DEBTORS VERSUS CREDITORS IN THE STATE AND FEDERAL COURTS IN VIRGINIA

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The theme of this paper is neo-Progressive and deals with the relation of planter economics and developments in the law in Virginia during the early national period. Beginning with the long debated assertion that Virginia tobacco planters revolted from the British to absolve themselves of their debts, this work studies the connection in the 1780s between the economic conditions of an area and its voting behavior in the state legislature on legal and constitutional issues, and uses legal records to reveal the geographic dimension of indebtedness within the state.

Since the mid-eighteenth century, Virginia's courts had been filled with suits by British merchants against indebted tobacco planters. Debtors found protection in their local courts, and, during the Revolution, the state courts were closed to the British.[1] A political faction, led by Patrick Henry and based in the indebted parts of the state, kept the courts closed in the 1780s and resisted attempts to make the state judiciary more accessible to creditors. The locals used their county courts and, in particular, the jury system to defend themselves from British claims. This strategy was compromised by the ratification of the Constitution and the establishment of a federal judiciary. But, if the new law and courts transcended their control, they could still rely on the independent jury. This right, demanded by the anti-Federalists and secured in the Bill of Rights, could possibly protect Virginia debtors from British creditors who sued them in the new federal courts.

Virginia planters owed almost half of all the British debt in America, and their situation grew worse in the 1780s as tobacco prices continuously fell.[2] The suits eventually brought before the federal circuit court show where these debtors lived. The area of the heaviest indebtedness was the tobacco region of the Southside, the area below the James River, and from the Tidewater through the river valleys of the James, York, and Rappahannock to the western Piedmont. This area supplied Henry with lieutenants and future leaders of the anti-Federalist faction. These men were either indebted, related to debtors, or residents of counties heavily indebted to British merchants, and included John Taylor, Spencer

Roane, Meriwether Smith, Josiah Parker, Isaac Coles, French Strother, Edmund Ruffin, James Monroe, Joseph Jones, John Dawson, and various Randolphs and Harrisons.[3]

Representatives from indebted regions voted in the state legislature against opening the courts to British creditors, and they voted against judicial and constitutional reforms within the state which would have aided creditors in securing justice.[4] In the 1780s, not only were the states completely sovereign, but local communities often determined all-important matters for themselves. In Virginia, the epitome of localism, the counties had existed prior to and were separate from the state government and were practically states in a federal system. Local power was centered in the county courthouse on court day.[5] There was little to check the local courts--only a limited and inadequate appellate system. Beyond the county level there were, for most kinds of cases, two courts, the General Court, which dealt with both civil and criminal matters, and the Chancery Court. Between these two there were eight judges who (along with the three members of an Admiralty Court) made up a final Court of Appeals. These judges were unable to handle the number of debt cases, so creditors were dependent on county courts.[6]

In Virginia's judicial system, most cases were at the county level, and juries favored debtors. For an indebted farmer facing a merchant creditor, the local jury provided him with protection from a "foreign" law. Generally, judges determined the law and juries determined the facts, but the jury was all-important in debt cases because facts meant more than the law. It availed the creditor little to have the law and even the judge on his side. The juries determined the verdict and the damages. Even if a creditor won the verdict, he might be disappointed in the amount the jury awarded him.[7] Indebted farmers were tried by their peers, twelve honest indebted farmers.

Opposing Henry's party of anti-Federalists was a group led by James Madison; it favored legal and constitutional reform to subordinate local interests to the best interests of the state and the nation. This party had the support of George Washington and usually George Mason, and included most of the Lee family, John Marshall, Archibald Stewart, Zachariah Johnson, Francis Corbin, Alexander White, and Wilson Cary Nicholas. Their geographic base was the Northern Neck, the area between the Rappahannock and Potomac rivers, the central western Piedmont (Orange and Albemarle

counties), and the Great Valley.[8] Much of this area had been practically a proprietary colony within a royal colony. Lord Fairfax, proprietor, had had his own land office separate from the colonial government. Selling land in large tracts, he established a well-to-do-gentry, many of whom rented their land to tenants. The planters diversified their agriculture, going particularly into wheat, so that after tobacco prices declined in the 1780s, affecting most of Virginia, they remained prosperous. These areas were nearly devoid of British indebtedness, and their representatives in the legislature voted as a bloc, against the tobacco regions.[9]

Madison's party could reform the judiciary either through legislation or constitutional revision. Henry's party opposed any constitutional changes that might centralize power by bringing the county governments under state control. They did not want a government that could make enforceable the obligations of contracts and the payment of debts. They did not want to be bound by a "foreign" law. Yet, their obstruction of constitutional reform in the state led less provincial Virginians to make further efforts at reform at the federal level. In helping to draft the Constitution, Madison hoped that a veto power over the states could be established which would check the activities of such states as Virginia led by provincial-minded men such as Henry. After the Constitution was drafted and submitted to the states, the battle in Virginia continued along the same lines. The question remained whether Henry's party would relinquish local control.

