

## WYTHE HOLT

*Morton Horwitz\**

It is a great pleasure to be asked to celebrate the distinguished career of Wythe Holt. I have known Wythe for over thirty years. We became friends during his year as a Law and Humanities Fellow at Harvard in 1975-76. The young Wythe already displayed that extraordinary combination of, on one hand, passionate outrage at injustice and empathy for society's underdogs and outsiders, and, on the other, a sweetness and gentleness of spirit that made it a privilege to be his friend.

Wythe's academic career expressed his moral and political commitments, much of it during a time in Alabama when it took real moral courage to identify openly with Marxism or to advocate progressive positions on questions involving race or class. Wythe began his teaching career in 1966 during George Wallace's first term as governor of Alabama and three years after Wallace's notorious "stand at the schoolhouse door" speech shouting defiance against *Brown v. Board of Education*. During Wythe's first twenty-one years at Alabama, Wallace, his wife, or one of his close supporters, occupied the governor's mansion. I never heard Wythe complain about being isolated or marginalized, though for many years he surely encountered real pressure to conform. He stood firm and found his community where he could—among sympathetic Alabama faculty and students when he could and among legal historians and members of the Conference on Critical Legal Studies when he could not. Ultimately, I suspect, it was his commitment to scholarship that sustained him through those many years as an outlier. Wythe's most fertile scholarly period was during the 1980s, a time when a physically stricken Wallace continued to dominate state politics, while returning to the less rabid racial politics of his pre-demagogic days.

Though Wythe's writings always force us to recognize the painful gulf that separates the world as it is from the world as it might be, what also comes through in all of Wythe's writing is a passionate Enlightenment faith that truth has the power to overcome mystification. It reminds me of the Enlightenment faith of the Framers, especially the Virginia Framers, or of that great Alabamian, Justice Hugo Black. Perhaps it comes from Wythe's great namesake—Jefferson's and Marshall's teacher, the Chancellor of Virginia—George Wythe. In all of Wythe Holt's writing there is an effort to unmask the formal, legal justification or explanation for a doctrine or insti-

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tution—what Laura Kalman calls the “internal” arguments in law—and to see those “external” forces of organized wealth and power that have, in the end, more greatly influenced the outcome.<sup>1</sup>

When Wythe began teaching, a complex array of influences determined his scholarly course. Though the Warren Court had already been in existence for thirteen years, the prevailing influences in academic thought continued to be derived from the depoliticizing “legal process” and “neutral principles” schools. From his earliest writing, Wythe sought to challenge the claim that law had ever been neutral vis-à-vis social and political struggle. In two early articles on the “Labor Conspiracy Cases” and on the right of an employee to recover for time worked after he quit, Wythe looks beyond doctrinal justifications to see the pro-employer bias at the heart of the judges’ decisions in those cases.<sup>2</sup> This emphasis on neutral principles was especially prevalent in Wythe’s own field, the Hart and Wechsler dominated subject of Federal Courts.

In his work on federal courts, Wythe combines a technical mastery of a difficult body of law with a broad theory of the original role of the federal judiciary in the Federalist vision.<sup>3</sup> In separate studies on the historical basis for establishing a federal judiciary and for creating diversity and alienage jurisdiction, Wythe touches on a common pattern—a belief among Federalists that federal courts would be much better disposed to creditors than would pro-debtor state courts.<sup>4</sup> He penetrates the reified fog of “local prejudice”—the usual justification for federal jurisdiction—to show us the specific forms that pro-creditor sentiment took in each of the jurisdictional provisions of the Judiciary Act of 1789 that he has studied. The provision allowing aliens to sue in federal court was designed, above all, to permit British creditors to recover under the Treaty of 1783, despite continuing state resistance.<sup>5</sup> In particular, it permitted loyalist landowners who had fled to Britain to bring their unpopular lawsuits to recover their lands in federal court.<sup>6</sup> Diversity jurisdiction allowed creditors in federal court to adjust

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1. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *YALE L.J.* 2165 (1999).

2. Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 *WIS. L. REV.* 677; Wythe Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 *OSGOODE HALL L.J.* 591 (1984).

3. Wythe Holt, “*To Establish Justice*”: *Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 38 *DUKE L.J.* 1421 (1989) [hereinafter Holt, “*To Establish Justice*”]; Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 *OKLA. CITY U. L. REV.* 547 (1989) [hereinafter Holt, *The Origins of Alienage Jurisdiction*]; Wythe Holt & James R. Perry, *Writs and Rights, “clashings and animosities”*: *The First Confrontation between Federal and State Jurisdictions*, 7 *LAW & HIST. REV.* 89 (1989); Wythe Holt, “*The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects*”: *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 *BUFF. L. REV.* 301 (1987); Wythe Holt, “*Federal Courts as the Asylum to Federal Interests*”: *Randolph’s Report, The Benson Amendment, and the “Original Understanding” of the Federal Judiciary*, 36 *BUFF. L. REV.* 341 (1987); Wythe Holt, *The First Federal Question Case*, 3 *LAW & HIST. REV.* 169 (1985).

4. See Holt, “*To Establish Justice*,” *supra* note 3; Holt, *The Origins of Alienage Jurisdiction*, *supra* note 3; Holt & Perry, *supra* note 3.

5. Holt, *The Origins of Alienage Jurisdiction*, *supra* note 3, at 561-64.

6. *Id.*

their recoveries to account for inflation while the laws of many states required creditors to accept devalued currency in satisfaction of their loans.<sup>7</sup> It also furthered the goal of creating a general federal common law of commercial relations, which allowed federal courts to bypass the pre-commercial mentality that prevailed in many state courts.<sup>8</sup> Though *Swift v. Tyson*<sup>9</sup> established this principle, a much earlier example appears in *Riddle & Co. v. Mandeville*,<sup>10</sup> in which Chief Justice Marshall invoked a vague federal equity power to recognize one of the most important and eagerly sought after pro-creditor doctrines favoring the negotiability of notes, despite a flatly contrary state rule in Virginia, where the notes had been negotiated.<sup>11</sup>

As in his writing on the labor cases, Wythe argues that all of these uses of the federal courts to advance the creditor interest should not be seen simply as interest group politics but as a real example of a perennial structure of class conflict. In a long footnote in his 1989 *Duke Law Journal* article, he defends his class analysis and, in particular, his use of the concept of class.<sup>12</sup> (I can just imagine the negotiation that took place between the editors of the *Duke Law Journal*, who thought they were publishing an article on the Judiciary Act of 1789, and Wythe, who believed that a more abstract methodological discussion of class was called for.)

This is perhaps the moment to say something about Wythe's understanding of Marxism, whose analytical categories had been under attack, even by leftists, for more than a generation. Wythe's early work shows that Marxism was not yet part of his thinking. His 1974 *Indiana Law Review* article is a typical Legal Realist challenge that denounces "internalist" doctrinal analysis and calls for understanding the "external" influences of social and economic power.<sup>13</sup> Eight years later, in his complex and subtle review of my book, Wythe has already adopted a Marxist framework.<sup>14</sup>

The explanation for his changed orientation would seem to be the influence of the Conference on Critical Legal Studies (CLS), founded in 1977, which introduced him to the world of social theory.<sup>15</sup>

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7. *Id.* at 558-61.

8. *Id.* at 562.

9. 41 U.S. 1 (1842).

10. 9 U.S. 322 (1809); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 220-26 (Cambridge: Harvard Univ. Press 1977).

11. See HORWITZ, *supra* note 10, at 332-33.

12. Holt, "To Establish Justice," *supra* note 3, at 1430-32 n.28.

13. Wythe Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 *IND. L. REV.* 615 (1974).

14. Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 *WM. & MARY L. REV.* 663 (1982).

