

## A SWINGER OF BIRCHES: A VIEW OF WYTHE FROM WITHOUT

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Readers familiar with *Tilt*,<sup>1</sup> an utterly perfect small gem of an article, know from whence half this tribute's title comes,<sup>2</sup> but here the view from without comes from a friend, colleague, and an observer of Wythe in his natural habitat of academe. I come, unabashedly, to praise him.

I've known Wythe for almost a quarter century, and although Wythe is about everything but centrism, I want to start with a story that occurred right around the middle of that quarter century. The story begins with the University of Alabama Faculty Senate where Wythe has the still and probably always unique distinction of having held all five of its offices (President, Vice President, Secretary, Parliamentarian, and Historian). The Faculty Senate, which Wythe sometimes referred to as student council for grownups, has in fact been an important force on campus in all the ways that faculty voice can contribute to the idea of a university community.

The Senate occasionally and far from annually confers on a member of the university community its highest honor, the Faculty Senate Distinguished Service Award. (The Senate has awarded this honor eight times in its thirty-five-year history, to six faculty members, one dean, and one university president.) A committee to consider nominees is formed only when there is a nomination. I was chair of the committee when Wythe was nominated.

The initial letter nominating Wythe came from Salli Davis, a then member and later chair of the English faculty. The letter recounted the numerous services to the university that Wythe had selflessly performed (including having been the gadfly motivator, or principal drafter, or both, of virtually every important campus faculty policy, and having been one of the faculty leaders in a successful effort to replace a university president utterly unsympathetic to the notion of faculty governance with one who shared Wythe's view that faculty governance, inefficient and messy as it can be, is utterly necessary to the idea of a university). The letter went on to praise Wythe's courage, integrity, spirit, intellect, energy, and political savvy, al-

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1. Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).  
2. For the other half, see *infra* note 20.

though my memory is that it was a bit restrained in its celebration of his sense of humor, which runs toward outrageous puns.

But what I remember most about the letter were the words with which it ended, words that for anyone who has known Wythe well will involuntarily but tenderly cause the flexing of their zygomaticus major and orbicularis oculi muscles to sculpt the lips (and eyes) into a smile whose enigmatic qualities might recall, or even shame, *La Gioconda*. The words were these: “Wythe, never, ever easy, but always, always worth it.”

A person driving down University Boulevard will upon entering the University of Alabama campus encounter a brick wall with three words: “Teaching, Research, Service.” As a young faculty member, I always found those words a far-from-subtle reminder of what my senior colleagues expected of me before they would grant me tenure. But now they take on new value, providing a structure for the remainder of this Essay. (This is, of course, more or less the structural orthodoxy for this genre of writing.<sup>3</sup>)

First, teaching.

I had a brilliant research assistant, Victoria Davis, during the second semester of my first year of teaching—brilliant but atypical of Alabama law students. Vickie’s dad was a trucker and while in law school she and her husband, also a trucker, lived in a mobile home park. (And she was probably the first lawyer at the prestigious Dallas law firm that employed her who had commuted between home and office from a double-wide.) She had a lovely wit about her. And that semester she was taking Future Interests from Wythe.

One of the exercises that Wythe had his students go through is a written but anonymous evaluation of the class. He showed me an evaluation he received from one of his students, which I immediately recognized as written by Vickie. It began something like this: “I almost didn’t take this class. I thought, Future Interests taught by a Marxist? What could be more anomalous. But then I thought, if I want to be an estate planner and help rich people keep the government away from their money, I really should take this course. So I thought, what the hell.”

A couple of years ago I spent some time in the city where my former research assistant worked. (She now has her own consulting business and is thriving and has a lovely child and is no longer living in a double-wide.) I asked her who were the really great teachers at Alabama. At the top of her list was Wythe. I didn’t ask her why then, but another one of my favorite students, Robert Boliek,<sup>4</sup> who this year is teaching sixty miles east of here at

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3. See, e.g., Verner F. Chaffin, *In Tribute to John C. Payne: A Former Colleague’s View*, 35 ALA. L. REV. 1 (1984) (discussing teaching, research, service); Thomas W. Christopher, *Professor John C. Payne*, 35 ALA. L. REV. 5 (1984) (discussing teaching, research, service); Harry Cohen, *John C. Payne—A Law Teacher Par Excellence*, 35 ALA. L. REV. 7 (1984) (discussing teaching, research, service); Richard A. Thigpen, *Professor John C. Payne—Is He “Kingsfield” Or Is He Not?*, 35 ALA. L. REV. 19 (discussing teaching, research, service). See also the loving tributes to Robert M. Cover at 96 YALE L.J. 1699 (1987).

