

GEORGE WYTHE: EARLY MODERN JUDGE

*Wythe Holt**

George Wythe¹ was one of many leaders of the American Revolution who are little known today.² Though Wythe lived mostly in the eighteenth century, his landmark judicial opinions are startlingly modern in their assumptions and socioeconomic import. We might think of him as a founder of the American judicial tradition. This essay will study four of Wythe's opinions to establish and discuss their modernity.

THE ESSENTIAL FACTS ABOUT GEORGE WYTHE

Born to landed if petty gentry in eastern Virginia in 1726 or 1727, Wythe was fairly well known at the time of the founding of the United States.³ He had been a successful colonial lawyer and an important politician in the lower house of Virginia's legislature. As a well-liked member of the Continental Congress, he was among the earliest, strongest, and most influential advocates of American independence, and was a signer of the Declaration of Independence. John Adams said that he wrote his *Thoughts on Government* in response to a statement of need from his friend Wythe.⁴

* University Research Professor of Law Emeritus, University of Alabama School of Law. I am deeply grateful to Dean Kenneth Randall and the University of Alabama Law School Foundation for the funding which supported the research for this essay. It is an honor and a pleasure to be a part of this symposium, originally organized as a series of scholarly and friendly critical talks by my fellow workers in American legal history, with much hard work from my kind colleagues Alfred Brophy and Norman Stein. I appreciate the bibliographic suggestions of Staughton Lynd and Norm Diamond. I have not altered spelling, punctuation, and capitalization in quoting from my sources.

1. The reader will have noticed a sameness in the names of author and subject. I am descended from Wythe's sister Ann Wythe Sweeney.

2. See, e.g., Wythe Holt, *How a Founder Becomes Forgotten: Chief Justice John Rutledge, Slavery, and the Jay Treaty*, 7 J. S. LEGAL HIST. 5 (1999).

3. Careful, thoroughly and imaginatively researched studies of Wythe include W. Edwin Hemphill, "George Wythe the Colonial Briton: A Biographical Study of the Pre-Revolutionary Era in Virginia" (1937) (unpublished Ph.D. thesis, University of Virginia), ALONZO THOMAS DILL, *GEORGE WYTHE: TEACHER OF LIBERTY* (1979), and ROBERT B. KIRTLAND, *GEORGE WYTHE: LAWYER, REVOLUTIONARY, JUDGE* (1986). Lively and insightful accounts, emphasizing differing aspects of Wythe's life, but not free from error are IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* (1981) and WILLIAM CLARKIN, *SERENE PATRIOT: A LIFE OF GEORGE WYTHE* (1970). Also useful is JOYCE BLACKBURN, *GEORGE WYTHE OF WILLIAMSBURG* (1975). The widely accepted facts in this section of the essay are taken from these sources.

4. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 332 n.3 (L.H. Butterfield ed., Atheneum 1964) (1961) (describing Apr. 9, 1814, letter from John Adams to John Taylor). *But see* KIRTLAND, *supra* note 3, at 95 & n.20, 106-07 ("There is, however, some question about how the essay came to be written, and much of the account given here depended upon the memories of old men about long-past events."); DILL, *supra* note 3, at 34-35 (noting Wythe was among the inspirers of Adams's pamphlet).

A delegate to the Constitutional Convention, Wythe would have signed the Constitution too had not the terminal illness of his wife called him home from Philadelphia in the early summer of 1787. Estimated contemporaneously to be one of the most learned men of his time, the essentially self-taught Wythe was product and part of the Enlightenment. He was a well-reputed student of the Greek and Latin classics (in the original), read French and other modern languages, learned Hebrew in his seventies, and was an expert amateur in mathematics and the natural sciences while being well-read in the letters—material which peppers his judicial opinions.⁵

Wythe tutored several young men in the law in his home, including Thomas Jefferson, with whom he had a long, warm, and productive intellectual friendship. Then he became the second professor of common law in the Anglo-American world, after Blackstone at Oxford, when in 1779 Governor Jefferson engineered a reorganization of the faculty at the College of William and Mary to establish for his mentor a Chair of Law and Police. John Marshall was Wythe's best-known student. Henry Clay acted as Wythe's clerk after his ten-year professorial stint ended, and many other of his pupils became distinguished lawyers and politicians.