15. See John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 *STAN. L. REV.* 391 (1984).

## THE REBEL

From the late 1980s, one can see Wythe beginning to digest the critique of orthodox Marxism that had been a prominent feature of CLS writing. It can be seen in several areas.

First, he develops a critique of determinism without entirely acknowledging the centrality of the idea for scientific Marxism itself. Second, he becomes critical of the base-superstructure formulation, a criticism which was especially prominent among activist left lawyers who were not happy with conceiving of law as an entirely super-structural dependent reflection of society.

Third, he comes to realize the inadequacy of Marxist definitions of class based on relation to the means of production, and he begins to articulate a less rigid notion of class. Nevertheless, Wythe continues to insist on class analysis and, in the process, continues to bring a certain dogmatism to his wish to see a clear distinction between classes and interest groups.

Even as Wythe is adapting his Marxism to the growing left critique, he continues to patrol the borders of orthodoxy with enthusiasm, denouncing “bourgeois” and “idealist” analysis as if Marxist theory could still be treated as self-evidently true. On one hand, he seems like the religious convert who wishes to be more orthodox than the Pope. On the other, he has become aware of the difficulties in orthodox Marxism and is engaging in his own revisionist reworking of the theory.

Wythe’s critique of “idealist” legal theory shows the difficulties of reasserting a sharp distinction between “material” and “non-material” explanations. The basic problem is that any sharp distinction between “base” and “superstructure” ignores the ways in which ideas structure material reality. Even the idea of “property” acquires its real meaning only in the context of conceptions of how wealth should be acquired, transferred, and distributed.

Wythe often wrote as a defender of orthodox Marxist categories even as he was acknowledging that Marxist analysis had encountered significant challenges. While he sympathized with the critique of so-called scientific Marxism by the “consciousness Marxism” of Lucas and Gramsci, he continued to rail against a tendency towards “idealism” on the left that, in my view, was an inevitable consequence of that split between “the two Marxisms.” At the core of the Marxist intellectual crisis was its failure to deliver on its claims to the scientific character of its critical concepts like “labor surplus” or “base and superstructure” or even “class.” As it came to absorb the positivist methodology of the natural sciences, it became more mechanistic and reductionist as it sought to discover the laws of society and history.

Wythe’s struggle with the use of “class” typifies the problem. As much as Wythe wishes to restore a pristine concept of class—like the orthodox Marxist definition of class as based on one’s relation to the means of production—he is confronted at every turn with the elusiveness of the concept in history. At one pole, the strict Marxist definition simply universalizes the

historically specific factory system of early capitalism when class could plausibly be defined in terms of relation to the means of production. In developed economic systems in which the traditional working class is shrinking, the idea of class needs to be separated from its rigid connection to the factory system. As the idea of class becomes separated from the original material conditions that gave it birth, it brings to the fore the question of whether class itself is not a socially constructed and historically bounded concept.

This issue is present in Wythe's analysis of the early establishment of a federal judiciary intended to favor creditors over debtors. He seems to want to persuade us that it also represents some universal example of class struggle under capitalism. Perhaps this should be viewed instead as an example of Madisonian interest group conflict. Is the debtor-creditor conflict different in kind from simple economic inequality or from pervasive use of the state for maintaining economic domination by the wealthy?

One of the methodological issues in writing history that Wythe confronts with gusto is contained in his frequent challenge to those who accuse writers on the left of conspiratorial thinking. He is wise to the ways in which liberal historians have claimed a self-righteous neutrality while accusing others of being "political" or "ideological." And he is quick to show how class analysis always draws accusations of conspiracy while interest group analysis, which similarly ascribes a supra-individualist will to groups, rarely draws that charge.

It has been a great pleasure to honor the work of Wythe Holt, whose moral courage and intellectual seriousness have served as a model of the engaged law professor.