4. See generally Robert Boliek, *Dogfish*, 30 LEGAL STUD. F. 425 (2006).

Cumberland Law School, recently explained to me why Wythe is such an extraordinary teacher.

Robert said, first, that Wythe's teaching was elegant, with no wasted motion: everything that occurred in the class was about learning, even the puns that you might catch if you were attentive, and those you did catch enriched your understanding of the subject. Robert provided an example, close to twenty-five years after he was a student in Wythe's federal jurisdiction course.

Wythe was making the point—Robert said unfamiliar to most of the class and exciting to at least some of them—that rights to protect minority freedoms depended not only on the enshrinement of those rights in words but also in the willingness of the federal courts to entertain claims disfavored by majoritarian sentiment. *Bell v. Hood*,<sup>5</sup> Wythe observed, was a ringing endorsement of this idea.

Robert also said that Wythe had a point of view in class, and it was a point of view that for many Alabama students was new, difficult, challenging, and thus especially valuable. But discussion in class was always encouraged, spirited, comfortable, and even necessary for the types of learning that Wythe so evidently cherished. Robert characterized it as participatory learning. (Robert noted that Wythe not only asked students to provide written, but anonymous, critiques of the class, but that he circulated the critiques, with his responses, to the class.)

In another class, Decedents' Estates, Robert remembers Wythe having students draft wills either for themselves or for a fictional version of themselves. The students then had to critique their wills, explaining what they were trying to do and how they did it. And then Wythe provided each student with an extensive written critique of his or her will. Robert notes that it is not so uncommon today for large-class teachers to give students "practical" exercises but that it was uncommon then, and it is still uncommon for a law teacher to expend the vast amounts of time it took Wythe to provide meaningful critiques of each of the wills. For all students in the class, the will exercise was practical and connected the course to their lives. For the most thoughtful members of Wythe's students, the exercise also connected them and their lives to the centuries of historical development that created the law they were now exploring in class.

Second, research.

Wythe has diverse scholarly interests. He has written on the history of working people and the labor movement;<sup>6</sup> he has written on the origins of

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5. 327 U.S. 678 (1946).

6. Wythe Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOOD HALL L.J. 591 (1984); 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, *Can Labor Law Produce Justice?: Matewan (1987), Norma Rae (1979), and Shout Youngstown (1984)*, in SCREENING JUSTICE—THE CINEMA OF LAW: SIGNIFICANT FILMS OF LAW, ORDER AND SOCIAL JUSTICE 397 (Renard Strickland et al. eds., 2006); Wythe Holt, *Union Densities, Business Unionism, and Working-Class*

federal jurisdiction;<sup>7</sup> he has written on future interests;<sup>8</sup> he has written on the political history of Virginia in the Progressive Era;<sup>9</sup> he has written about bottom-up democracy and top-down democracy (the latter often a means of oppression).<sup>10</sup> He has the perhaps singular distinction of having discovered a previously undetected future interest in the back roads of Alabama estates law, of which, in the tradition of discoverers of astronomical bodies, he claimed naming rights (“[P]erversion,” a variant of which he labeled “possibility of perverter.” Indeed.).<sup>11</sup>

Although Wythe’s scholarly interests are broad, they do not overlap my own, so I am not well situated to explore the significance of his work, which I leave to the more capable hands of others.<sup>12</sup> But I can say some things about Wythe as a scholar. In fact, I will say four things.

1. Wythe and research constitute requited love. Several years back, at the end of the summer, I saw Wythe for the first time in several months. He had driven from Alabama up to New England, and then down to Philadelphia and Virginia, doing archival research on the Whiskey Rebellion and habeas corpus. I made some hackneyed comment about the scholar’s life being a lonely one, and Wythe cut me off, telling me how the kind of research he had just completed connected him to lives already lived and (though this might not have been exactly what he said, it is close enough in sentiment) to lives still to be lived (for that is what real scholarship is about). He had just handled papers that few people in the last century had handled, much less read, and he thought he saw in some of those papers ideas and themes whose geography desperately needed mapping. Nothing could be more refreshing and more invigorating. We then talked for more

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*Struggle: Labour Movement Decline in the United States and Japan, 1930-2000*, 59 LABOR/LE TRAVAIL (forthcoming 2007).