The word "police" in the title of his professorial chair meant what would today be known as "political science" or "government."⁶ True to the title, Wythe proved an innovative law teacher. Designed to produce lawyer-citizens both dedicated to the cause of liberty and productive in state and national legislatures,⁷ Wythe's course of lectures included government and political economy as well as the common law of Virginia and England.⁸ He revived the custom of student moot courts, or mock trials of causes Wythe devised, and in which he sat as judge and preceptor in legal procedure. And he introduced the mock legislature, where on Saturdays in front of the populace of Williamsburg his law students debated and often amended bills Wythe brought forward out of the large number of proposals constituting a total revision of the laws of Virginia he, Jefferson, and the equally renown and venerated Edmund Pendleton had spent years drawing up, at legislative behest.⁹

5. Wythe's copious judicial citations to classical sources are analyzed in Richard J. Hoffman, *Classics in the Courts of the United States, 1790-1800*, 22 AM. J. LEGAL HIST. 55 (1978).

6. See generally CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 35-59 (1993).

7. See OSCAR L. SHEWMAKE, THE HONORABLE GEORGE WYTHE 17 (2d prt. 1954) ("to form such characters as may be fit to succede those which have been ornamental and useful in the national councils of America" (quoting Dec. 5, 1785, letter from George Wythe to John Adams) (internal quotation marks omitted)); Letter from Thomas Jefferson to James Madison (July 26, 1780), in 3 THE PAPERS OF THOMAS JEFFERSON 506, 507 (Julian P. Boyd ed., 2d prt. 1972) [hereinafter JEFFERSON PAPERS] ("This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.").

8. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 535-36, 574 (1990).

9. See Letter from John Brown to William Preston (July 6, 1780), in 9 WM. & MARY Q. (1st ser.) 79-80 (1900). On Pendleton, see DAVID JOHN MAYS, EDMUND PENDLETON 1721-1803: A BIOGRAPHY (Virginia State Library 1984) (1952).

As if these important careers were not enough, Wythe was named one of the three Chancellors of a new state high court of equity in 1778 (and as such he was also a member of the Virginia Court of Appeals, the state's highest court). Eleven years later, in a reorganization of Virginia's courts establishing a Court of Appeals staffed with its own judges, he became sole Chancellor. Then in 1802, as he entered his fourth quarter-century and fell behind on a burgeoning docket, he was named one of three Virginia Chancellors who sat separately, not as a single court. Wythe thus had been an important trial (and, at the beginning, appellate) judge for 28 years upon his death in 1806.

It is of his jurisprudence—the product of perhaps the best-read and most erudite of our founding judges¹⁰—that my story is told here. I will look at four opinions he wrote, to demonstrate that he was in a sense ahead of his time and out of his southern place.¹¹ Unlike many of Wythe's contemporaries, modern judges—say, at least from the late nineteenth century onwards—have agreed with the idea of judicial review despite its antidemocratic tendencies, have enforced valid contracts no matter what circumstances occurred after their making, and have believed that workers should not be enslaved, but free to bargain with their employers. In terms of the ideological assumptions and the socioeconomic effects of his jurisprudence, George Wythe was a modern, bourgeois¹² judge.

10. The other candidate for this accolade is James Wilson, named to the first U.S. Supreme Court in 1789—and indeed it is Wilson who I would argue is that contemporary American judge most like Wythe in jurisprudential approach and in the socioeconomic implications of his opinions. See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 60-61, 192-95 (1995) (analysis notes Wilson's protection of his investments in at least one judicial opinion); Hoffman, *supra* note 5, at 63, 66-68, 78-80 (noting Wilson's use of classical sources). Hoffman shows, briefly, that there were several other classical scholarly judges in the founding period, if perhaps they were not as deep, contemplative, or contextually aware as were Wilson and Wythe.

11. Only one of Wythe's biographers attempts to assess his judicial work. KIRTLAND, *supra* note 3, esp. at 205-10, focuses on Wythe's jurisprudence of equity, arguing cogently that the great Chancellor refused to accept British decisions as controlling authority, as a measure of the newly won liberty of Americans, *accord* Hoffman, *supra* note 5, at 64-66, and that he attempted to institute and justify a novel "tradition" of equitable jurisprudence as a republican, freshly American antidote to the difficulties and lacunae of (mostly British) common law rules. This essay takes a different but not inconsistent tack.

12. In this essay, I use the word "bourgeois" to refer to ideological support of the capitalist system. Marx uses the term "bourgeois" as synonymous with "capitalist." See KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* (Int'l Publishers Co. 1975) (1848).