At the Virginia ratifying convention of 1788, the friends of the Constitution, or Federalists, were led by Madison, and included Edmund Pendleton, the president of the Court of Appeals; George Wythe, head of the Court of Chancery and professor of law at William and Mary; Henry Lee; John Marshall; George Nicholas; Francis Corbin; and Edmund Randolph, the governor. The most distinguished Virginian, George Washington, was not present, but it was public knowledge that the president of the Philadelphia Convention favored ratification. The major surprise was George Mason, who was active in the Philadelphia Convention but who refused to sign the finished document opposing both Madison and his party and his Northern Neck neighbors. Mason joined Henry. Along with William Grayson, they were the principal opponents of the Constitution, or anti-Federalists. Henry spoke the most often and at times appeared to be taking on the whole Federalist phalanx

single-handedly.

The anti-Federalists claimed the new Constitution was detrimental to the interests and rights of the state. Henry emphasized that the proposed Constitution was a foreign constitution, superseding the sovereignty of the state. Its ratification would create a fundamental law superior to state laws and provide for a judiciary to enforce it directly on Virginians. For protection, trial by jury was essential, especially because of the debt issue. The Constitution guaranteed jury trials only for criminal cases, which was no security for debtors. And, since treaties would be part of the supreme law of the land, the state laws against compliance with the treaty with Great Britain would be unconstitutional, and British creditors could bring suits against debtors through the federal judiciary. Henry and other anti-Federalists also claimed that Virginians would be hauled off to the center of the Union, to the federal city, to New York or Philadelphia or some other "foreign" place, where they could not expect a sympathetic hearing. The anti-Federalists wanted to secure the principle of locality in jury trials and insisted jurors come from the vicinity of the defendant. They were criticized for demanding a justice of familiarity rather than one of impartiality. It appeared that their demand for trial by jury was simply an agreement among neighbors to protect themselves. As Henry stated, "This gives me comfort--that, as long as I have existence, my neighbors will protect me."[10]

If the anti-Federalists were concerned about protecting local interests within the convention, they were even more adamant on the subject outside the convention hall. Since the British debts question related to the issue of the federal judiciary, the anti-Federalists stated their concern about the power a distant authority could have over them. The further removed a government was from their control, the more they wanted to limit it. The more local the government, the less they feared it. The anti-Federalists were strong in the Virginia General Assembly but might be insignificant in a federal Congress. Henry talked of the rights of man, but he meant the power of local interests to control their affairs. He wanted Virginia farmers to be able to live with little interference from the rest of the world.[11]

Madison and Henry led the opposing forces on constitutional reform in the convention, just as they had led opposing factions

for a decade in the state legislature. The geographical voting pattern continued.[12] Though the anti-Federalists failed to prevent Virginia from ratifying the Constitution, they did get to make recommendations for amendments which included the guarantee of trial by jury in civil suits with jurors drawn from the vicinity of the defendant.[13] An advantage of the jury trial was that it protected local interests within a state and federal appellate system and tempered the force of law through its control of facts, verdicts, and damages.

Madison and other Federalists won seats in Congress by promising amendments, and anti-Federalists found satisfaction in the Bill of Rights, which secured jury trials in civil suits. In the federal court system, as set out in the Judiciary Act of 1789, facts would be tried by juries drawn at the district court level--and each state was made a federal district--and appeals would be on the record from the lower court.[14] The result was that though there would be a federal appellate court system, Virginians would be tried in their state before local juries.

The British debt cases provided a good example of how the new system would work. In 1790, the Court of the United States for the Middle Circuit in the District of Virginia opened, and its docket quickly filled with British debt cases. The attorneys for the debtors put forward a number of pleas that had to be decided by the judges before there could be a trial for repayment of the debt. They also presented a plea that the debt had been paid, a question of fact, so that, if they lost on the points of law, a trial by jury would be assured.[15] Hearings began in 1791 on *Jones v. Walker*, which became a test case: other related suits were delayed until a decision was reached. Appropriately, Henry was involved with the defense of Virginia's debtors. This offered him another chance to strike at the British oppressor, to defend the poor indebted farmer, and to add to his fame as an orator. Henry prepared for this as he had never done before as a politician or lawyer. He gave great performances to a packed courtroom.[16] Though he spoke as a lawyer in a system of adversary justice, his defense of a particular debtor was a defense of all those indebted to the British, himself, his party, and their actions since the Revolution.

