more than 100 delegates.¹⁷ Moreover, although the Assembly approved relatively modest installment acts and valuation laws, it enacted no debt forgiveness laws, and creditors as a group fared reasonably well in Virginia.¹⁸ In other words, few of the acts of other state legislatures of the Confederation era that Madison was to decry in 1787 in his influential *Vices of the Political System of the United States*¹⁹ occurred during his period of legislative service in Virginia.

What then were the issues on which the Assembly failed to follow Madison's lead? The following enumeration, while hardly comprehensive, suggests their general outline. First of all, Madison found little sympathy for his plans for reform of the 1776 Virginia Constitution, and his proposal for a new state constitutional convention was soundly rejected in June 1784.²⁰ His efforts to bolster the powers of the national government met a similar fate. Although the Assembly approved a 1784 resolution committing Virginia to pay its congressional requisition, it overwhelmingly defeated a Madison-backed petition calling for a revision of the Articles of Confederation.²¹ In 1785, the Assembly rejected Madison's proposals for the reform of the state's court system and balked at the prospect of adopting a new penal code.²² At the same

16. R. BEEMAN, *supra* note 7, at 119. Generally, however, Madison and Henry found themselves at odds on important public issues. For a discussion of the tumultuous relation between Henry and Madison, see *id.* at 130-35, 143-44, 161-63, 168, 176, 189. At the root of their differences was Henry's ideological commitment to a system of localized, decentralized government, a commitment that Madison obviously did not share.

17. J. MAIN, *supra* note 15, at 254 n.23.

18. *Id.* at 254; Main, *supra* note 7, at 101-02.

19. Madison, *Vices of the Political System of the United States*, reprinted in 9 THE PAPERS OF JAMES MADISON 345 (1975). Madison drafted this work, a compendium of complaints concerning the state legislatures of the Confederation period, in the late winter of 1787.

20. R. BEEMAN, *supra* note 7, at 117; R. KETCHAM, *supra* note 5, at 158-62.

21. R. KETCHAM, *supra* note 5, at 159; J. MAIN, *supra* note 15, at 257.

22. R. KETCHAM, *supra* note 5, at 161-62; A. ROEBER, *supra* note 7, at 192-95.

session it also refused to enact legislation establishing a rudimentary public school system.²³

Madison proved to be at odds with a majority of his colleagues on the issue of taxes as well. In 1784, the Assembly defeated an effort to increase taxes supported by Madison, and the same year, over the opposition of Madison, it postponed the collection of existing taxes for twelve months.²⁴ The following year, after a collapse of tobacco prices, Madison was able to prevent the outright cancellation of taxes only by accepting an act that provided for another period of postponement and an option of paying taxes in tobacco or produce rather than specie.²⁵

Central to Madison's plan for Virginia's economic recovery was the formal designation of a single port at Norfolk for all foreign trade entering Virginia. Such a plan, Madison believed, would allow the state to compete more effectively with its northern neighbors and, at the same time, give Virginia merchants rather than their British counterparts control over middleman profits. Here again, Madison encountered staunch opposition. Although the Port Bill eventually became law, its implementation was delayed, and the Assembly later amended the bill to provide for first five, then seventeen, and finally forty-one official ports, effectively negating the bill's original objective.²⁶

Finally, Madison's efforts to bring Virginia into compliance with the terms of the Treaty of Peace with Great Britain also failed. His attempts to repeal existing state acts designed to circumvent the terms of the treaty were rebuffed. In January 1785, Madison assembled what he thought was a majority in favor of the repeal of such acts, but the effort failed for the lack of a quorum. A similar bill introduced that fall was so burdened with amendments that Madison refused to bring it to a vote.²⁷

While these defeats *may* have represented narrowmindedness on the part of the members of the Virginia Assembly, they did not represent the breakdown of constitutional government. Nor were

23. R. KETCHAM, *supra* note 5, at 162.

24. *Id.* at 171.

25. *Id.*; see J. MAIN, *supra* note 15, at 249-50.

26. For the full story of the Port Bill, see McCoy, *The Virginia Port Bill of 1784*, 83 VA. MAG. HIST. & BIOGRAPHY 288 (1975).