THE FOUR OPINIONS

Commonwealth v. Caton (The Case of the Prisoners)¹³
and the Power of Judges

During the American Revolution perhaps two thirds of the inhabitants of the colonies did not support the independence movement. Many were neutral. However, many others (called “Tories”) favored the king; of these, large numbers fled to England, Canada, or other English dependencies, but many stayed at home. In Virginia, the seaboard area around Norfolk, especially Princess Anne County, was a Tory hotbed.¹⁴ Tensions were naturally high; Patriots made life dangerous and miserable for known or suspected Tories, and most of the latter kept silent. When, however, in 1781 three British armies were ravaging the countryside, and General Tarleton had chased Governor Jefferson and the Virginia government across the mountains to Staunton, Tories came out of the southeastern Virginia woodwork to aid the British cause. Horses were stolen, nighttime violence was wreaked, and Patriots were just as cowed and terrorized as their Tory neighbors had recently been.

The tables soon turned again. General Cornwallis was cornered at Yorktown, the French fleet kept the English from rescuing him, General Washington force-marched his army from hundreds of miles away to hem him in and to accept his surrender (using Wythe’s nearby home as his headquarters), and independence was won. Because of Tory strength in Princess Anne, special criminal courts were ineffective to handle the trials of those who, briefly, had joined the British cause, and in spring 1782, as examples, three men—Joshua Hopkins, James Lamb, and John Caton—were marched from the Princess Anne jail to Richmond to be tried for treason before the General Court. They were duly convicted and sentenced to be hanged. Upon their application to the General Assembly (Virginia’s legislature) for pardons, a compassionate House of Delegates granted their request, but the Senate refused to concur. Opaque language in the Constitution of Virginia could be read to give the House the sole power of pardon, while a legislative

13. Commonwealth v. Caton, 8 Va. (4 Call) 5 (Ct. App. 1782); *Pendleton’s Account of “The Case of the Prisoners” (Caton v. Commonwealth)*, in 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON 1734-1803, at 416, 416-27 (David John Mays ed., 1967) [hereinafter PENDLETON PAPERS], discussed in 2 MAYS, *supra* note 9, at 187-202; DILL, *supra* note 3, at 60-62; CLARKIN, *supra* note 3, at 158-61; KIRTLAND, *supra* note 3, at 216-19. Mays’s discussion is definitive, especially since, as Mays notes, the report of the case by Daniel Call was written only in 1827 and is incomplete and sometimes inaccurate, as compared with the contemporary bench notes taken by Edmund Pendleton (one of Wythe’s fellow Chancellors, and thus on the Court of Appeals). See 2 MAYS, *supra* note 9, at 385 n.9. The facts in the text are from Mays’s narrative.

14. My ancestors William and Rhoda Holt, the former being a third-generation farmer in Princess Anne County, sold their farm and left Virginia in 1774, as I have learned from my own genealogical researches. When I got interested in family history as a child, my grandfather—their great-great grandson Harry Holt—somewhat sheepishly told me “I think our family were Tories during the Revolution.” The son of William and Rhoda Holt, another William, returned to Princess Anne County soon after 1800, and was welcomed by the local community.

act passed almost simultaneously with the Constitution required the concurrence of both houses. The instance went back to the General Court, which, because of the difficulty of the issues, voted to adjourn the case to the Court of Appeals (consisting of Virginia's Chancery, General Court, and Admiralty judges all sitting together). The prisoners waited in an overcrowded, sometimes "fetid and unwholesome" jail cell for months.¹⁵

On November 2 the eight sitting judges¹⁶ delivered their opinions *seriatim*, as was the judicial custom at that time. A young John Marshall, two years after having attended some of Wythe's William and Mary lectures, was among "the very numerous and respectable audience [which] attended the Argument and [the] delivering [of] the Judgment."¹⁷ The crowd was large because the newspapers had trumpeted an impending decision of "[t]he great Constitutional question,"¹⁸ that is, whether a court could declare a legislative act void as contrary to the Constitution.