Henry attacked the conduct of the British while answering their charge that Virginians had fought the Revolution to avoid paying their debts. He reminded his audience that British tyranny

had caused the Revolution and that Americans had not only fought for their liberty, but also if they had lost the war, they could have lost their lives and property. With everything at stake, was it not just that the winners be absolved of their debts? Henry appealed to a higher law above contractual obligations. He believed that a sanctity had been given to the repayment of debts that was illusory. It was this sense of a higher justice that had led Virginia to revolt from Britain. The same authority justified Virginia's legislation to prevent the collection of British debts and to close its courts to the British; and that, in effect, had brought about a confiscation of the debts by the state. Henry argued that after 1776 it was in their power as an independent nation to confiscate British property and debts. And during the Revolution, when the bonds of the Anglo-American society were broken, all legal and financial connections between the two countries ended. Virginia became economically as well as politically independent of Great Britain. Several of Henry's points appeared compromised by the Treaty of 1783, but he challenged its validity. He argued that the treaty was of no effect since it had been broken by the British, who had retained posts in American territory.[17]

Since no decision was reached in 1791, the case of *Jones v. Walker* was postponed until 1793, when hearings were resumed and a decision was reached in another test case, *Ware v. Hylton*.[18] This case involved a debtor who had paid some of his debt into the state loan office--on the basis that the state had assumed the position of creditor, having confiscated the British debts. The defendant put forth the plea that debts so paid had been discharged and could not be collected by the British creditor. The presiding judges, John Jay, James Iredell, and Samuel Griffin, United States judges for the Virginia district, ruled for the plaintiff, the British firm. They rejected all of the defendant's pleas except the one concerning payments into the loan office. The court was not swayed by the argument that events during the Revolution had terminated the debts since they were recognized as existing in the Treaty of 1783. Nor would the court declare that the British had broken the treaty. The judiciary did not have the authority to make such a decision, for that was the domain of the president and the Senate under the Constitution. Until they declared otherwise, the judiciary must assume that a treaty was in effect.[19] On the plea that debts paid into the loan office were discharged, Ware appealed his case

against Hylton to the Supreme Court. When the appeal of *Ware v. Hylton* was heard, in 1796, the Court reversed the judgment of the circuit court and decided for the plaintiff that state acts could retroactively be nullified by the Constitution, that the debts paid into the loan office were still owed, and that they must be repaid by the debtors to the British creditors.[20] This decision meant that there was no legal bar to the recovery of British debts.

The victory of the British creditors was made problematic, however, by having to place their cause before Virginia juries. After most of the questions of law had been settled by the circuit court in *Ware v. Hylton*, the plea of debt payment, a question of fact, was put to a jury (on the part of the debt not paid into the loan office). Since there was ample evidence that Hylton was indebted to Ware, the jury gave a verdict for the plaintiff. But Ware did not receive all the damages he had requested. Interest on the debt for the entire period of the war was subtracted. Chief Justice Jay instructed the jury that it should not subtract the war interest, but this was a question of fact, where juries, not a federal chief justice, had jurisdiction. The pattern for the cases that followed was that when a British creditor won a verdict, war interest was always deducted. Defendants' counsels consistently used the argument that the plaintiff was a British merchant who had been out of the country during the war, and who was himself responsible, therefore, for the interest not being paid. Of course, actions by the state and its citizens had made it unwise for a British creditor to be in Virginia at the time, much less to try to collect interest payments, but juries had a ground for withholding the war interest.[21]

When the Supreme Court sent its decision down in *Ware v. Hylton* to be carried out by the circuit court, it involved the lower court's calling a jury to try the issue of fact on the payment into the loan office. This process, in the *Ware v. Hylton* cases, showed anti-Federalist Virginians that the federal judicial system worked as they had hoped it would.[22] The appeal was on a point of law while the facts were tried in the circuit court by Virginia juries. After the decision in this case, the most important legal question left regarding the British debts was a question not of law but of fact--that of the war interest. The juries not only lessened the effect of the creditors' actions but frustrated them to such an extent that they left the courts and looked to their government for an out-of-

court diplomatic solution.[23]

The use of delaying tactics and the obstinate refusal to submit in the end proved successful for the debtors, though they never actually won their point of law. Earlier, Henry and his party had tried to compromise the law that debtors had to pay back their debts, because of British tyranny and American losses during the Revolution, and they had failed. They had attempted to prevent the establishment of any court with the jurisdiction to try the claims, and they had failed. The legal principle stood backed by the Constitution and the federal judiciary. But local juries had provided Virginia debtors with their best defense. The interests of indebted farmers had not been seriously compromised by any legal or constitutional reforms. On this score, Henry had won against Madison. At the state and--due to juries--even at the federal level, creditors found that they were still at the mercy of local justice. Henry's neighbors continued to protect themselves from a cold and distant law.