7. See, e.g., Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421; Wythe Holt, “[I]f the Courts have firmness enough to render the decision”: *Egbert Benson and the Protest of the “Midnight Judges” Against Repeal of the Judiciary Act of 1801*, in WYTHE HOLT & DAVID A. NOURSE, *EGBERT BENSON: FIRST CHIEF JUDGE OF THE SECOND CIRCUIT (1801-1802)*, at 9 (1987); Wythe Holt, *Separation of Powers?: Relations Between the Judiciary and the Other Branches of the Federal Government Before 1803*, in NEITHER SEPARATE NOR EQUAL: CONGRESS IN THE 1790S, at 183 (Kenneth R. Bowling & Donald R. Kennon eds., 2000); Wythe Holt, *Why We Have Federal Courts*, 63 GUILD PRAC. 1 (2006).

8. See Wythe Holt, *The Testator Who Gave Away Less Than All He or She Had: Perversions in the Law of Future Interests*, 32 ALA. L. REV. 69 (1980).

9. See, e.g., WYTHE HOLT, *VIRGINIA’S CONSTITUTIONAL CONVENTION OF 1901-1902* (1979); Wythe W. Holt, Jr., *The Senator from Virginia and the Democratic Floor Leadership: Thomas S. Martin and Conservatism in the Progressive Era*, 83 VA. MAG. HIST. & BIOG. 3 (1975).

10. See, e.g., HOLT, *CONSTITUTIONAL CONVENTION*, *supra* note 9; Wythe Holt, *Of Love, Strikes, and Democracy: A Revolutionary Essay*, 61 GUILD PRAC. 208 (2004); Wythe Holt, “*If any of you professes to care, I shall question and examine and test him; I shall do this to everyone I meet, young or old, foreigner or fellow-citizen*”: *Socrates on Democracy*, 14 LEGAL STUD. F. 291 (1990); Wythe Holt, *Introduction: Law vs. Order, or Habeas vs. Hobbes*, 51 ALA. L. REV. 525 (2000).

11. See Holt, *supra* note 8, at 84.

12. Alfred L. Brophy, *Wythe Holt: Teacher and Colleague*, 58 ALA. L. REV. 951 (2007); Morton Horwitz, *Wythe Holt*, 58 ALA. L. REV. 961 (2007); John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 ALA. L. REV. 967 (2007).

than an hour about some of his discoveries and ideas from his journey, intertwined with stories of family and of friends he had visited along the way.

2. Much of Wythe's scholarship is marked by a recurring theme: the idea that the human enterprise is at its best when people receive from each other what they most need—respect, dignity, mutual caring, purpose, and responsibility—and that these qualities both arise from and produce genuine community. Some of his most impassioned work is focused on historical moments when groups came together to form such communities (the Wobblies,<sup>13</sup> for example, and the Whiskey Rebellion insurrectionists<sup>14</sup>). And just as Wythe's work is concerned with the creation of community, it is also focused on threats to community and often peels away from the law its veneer of neutrality to reveal how the law too often works to protect elites from the transformative potential of such communities.

3. In his career, Wythe has commented on many hundreds of papers, theses, op-ed pieces, and articles written by friends, colleagues, students, and critics; his devotion to such work is an extension of Wythe's own work. Here at Alabama, he has shepherded generations of junior colleagues through the rigors and joys of scholarship. One of my colleagues, who joined the faculty about a decade after I did, recently recalled her utter astonishment when she received Wythe's critique of her first paper.<sup>15</sup> It was long, it caught errors large and small, it took her seriously, it reflected on her ideas, it directed her to original and secondary materials, and most important, it encouraged her. She came from a big-firm law practice and her legal work had certainly been subjected to serious review before, but she said that Wythe's response to her article (non-billable time lovingly rendered) caused her to understand that academic life was—as Robert Graves put it, only slightly differently in a slightly different context—as different from the practice of law as truth from lies and law from art.<sup>16</sup>