The decision was something of a let-down. Six judges tortuously found that the statute did not contravene the constitutional language and thus that the pardon, requiring Senatorial concurrence, was void. Two judges found the pardon good, but only one of them (Wythe's student James Mercer) concluded that the statute violated the Constitution. Most of the judges avoided "the great Constitutional question" like the plague. Wythe, in dictum (since he found the act not inconsistent with the Constitution), apparently alone among the judges spoke clearly and directly to the question of judicial review. His ringing language answered the question positively, giving what have become the usual protective reasons why unelected judges may overturn an act of the elected legislature.¹⁹

Wythe began by approving of the principle of separation of powers, because thereby "tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted."²⁰ But why were governmental powers separate when the members of one department had the final say about whether the act of another department was valid? Moreover, why should an unelected branch control the "sphere" of an elected branch in a democracy? Further, what of minority rights? Were not Tories still "citizens," whose "liberty" should be "promoted" through the operation of separation of powers, rather than (as actually occurred) having their pardons denied by the "separate" judiciary?

15. 2 MAYS, *supra* note 9, at 190.

16. Three of the eleven judges did not sit.

17. Pendleton's Account of "The Case of the Prisoners," *supra* note 13, at 427. For Marshall's presence, see 2 MAYS, *supra* note 9, at 194.

18. Letter from Edmund Pendleton to James Madison (Nov. 8, 1782), in 2 PENDLETON PAPERS, *supra* note 13, at 427, 428.

19. It would be most interesting to learn the opinion of the sole judge—Peter Lyons—who declared himself "[a]gainst the Power of the Court to declare an Act of the Legislature void, because it was against the Constitution," Pendleton's Account of "The Case of the Prisoners," *supra* note 13, at 426, but that opinion is lost. The notes made by Attorney General Edmund Randolph, who argued against the power of judicial review in the case, are also lost. KIRTLAND, *supra* note 3, at 230 n.9.

20. Commonwealth v. Caton, 8 Va. (4 Call) 5, 7 (Ct. App.1782).

Wythe ignored those difficulties. His opinion glided past the difficult issue of the operation of “separation of powers” where judges sit in review of legislatures, just as most modern judicial opinions do. He presumed that judges were “impartial[.]” Since they had neither the power of the purse nor the power of the sword, they could act as referees in such instances, “[f]or thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of [each] authority peaceably established.”²¹ Wythe adopted the myth that judges are somehow apolitical, above politics and economic interests, able to be fair when the supposedly political branches cannot be, a position which now lies at the heart of modern American constitutional law.

On the difficulty of minority protection, Wythe made moves which have also become typical in modern judicial review. Protecting popular rights was at issue, but he did not distinguish between majority and minority rights, nor did he deal with issues of power or oppression. He made no mention of the relative powerlessness of Tories as a minority, or any needs or “rights” they might have had. In *Caton*, Wythe saw himself as protecting the rights of the “whole community” against legislative invasion. An unnamed English judge who had declared it “his duty to protect the rights of the subject, against the encroachments of the crown” was equaled by Wythe, who, he said, had the same “duty . . . to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other,” a duty he would “fearlessly . . . perform.”²² When usurpations occurred, Wythe, as appellate judge, would

say to the [lower] court, *Fiat justitia, ruat coelum* [let justice prevail even though the heavens fall]; and, to the usurping branch of the legislature, you attempt worse than a vain thing, for although you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.²³

Virginia’s Constitution had been neither drafted nor adopted by “the people.”²⁴ Though the franchise in Virginia at the time excluded women, African Americans, Native Americans, slaves, and those other adults not pos-

21. *Id.*

22. *Id.* at 8.

23. *Id.*

24. Virginia’s Constitution of 1776 was drafted by two Conventions (assemblies of popular delegates) and was not submitted to a popular vote. See 7 THE FEDERAL AND STATE CONSTITUTIONS 3812 n.a (Francis Newton Thorpe ed., William S. Hein & Co. 1993) (1909).

sessing sufficient property,²⁵ at least the legislature was elective. Wythe did not mention the lack of democracy connected with judicial review, much less talk about recurring to a popular vote on fundamental constitutional questions,²⁶ or any other more democratic resolution.²⁷ Just as most moderns assume, for Wythe, presumed judicial neutrality provided all necessary safeguards.

Wythe himself was estimated at the time to be the epitome of an incorruptible person and a fair, neutral judge. “As an attorney, he refused to defend unjust causes and abandoned those in which he had been misled.”²⁸ As a judge, John Randolph of Roanoke recalled of Wythe, “he lived in the world without being of the world. . . . [H]e was a mere incarnation of justice, . . . his judgments were all as between A. and B.; for he knew nobody, but went into Court as Astraea was supposed to come down from Heaven, exempt from all human bias.”²⁹ Jefferson said of him, “His virtue was of the purest tint; his integrity inflexible, and his justice exact [A] more disinterested person never lived.”³⁰ Wythe himself said that “compassion ought

25. See ALLAN KULIKOFF, *TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800*, at 285-86 (1986) (explaining that only Virginia's white male freeholders had the franchise).