NOTES

[1]See Emory G. Evans, "Planter indebtedness and the Coming of the Revolution in Virginia," *William and Mary Quarterly* 3rd Series, 19 (1962):511-33 and "Private Indebtedness and the Revolution in Virginia, 1776-1796,"*William and Mary Quarterly* 3rd Series, 28 (1971):349-74; T. H. Breen, *Tobacco Culture: The Mentality of the Great Tidewater Planters on the Eve of Revolution* (Princeton, NJ: Princeton University Press, 1985); and A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (Chapel Hill, NC: University of North Carolina Press, 1981), 128-37.

[2]Richard Sheridan, "The British Credit Crisis of 1772 and the American Colonies," *Journal of Economic History* 20 (1960):167; Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (1923; revised ed., New Haven, CT: Yale University Press, 1962), 139-40.

[3]Court of the United States for the Middle Circuit in the District of Virginia, Order Books, 1:1-231, Virginia State Library, hereafter cited as Circuit Court in Virginia, Order Books. For

finding debtor locations and their family relations, I have used Earl G. Swem, *Virginia Historical Index* (Roanoke, VA: 1934). My locating sixty-two debtors supplements the work of Evans, "Private Indebtedness," who used the records of those who paid their debts into the state loan office. On the Southside, which had poor access to shipping, see Richard R. Beeman, *The Evolution of the Southern Backcountry: A Case Study of Lunenburg County, Virginia, 1746-1832* (Philadelphia: University of Philadelphia Press, 1984).

[4]Roll call votes taken on compliance with the British Treaty: 17 December 1783; 7 and 23 June 1784; 17 November and 3 December 1787; *Journal of the House of Delegates of Virginia* (Richmond: 1784-88), October Session, 1783, pp. 124-26; ibid., May Session, 1784, pp. 52-55, 101-104; ibid., October Session, 1787, pp. 39-40, 61-62. Roll call votes on establishing a circuit court system: 13 December 1785 and 18 December 1786, ibid., October Session, 1785, pp. 89-90; ibid., October Session, 1786, pp. 106-107. Roll call vote on revising the Virginia constitution: 21 June 1784, ibid., May Session, 1784, pp. 86-87. In the geographical analysis of these votes, I have used Earl G. Swem and John W. Williams, *A Register of the General Assembly of Virginia 1776-1918, and of the Constitutional Conventions* (Richmond: 1918).

[5]On the county courts, see Charles S. Sydnor, *Gentlemen Freeholders: Political Practices in Washington's Virginia* (Chapel Hill, NC: University of North Carolina Press, 1952).

[6]Thomas Jefferson, *Notes on the State of Virginia* (1787; Chapel Hill, NC: University of North Carolina Press, 1954; Norton Library, 1972), chapter on Virginia laws.

[7]Ibid., Roeber, *Faithful Magistrates*, 128-37.

[8]Madison's Courts of Assize bill, 2 December 1784, Robert A. Rutland, ed., *The Papers of James Madison* (Chicago: University of Chicago Press, 1962-), 8:163-72; Madison to Monroe, 2 December 1784, ibid., 8:175-76; Madison to Jefferson, 9 January 1785, ibid., 8:222-34.

The lists above of leading members of Henry's and Madison's parties are drawn from the roll call votes cited in this paper from the House of Delegates and the Virginia ratifying convention. For a quantitative analysis of voting in the General Assembly that shows the development of parties led by Madison and Henry, see Norman K. Risjord and Gordon Denboer, "The Evolution of Political Parties in Virginia, 1782-1800," *Journal of American History* 60 (1974):961-

34.

[9]On the prosperity of the Northern Neck relative to other parts of Virginia, see Jackson Turner Main, "The Distribution of Property in Post-Revolutionary Virginia," *Mississippi Valley Historical Review* 41 (1954):241-58. Like planters of the Northern Neck, those of the central western Piedmont also went into wheat instead of tobacco production. Lewis Cecil Gray, *History of Agriculture in the Southern United States to 1860* (Washington: Carnegie Institution of Washington, 1933), 2:602-609.