4. An important gift Wythe has given to some of his colleagues on the Alabama faculty is the insight to recognize when they are engaging in historical work and the wisdom to recognize the limitations of even experienced historians in illuminating a different time with the light of the present and in illuminating the present with the light of a different time.<sup>17</sup> The lesson from Wythe was plain: if trained historians are limited in what they can claim from the past, then the enthusiastic amateur needed to be constantly vigilant in his or her own work not to overstate or over claim the past. On at

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13. Wythe plans a book on the history of the Industrial Workers of the World, or the Wobblies, who flourished between 1905-1920. He has praised them in summary fashion in Holt, *Union Densities*, *supra* note 6, and in Holt, *Can Labor Law Produce Justice?*, *supra* note 6.

14. See Wythe Holt, "Coercion by Law": The Federal Whiskey Rebellion Cases Take Working-Class Insurrection to Court, 1795 (2005) (unpublished draft manuscript).

15. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO STATE L.J. 557 (1999).

16. See Robert Graves, *The Naked and the Nude*, in ROBERT GRAVES, *NEW COLLECTED POEMS* 141 (1977).

17. See, e.g., Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999).

least one occasion, when I forgot that lesson, Wythe's critique of one of my essays<sup>18</sup> resulted in my redoing much of it from scratch. I am grateful to him for sparing me unnecessary embarrassment.

Third, service.

Who knows what is meant by service? Everything I wrote above about Wythe's teaching and scholarship could certainly count under most dictionary definitions of service. So would the twenty-five years Wythe was a member of the University of Alabama Faculty Senate, and a member of perhaps twenty or so ad hoc and permanent university-wide and law school committees. And his work on executive boards of AALS sections. And in helping found Tuscaloosa People for Peace, and the Coalition of Alabamians Rebuilding Education. And fighting school segregation in Alabama. And mootng lawyers in death penalty cases. And writing op-eds on any number of topics in Alabama newspapers. Wherever the good fight was to be, Wythe was as good as there is. And we in Alabama have been lucky for that.

The essence of service is selflessness, and there is one particular story I want to tell before I move on to the conclusion of this Essay. Wilfred Julius Ritz, a professor who had a long and distinguished career teaching law at Washington and Lee University, had spent much of his life studying the origins of federal jurisdiction. What he had to say was novel, important, and, in the view of Jefferson Powell, "explode[d] many of our present notions about the origins and original meaning of the 1789 Judiciary Act."<sup>19</sup> The manuscript was largely complete, but reviewers had suggested changes and some work remained to be done. Before he could complete the project, Professor Ritz suffered a debilitating stroke. Wythe and his (and Professor Ritz's) good friend from Washington and Lee, L.H. LaRue, put aside their own work and spent almost a year completing Professor Ritz's project, preserving his research and commentary for future generations of students and scholars. Again, it was non-billable hours lovingly rendered for a friend and for the pure pursuit of knowledge.

Finally, community.

In the process of writing this Essay, I learned something else about Wythe. For him, teaching, research, and service are neither separate endeavors nor even closely connected endeavors. They are, rather, one and the same, all deriving from the very human need to create and nurture and participate in community. As Robert Frost wrote, in one of my favorite verses, "Earth's the right place for love:/I don't know where it's likely to go better."<sup>20</sup>

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18. Norman P. Stein, *Some Lessons from History: The Origins of Pension and Profit-Sharing Taxation, 1914-1942*, 58 N.Y.U. INSTITUTE ON FEDERAL TAXATION ch.12 (2000).

19. Jefferson Powell, *Introduction* (book jacket) to WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* (Wythe Holt & L.H. LaRue eds., 1990).

20. Robert Frost, *Birches*, in ROBERT FROST, *COLLECTED POEMS, PROSE & PLAYS* 117, 118 (1995). Robert Frost was an occasional teacher, and a reader of his verse, at Amherst College, when Wythe was

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a student there. It was somewhere near the beginning of my preparing this Essay that I thought the current last lines would be a nice place toward which to work. I did, however, wonder whether *Birches* in fact is a poem about the importance of community to human striving, or whether it might be read more as a celebration of the creativity that comes from isolation. Ultimately, it seemed to me about both (and of course other things as well) and thus very much about a life lived in scholarship.