26. Jefferson came to differ severely with his mentor about judicial review. At first, he seemed to agree, but when the federal courts proved to be (in his view) instruments of the Federalist Party, he rapidly changed his mind. When the issue was federal judicial review of state laws, Jefferson in the 1798 Kentucky Resolution argued that the federal court should not be the final judge of constitutionality; rather, that job was for the state legislatures. See Richard E. Ellis, *The Persistence of Antifederalism after 1789*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 295, 302 (Richard Beeman et al. eds., 1987). As President, Jefferson adopted what has been called the tripartite theory, that each branch of the federal government was the final arbiter of the Constitution within its own sphere of operation. See, e.g., Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in *THE ADAMS-JEFFERSON LETTERS* 278, 279 (Lester J. Cappon ed., 1959). Ultimately, Jefferson imagined, in a democracy the people would arbitrate any constitutional crisis at the ballot box. He knew “no safe depository of the ultimate powers of the society but the people themselves.” Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *10 THE WRITINGS OF THOMAS JEFFERSON* 160, 161 (Paul Leicester Ford ed., 1899) [hereinafter *JEFFERSON WRITINGS*]. See generally DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 257-94 (1994).

27. A contemporary, more thorough analysis of judicial review was given by James Iredell, a future Supreme Court Justice but at the time a North Carolina lawyer in the process of successfully arguing that the North Carolina constitution's guarantee of jury trial overrode a statute denying jury trials to those (Tories and Englishmen) seeking to recover lands confiscated during the Revolution—that is, he used judicial review to protect property rights—in *Bayard v. Singleton*, 1 N.C. 5, 1 Martin 48 (1787). Like Wythe, Iredell did not deal with issues of power or oppression. But unlike Wythe, Iredell recognized that judicial review was undemocratic; he responded that more democratic remedies for unconstitutional legislation—such as a popular petition, a fresh election for the legislators, or a popular uprising—would fail to protect (propertied) minority rights. See James Iredell, *An Elector* (Aug. 17, 1786); Letter from James Iredell to Richard Speight (Aug. 26, 1787), both in GRIFFITH J. MCREE, *2 LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145, 172 (1857), discussed in CASTO, *supra* note 10, at 216-20.

28. Julian P. Boyd, *The Murder of George Wythe*, in *THE MURDER OF GEORGE WYTHE: TWO ESSAYS* 3, 6 (2d prtg. 1958).

29. B.B. Minor, *Memoir of the Author*, in *GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS, REVERSING SOME OF THOSE DECISIONS* 91 (B.B. Minor ed., 1852) (1795) [hereinafter *Wythe's Reports*] (quoting a letter from Judge Beverly Tucker to B.B. Minor, which in turn quotes Randolph).

30. Thomas Jefferson, *Notes for the Biography of George Wythe*, in *1 THE WRITINGS OF THOMAS JEFFERSON* 166, 169-70 (Albert Ellery Bergh ed., 1907).

not to influence a judge, in whom, acting officially, apathy is less a vice than sympathy.”³¹

Wythe and his eulogizers were doubtless speaking of a judge acting under overt, conscious bias. Political and economic biases, however, need not be consciously recognized, or consciously pursued. Our actions and, sometimes, our opinions reflect our unstated and perhaps unrealized economic interests, even when our conscious ideology is otherwise. This essay, I think, demonstrates that Wythe’s greatest opinions as a judge followed a protomodern, bourgeois bias—likely one Wythe would not have himself understood, much less recognized.

Moreover, all understood that self-interest affected the actions and opinions of human beings.³² The reason Wythe’s disinterestedness received such praise was the fact that it was highly unusual. They were *sub silentio* recognizing the truth, that bias is usual in human affairs, even in the activity of judges. And thus, Wythe’s assertion of the neutrality of judges was not only unproven, it was suspect. In Wythe’s view, unelected, *assertedly* disinterested judges were to be the guardians and protectors of the body politic, whether the electorate liked it or not, and they could overturn considered judgments of an elected legislature in their guardianship. Ultimately, that is a bias against democracy and in favor of guidance by an elite, a bias in my view consistent with the mores and judicial habits of most American judges in the two centuries that have passed since Wythe’s death.