27. R. KETCHAM, *supra* note 5, at 171.

they the sort of infringements of individual rights that Madison warned about in his 1785 letter discussing a constitution for Kentucky.²⁸ While certain actions of his legislative opponents might be viewed as abridgements of the rights of property owners, they were hardly infractions of the sort to suggest that the future of republican liberty was at peril.

Madison's strong reaction (one might maintain, his overreaction) to his legislative experiences in the mid-1780s can be best understood in the context of sectional political alignments in post-Revolutionary Virginia. As Jackson Turner Main and Marc Egnal have demonstrated, political disputes in Virginia in the 1770s and 1780s typically pitted the residents of the Northern Neck and their allies along the James and York Rivers against the residents of the Southside, with the balance of power resting in the hands of the representatives of the state's western sections.²⁹ In this context, Madison represented the region with which he most closely identified, the Northern Neck—the most cosmopolitan and expansionist section of the Old Dominion during the last half of the eighteenth century.

The Northern Neck is the part of Virginia between the Potomac River on the north and the Rappahannock River on the south, and extending west to the Blue Ridge Mountains. In the 1780s and 1790s, it could be distinguished from other parts of the state by its

28. Madison listed these infringements as including meddling with religion, abolishing juries, suspending habeas corpus, forcing witnesses to testify against themselves, restricting the press, enacting ex post facto laws, and taking property without just compensation. Rakove, *supra* note 1, at 251 (citing Letter from James Madison to Caleb Wallace (Aug. 23, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 350, 351 (1973)). The most complete statement of Madison's complaints concerning the excesses of the state legislatures of the 1780s is his *Vices of the Political System of the United States*, *supra* note 19.

29. The distinctive role of the Northern Neck is explored in J. MAIN, *supra* note 15, at 244-67; N. RISJORD, *supra* note 7; Main, *supra* note 7; and in two more recent works by Marc Egnal: M. EGNAL, A MIGHTY EMPIRE: THE ORIGINS OF THE AMERICAN REVOLUTION 87-101, 215-26 (1988); Egnal, *The Origins of the Revolution in Virginia: A Reinterpretation*, 40 WM. & MARY Q. 401 (1980). Other sources on the Northern Neck include J. MAIN, THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA (1965); R. MORTON, COLONIAL VIRGINIA: WESTWARD EXPANSION AND PRELUDE TO REVOLUTION, 1710-1763 (1960); J. Gouger, Agricultural Change in the Northern Neck of Virginia, 1700-1760: An Historical Geography (Ph.D. dissertation, University of Florida, 1976); J. Schlotterbeck, Plantation and Farm: Social and Economic Change in Orange and Greene Counties, Virginia, 1716 to 1860 (Ph.D. dissertation, Johns Hopkins University, 1980).

distinctive social structure and its ready access to transportation and communication facilities.

The area had been granted to the Fairfax family in 1689 as a separate proprietorship within Virginia. In contrast to the official policy of the colony, the proprietors disposed of the land by the sale of huge tracts that were converted into great plantations worked by slave labor. Other whites moved to the Northern Neck, but because of the scarcity of good land, the area contained a smaller portion of yeoman farmers than any other part of the colony. Prior to the Revolution, the incidence of farm tenancy was higher in the Northern Neck than elsewhere in Virginia, and no section of the state was as dependent on the labor of white indentured servants.³⁰

This pattern continued during the Confederation period. In the 1780s, for example, ten percent of Richmond County planters owned at least thirty percent of the land in the county while thirty percent of taxpayers owned no land at all.³¹ This social structure, peculiar to the Northern Neck, contrasted sharply with that of Southside Virginia, the region south of the James River and east of the Blue Ridge Mountains. Although the Southside also contained large numbers of slaves, it possessed a far more balanced distribution of property among whites.

The Northern Neck's location also made it well suited for large-scale commercial agriculture, particularly the cultivation of tobacco. Although the "light" soils of the Northern Neck ultimately made the production of high quality tobacco very difficult, the area's relatively late settlement meant it did not have to confront the problem of soil exhaustion as early as some parts of southern Tidewater.³² By the 1780s, however, the lower part of the Northern Neck was beginning to experience the effects of economic decline—reduced fertility of the soil and the departure of both whites and blacks. At the same time, other parts of the region, par-

30. See sources listed *supra* note 29.

31. N. RISJORD, *supra* note 7, at 22 (Richmond County does not include the city of Richmond, which is located outside the Northern Neck.).