[10]Speeches of Henry, Mason, Pendleton, Madison, Henry Lee, George Nicholas, Francis Corbin, Edmund Randolph, and Marshall, in the Virginia ratifying convention, Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Congressional publication, 1830-36; reprinted, Philadelphia: J. B. Lippincott Co., 1941), 3:21-23, 44-57, 98, 110, 186-87, 201-204, 222-23, 245-47, 301, 383, 406, 445-50, 517-19, 523-26, 530-31, 535-51, 578-80.

[11]Another issue discussed involved land disputes resulting from the Revolution such as the confiscations of British and Tory property. Madison to Washington, 4 and 13 June 1788, Rutland, ed., *Papers of Madison*, 11:77, 134.

[12]The roll call vote for ratification, Elliot, ed., *Debates*, 3:654-55.

[13]The recommended amendments, ibid., 3:657-61.

[14]Madison to Jefferson, 8 December 1788, Rutland, ed., *Papers of Madison*, 11:381-85; a Madison campaign public letter, January 1789, ibid., 11:428-29; Madison to Jefferson, 29 March 1789, ibid., 12:37-40; Madison's speeches for a Bill of Rights, 1st Cong., 1st Sess., House, *Annals of the Congress of the United States* (Washington: Gales & Seaton, 1834-56), 1:431-40, 746-47. On the lack of Virginian opposition to, and Madison's support for, the Judiciary Act of 1789, see ibid., 1:812-13, 894; Richard Henry Lee to Henry, 28 May 1789, James Curtis Ballagh, ed., *The Letters of Richard Henry Lee* (New York: The Macmillan Company, 1912-14), 2:487. An Act to Establish the Judicial Courts of the United States, Generally known as the Judiciary Act of 1789, 24 September 1789, Richard Peters, ed., *The Public Statutes at Large of the United States of America* (Boston: Charles C. Little and James Brown, 1848), 1:73-93.

[15]Circuit Court in Virginia, Order Books, 1:1-83. For a

summary of the pleas see the next paragraph on Henry's argument. The pleas are listed in the court report for the Supreme court case of *Ware v. Hylton*, 3 Dallas 199 (1796). Also, see Charles F. Hobson, "The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797," *Virginia Magazine of History and Biography* 92 (1984):176-200.

[16]Pendleton to Madison, 9 December 1791, David John Mays, ed., *The Letters and Papers of Edmund Pendleton* (Charlottesville, VA: University Press of Virginia, 1967), 2:582.

[17]William Wirt used David Robertson's shorthand account of the case of *Jones v. Walker* to reproduce Henry's argument in his *Sketches of the Life and Character of Patrick Henry* (1817; revised ed., Philadelphia: Thomas, Cowerthwait & Co., 1841), 220-54.

[18]Summaries of *Jones v. Walker* and *Ware v. Hylton* are included in Hobson, "the Recovery of British Debts." *Jones v. Walker* was postponed due to the absence of two of the Supreme Court justices. Before his case resumed, William Jones died, which suspended his suits, including *Jones v. Walker*. His administrator, John Tyndale Ware, resumed the suits, the first of which that was heard, the new test case, by consent of the defendant, was against Daniel Hylton & Co. and Francis Eppes. Circuit court in Virginia, Order Books, 1:1-141; Monroe to Jefferson, 1 May 1792, Walter Lowrie and Mathew Clark, ed., *American State Papers* (Washington: Gales & Seaton, 1832), 1:234; Bemis, *Jay's Treaty*, 285.

[19]A summary of the circuit court case is in the report of the Supreme court appeal, *Ware v. Hylton*, 3 Dallas 199 (1796).

[20]Ibid.

[21]Besides the court costs, Ware received only about a fourth of the amount he sought. Not counting both the payments into the loan office and the interest during the war, he still only received about forty per cent of what he could have expected. In a number of cases, the subtraction of "war interest" was an understatement, the interest payments not starting until two to seven years after the signing of the peace. Ibid.; Circuit Court in Virginia, Order Books, 1:113-14, 161-62; *McCall v. Turner*, 1 Call 133 (1797).

[22]*Ware v. Hylton*, 3 Dallas 199 (1796). In the Supreme Court appeal, the justices who rendered a decision were Samuel Chase, William Paterson, James Wilson, and William Cushing.

[23]This process began in a debt commission being established by the Jay Treaty and concluded in the Convention of 1802 between the

United States and Britain. No actions were taken against American litigants. See Bemis, *Jay's Treaty*, 283-86, 356-58, 438-41; John Bassett Moore, *International Adjudications* (New York: Oxford University Press, 1929-33).