Wythe used judicial review in *Caton* for majoritarian purposes, helping (if not directly leading to) the overturning of a pardon generously granted to members of a hated and mistreated minority.³³ Although Wythe’s tone in places seemed to adopt Patriot attitudes of disdain and enmity towards Tories, his rhetoric ignored both any characterization of the relative power of the groups involved, and any question of protecting the rights of an oppressed minority. In my view, democracy requires attention to such distinctions, especially a self-consciousness about majoritarian biases when the rights of an oppressed minority are in contention. Wythe’s opinion contained an antidemocratic triple paradox. First, he advocated judicial supremacy within a government whose powers had been supposedly equally divided into three coequal branches, in order to overturn the act of that branch which was elective. Second, he was unperturbed by unelected officials’ taking the fore in setting “the boundaries of [each] authority”³⁴ in a supposedly popularly run democracy. Third, he trumpeted the protection of rights without dealing with the kind and quality of the citizens’ rights involved in

31. *Field v. Harrison*, Wythe’s Reports, *supra* note 29, at 273, 282 (Va. Ch. 1794).

32. *See, e.g.*, THE FEDERALIST NOS. 10, 51, at 53-60, 285-90 (James Madison) (E.H. Scott ed., 1894). Like Wythe, the authors of THE FEDERALIST believed judges were somehow free from these concerns. THE FEDERALIST NOS. 78, 79, at 521-34 (Alexander Hamilton) (E.H. Scott ed., 1894).

33. Interestingly enough, after their loss in *Caton*, when the three Tories again petitioned the General Assembly for a pardon, the House granted each of them a conditional pardon, and the Senate concurred. 2 MAYS, *supra* note 9, at 201-02.

34. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 7 (Ct. App. 1782).

the case, as this seemed to suit the court's purposes. Such an approach was two decades later to be enshrined by his auditor John Marshall as Chief Justice of the United States in *Marbury v. Madison*, used then, as judicial review is in my view usually used, not to protect the rights of a popular majority, not to protect civil rights, but to protect the property rights of an entrenched, powerful, but threatened minority.³⁵

Page v. Pendleton³⁶ and the Rights of Creditors

When the Virginia courts shut down in 1774 because of the impending break with England, huge sums—probably totaling as much as two million pounds³⁷—were owed by Virginians to English and Scottish merchant-creditors, largely for household and fancy goods which British mercantilistic laws did not allow to be made in America, purchased on credit given against the promise of future crops. Then came the Revolution, which kept the courts closed as to enemy aliens, and with newly invented compound interest adding more debt by the minute, British merchants were very desirous of settling accounts. (Over the course of time, these became notorious as the “British debts.”)³⁸

For Virginians during the Revolution, there was a grave problem in the courts' being closed. Reopening them, however, might allow a lot of unwanted “British debt” liability, due to local holding of British commercial paper, the assignment of British debts to locals, or suits by resident agents of British creditors. Legislator Thomas Jefferson tried and failed to get the courts opened in 1777. He succeeded in 1778, after passage of his act to “Sequester British Property, enabling debts owed to British subjects to be paid into a loan office established by the State.”³⁹ Jefferson's loan-office scheme was ingenious, and it was soon adopted by Maryland to accomplish

35. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). On Supreme Court protection of property rights over human rights, see generally for example FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955); DIALECTICS OF THE U.S. CONSTITUTION: SELECTED WRITINGS OF MITCHELL FRANKLIN (James M. Lawler ed., 2000); THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM (Bertell Ollman & Jonathan Birnbaum eds., 1990); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

36. *Page v. Pendleton*, Wythe's Reports, *supra* note 29, at 211 (Va. Ch. 1793), discussed in KIRTLAND, *supra* note 3, at 219-23, 227-28; JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* 31-32 (1976); BROWN, *supra* note 3, at 258-59; CLARKIN, *supra* note 3, at 190-91, 197-98; see also 5 THE PAPERS OF JOHN MARSHALL 261 (Charles F. Hobson et al. eds., 1987) [hereinafter MARSHALL PAPERS].

37. Emory G. Evans, *Planter Indebtedness and the Coming of the Revolution in Virginia*, 19 WM. & MARY Q. (3d ser.) 511, 511 (1962); see also *id.* at 517-18, 524-25; Jacob M. Price, *The Rise of Glasgow in the Chesapeake Tobacco Trade, 1707-1775*, 11 WM. & MARY Q. (3d ser.) 179, 196-98 (1954).