32. On the problems of tobacco cultivation on the Northern Neck, see T. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF THE REVOLUTION* xiv, 40, 68, 80, 83, 148, 182 (1985).

ticularly the counties to the north, were moving away from a concentration on tobacco to a more diversified form of agriculture.³³

A far more important advantage of the Northern Neck was its ready access to navigable waterways. Hardly a farm or plantation in the entire region was located more than a day's trip from either the Potomac or the Rappahannock Rivers. These waterways not only facilitated trade, they encouraged travel from one part of the region to another, a fact that seems to have contributed to a cosmopolitan environment unusual for a region with no towns or cities.

Prior to the Revolution, the interests of the gentry elite of the Northern Neck, including the Washington, Lee, Carter and Mason families, frequently clashed with those of other Virginians. Attempts by the House of Burgesses to limit the production of tobacco in order to raise prices were particularly unpopular in the Northern Neck.³⁴ In the 1740s and 1750s, the Northern Neck gentry became extensively involved in land speculation in the Ohio Valley—The Ohio Company was composed largely of men from the Northern Neck—and they were the first to call for additional appropriations to protect Virginia's western settlements from the French. During the 1760s and 1770s, resistance to British policies and the movement for independence in Virginia achieved greater support in the Northern Neck than from any part of the colony. Throughout this period the Northern Neck was characterized by, in the words of Marc Egnal, "a readiness to adopt bold measures to promote the province's well being."³⁵

Technically, Madison's Orange County lay just outside the boundaries of the Northern Neck. Numerous factors, however, associate Madison with the region. He was born there; he shared the cosmopolitan and expansionist values associated with its gentry elite; and while their plantation was located west of the Rappahannock, the Madisons used that river to market their tobacco.³⁶ Fur-

33. N. RISJORD, *supra* note 7, at 24-25. This change in economic conditions may have played a role in the development of the political agenda of the Northern Neck representatives. Norman Risjord maintains that the Northern Neck had "clearly reached its peak by the time of the Revolution." *Id.* at 24.

34. Egnal, *The Origins of the Revolution in Virginia*, *supra* note 29, at 408.

35. *Id.* at 424.

36. R. KETCHAM, *supra* note 5, at 5.

thermore, the social structure of Orange County strongly resembled that of the Northern Neck counties, and the Madison plantation was virtually identical in size and function to those of the leading planters of the Northern Neck.³⁷ In the early 1780s, the Madison family owned 118 slaves, the largest number in Orange County, and James Madison, Sr., could easily afford to give his son James 560 acres of the former's estate.³⁸

Moreover, Madison's political views in the legislature were essentially identical to those of the Northern Neck's representatives. A study of Madison's voting record in the Virginia House of Delegates between 1784 and 1786 reveals that in votes that divided the legislature, Madison voted with the majority of Northern Neck representatives on twenty-one of twenty-five occasions.³⁹

During the Confederation period, representatives from the Northern Neck, along with their allies from the eastern James River area, consistently defended the rights of creditors; acknowledged Virginia's obligations under the treaty with Great Britain; favored governmental action on behalf of those who had suffered wartime damages; supported the imposition and collection of taxes; sympathized with the cause of manumission of slaves; and recognized the need to grant additional powers to Congress, the governor and the courts.⁴⁰

Representatives of the Southside, led by Patrick Henry, regularly opposed the interests of the Northern Neck bloc. Lacking the ready access to transportation facilities, operating in an economy chronically short of specie, and suspicious that most increases in governmental power were designed to aid other parts of the state, the Southside bloc characteristically opposed new taxes, favored taxpayer and debtor relief, saw little reason to open the courts to British creditors, rejected manumission and opposed the creation

37. The similarities between Orange County and the counties of the Northern Neck are noted in Main, *supra* note 7, at 107.