38. For the background and details of the British debt issue, see generally Wythe Holt, 'To Establish Justice': *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1430-35.

39. Clarkin gets the dates wrong, but has the idea correctly stated, and is the only scholar I have found who notes that the loan-office scheme was Jefferson's idea. CLARKIN, *supra* note 3, at 136-37. The loan-office statute is 9 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 377-80* (Univ. Press of Va. 1969) (1821).

the same results.⁴⁰ Under the scheme, the state confiscated all pre-Revolution debts owed by its citizens to British creditors, so that the creditors or their representatives or assigns had to sue the sovereign Commonwealth of Virginia for recompense—making successful suits highly unlikely under contemporary notions of sovereign immunity. Virginians could pay their British debts with payments into the loan office—using the rapidly depreciating Virginia paper currency of the time, allowing much debt to be paid off by little in the way of actual value—and the state could use any revenues thereby generated to prosecute the war. Many Virginians, including Thomas Jefferson and George Wythe, availed themselves of this opportunity to eliminate debts cheaply.⁴¹ (The problem was not confined to Virginia. “British debtors” existed in every state, and the best historian of the issue estimates that the total debt exceeded five million pounds.⁴² Every state enacted some sort of legal barrier to the collection of British debts.⁴³)

Jefferson was named one of the American representatives to negotiate a peace treaty with Great Britain, but he never sailed for Europe. The Treaty of Paris was thus negotiated by creditor-oriented lawyers John Jay of New York and John Adams of Massachusetts, with a more debtor-kindly Benjamin Franklin of Pennsylvania unable to sway the position they took on repayment of prewar debts. With the English negotiators under severe pressure from many hard-up or nearly bankrupt merchant-creditors furious at the many legal barriers Americans had erected, Article IV of the Treaty provided that creditors would meet with no legal impediments to the collection of prewar debts, and that they would receive pounds sterling in payment. No consideration at all was given to the now perilous situation of debtors.⁴⁴

And perilous the situation was. Virginia (and many other states) had been devastated by marauding and deliberately destructive British troops, so that the farm resources and crops they had pledged to use to repay these debts were largely unavailable. This formed the basis of the most important legal argument made against collection of the debts, as will be recounted below.⁴⁵ Another argument made by many Virginians was that, by winning the war—still the longest in American history, and one bloodily and bitterly fought—they had cancelled their debts to now-despised British subjects.⁴⁶ Moreover, all hard money had rapidly flowed out of the nation at the begin-

40. Perhaps Georgia had a similar scheme too. See Wythe Holt, *John Blair: “A Safe and Conscientious Judge,”* in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 155, 192 n.32 (Scott Douglas Gerber ed., 1998).

41. See CLARKIN, *supra* note 3, at 201 n.15.

42. Evans, *supra* note 37, at 511.

43. Holt, *supra* note 38, at 1435-39.

44. *Id.* at 1439-40 & n.56.

45. See *infra* notes 62-64 and accompanying text.

46. George Mason reported in 1783 that everywhere he heard the question, “If we are now to pay the Debts due to British Merchants, what have we been fighting for all this while?” Letter from George Mason to Patrick Henry (May 6, 1783), in 2 *THE PAPERS OF GEORGE MASON 1725-1792*, at 769, 771 (Robert A. Rutland ed., 1970).

ning of the war, little specie was in circulation,⁴⁷ the British prevented the lucrative trade Americans had formerly enjoyed with the British Caribbean, bad crop years accentuated the problem, and a deep economic depression began in 1783 or 1784. State court dockets filled with domestic debt suits. Article IV of the Treaty was greatly resented and excoriated throughout the nation, British merchants or their agents attempting to collect debts were assaulted, and every state passed at least one act contrary to its terms, erecting or continuing various impediments to repayment of the British debts. Virginia's courts remained shut to British merchants or their agents.⁴⁸

British merchants and the British government remained angry at this disobedience to the treaty, but a treaty clause which Americans read as requiring the British government to compensate them for the thousands of slaves who had fled to the British lines was also not being enforced, and several British forts erected within what was now the boundary of the United States remained in British hands contrary to express provisions of the treaty. The Confederation government attempted to obtain repeal of all state laws impeding the repayment of British debts, but Virginia responded in 1787 with a statute guaranteeing that the courts would be reopened once the British complied with these other portions of the Treaty.⁴⁹ A creditor-oriented Constitutional Convention established a federal court system, made treaties past and future a part of the supreme law of the land, allowed jurisdiction for the new courts over claims by foreign plaintiffs and over violations of federal law, prohibited state laws impairing the obligation of contracts, and forbade states' making anything other than gold and silver a tender (to deal with one way of avoiding British debts), all to ensure that a non-state-legislature-controlled court system might rule in favor of the British creditors.⁵⁰ In Virginia, resistance to the new federal government was strong, in no small part because of the British debt issue, and no further changes in the law were made.⁵¹