38. Schlotterbeck, *supra* note 29, at 16 (cited in D. McCoy, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 230 n.28 (1989)). For Madison's somewhat ambiguous feelings about his family's social and economic status, see D. McCoy, *supra*, at 230-33.

39. J. MAIN, *supra* note 15, at 443.

40. *Id.* at 260-66. For the strongly nationalist orientation of congressional representatives from the Chesapeake area, see N. RISJORD, *supra* note 7, at 619 n.1.

of any new governmental powers and agencies, whether state or national.⁴¹

This sectional division between the Northern Neck and the Southside was apparent in the response to all of Madison's legislative activities except for his opposition to the general assessment of religion.⁴² For example, during Madison's tenure in the legislature, seventy-five percent of Northern Neck delegates opposed the postponement of the collection of state taxes while seventy-two percent of their Southside counterparts supported it.⁴³ The enforcement of obligations covered by the treaty with Great Britain was supported by eighty-two percent of the Northern Neck bloc and opposed by ninety percent of those from Southside.⁴⁴ When the issue was rephrased to permit withholding debts due to British creditors, ninety-seven percent of the Southside delegates supported it as opposed to only twenty-five percent of Northern Neck delegates.⁴⁵

A majority of Northern Neck delegates, fifty-three percent, favored granting additional powers to the national government while seventy percent of the Southside bloc opposed it.⁴⁶ A more purely sectional issue—the pursuit of claims against Britain for damages to Virginia's coastal areas during the war—was supported by eighty percent of the delegates from the Northern Neck, but opposed by ninety-seven percent of those from the Southside.⁴⁷

Throughout the Revolutionary period, the role of the Northern Neck gentry had been in the ascendancy. It had provided a substantial portion of the leadership in the colony's movement for independence, and its members clearly associated their cosmopolitan, expansionist outlook with the best interests of the state. To a large extent, the legislative battles of the 1780s represented a resounding setback for their vision of Virginia's future in favor of

41. J. MAIN, *supra* note 15, at 260.

42. The following roll call comparisons are derived from Jackson Turner Main's analysis of roll call votes in the Virginia legislature, presented in J. MAIN, *supra* note 15, at 244-67, 442-48.

43. *Id.* at 262-63 (vote of the House of Delegates of the Virginia General Assembly, Nov. 21, 1785).

44. *Id.* (vote of June 7, 1784).

45. *Id.* (vote of June 23, 1784).

46. *Id.* (vote of Dec. 1, 1785).

47. *Id.* (vote of June 23, 1784).

one they considered excessively provincial and short-sighted. Although they persisted in their efforts to direct public policy, their opponents from the Southside and allied sections were sufficiently well entrenched to make further reform impossible on the state level.

The battle in Virginia, then, was not so much one of *faction* (as Madison subsequently implied) as it was one of *section*, and in this context Madison devised his proposal for a national negative on state laws. Had it been adopted, the national negative would have allowed the presumably cosmopolitan and nationalistic Congress to negate the effect of narrow sectional interests like those represented by the legislators from the Virginia Southside.

Madison's conclusion that the future of republican government depended upon a stronger central authority was not solely the result of the frustration of the legislative agenda of the Northern Neck. Obviously, his thinking was highly synthetic. One should remember, however, that Madison's theory of rights developed in the very real political context in which he operated as both a state and a national political figure. Madison's experiences in Virginia politics in the 1780s also remind us that during the antebellum period, the American debate over rights at both the state and national level typically took place against a sectional backdrop.

Certainly the political realities of the 1780s help explain Madison's belated endorsement of a bill of rights in 1788 and 1789. The narrow victory of the new national constitution in the Virginia ratifying convention, the rejection of Madison for one of the state's two seats in the new United States Senate, and the redrawing of the boundaries of Madison's own congressional district in an attempt to defeat him, were reminders that the opponents of Madison and his Northern Neck allies remained strong after the adoption of the federal constitution.

Although Madison did come to appreciate the value of a national bill of rights, his initial endorsement of the idea was most likely a pragmatic effort to placate his Virginia opponents who sought to condition their state's participation in the new union on its adoption. From the perspective of Virginia in the late 1780s and early 1790s, the Bill of Rights was a product, not of James Madison's successes, but of his failures.