47. An admittedly interested Thomas Jefferson—who as executor of his slave-trader/merchant father-in-law's estate was to be plagued until his death by British debts—estimated in 1786 that “[w]ere all the creditors to rush to judgment together, a mass of two millions of property would be brought to market [in Virginia] where there is but the tenth of that sum of money in circulation to purchase it.” Letter from Thomas Jefferson to Alexander McCaul (Apr. 19, 1786), in 9 JEFFERSON PAPERS, *supra* note 7, at 388.

48. Holt, *supra* note 38, at 1440-51.

49. 12 HENING, *supra* note 39, at 528; Holt, *supra* note 38, at 1437, 1440, 1444, 1451-52.

50. Holt, *supra* note 38, at 1459-66.

51. See Letter from Edmund Randolph to James Madison (Apr. 4, 1787), in 9 THE PAPERS OF JAMES MADISON 364, 364 (Robert A. Rutland et al. eds., 1975) (Foreign Affairs Secretary Jay's report declaring that the peace treaty is the law of the land, so that states cannot violate it, unanimously adopted by Congress, “will bring the question to a crisis. But will not this add a fresh reason *here* against the reform of the confederatio[n]?”); Letter from Randolph to Madison (Oct. 23, 1787) (Article III, bringing British debts into the federal courts, “is [to the Virginia General Assembly] the most vulnerable and odious part of the Constitution.”); Letter from Randolph to Madison (Mar. 27, 1789) (“If the peace of this country is interrupted by any untoward event, one of three things will have a principal agency in the misfortune: the new Constitution, British debts, and taxes.”); Letter from St. George Tucker to John Randolph (June 29, 1788) (“[T]he Constitution has been adopted in this State. . . . The recovery of British debts can no longer be postponed, and there now seems to be a moral certainty that your patrimony will all go to satisfy the unjust debt from your papa to the Hanburys [a prominent British mercantile firm].”), *last*

However, a December 1791 ruling by the federal Virginia circuit court in *Jones v. Walker*, refusing immediately to overturn the Virginia loan-office statute as a legal impediment, outraged the creditors—“‘[T]he courts of Justice in Virginia are still shut for the recovery of British debts,’ one of them fumed”—and gave heart to the debtors.⁵² A bill was filed in Wythe’s Richmond Chancery Court by Carter Page, executor of the heavily indebted estate of Archibald Cary, against the estate’s British creditors and some Virginians (including Edmund Pendleton as executor of another estate) who held Cary’s bills of exchange drawn on British merchants. Page argued that the 1787 statute opened the Virginia courts to such suits, pled payments into the loan office by Cary under the loan-office statute, and prayed for extinction of any indebtedness thereon to the merchants and holders of the bills.⁵³

Wythe smashed debtors’ hopes when he courageously gave his opinion on May 3, 1793. He had heard the arguments of his fellow Virginians, as embodied in the passionate three-day oration debtors’ attorney Patrick Henry gave against repayment of the debts in *Jones v. Walker* at the December 1791 session of the federal court. An upset creditor’s agent said that “all the declamatory talents of Patrick Henry were displayed to inflame Mens minds, prevent their Judgments & drive them to acts of Outrage.”⁵⁴ Wythe was equally as angry about Henry’s arguments. “[S]ome months before this opinion was delivered,” he said in *Page*, “a similar case was argued in another court [*Jones*] ... [in which] rhetoric [was] copiously poured forth . . . in order to prove that an american citizen might honestly as well as profitably withhold money which he owed to a british subject.”⁵⁵ Wythe mused that “a stranger, who heard” Henry, and saw the “admiration, adulation, [and] adoration” with which Virginians received his arguments, “might have suspected that one of the cardinal virtues, as they are called, either is not cultivated in America, or is not understood to be the same there as it is in all other civilized countries.”⁵⁶ Wythe had clearly if unconsciously adopted the creditor standpoint, which for him was unquestionable, the only “civilized” position. Knowing how important the issues were, he attempted to respond directly to Henry’s arguments, and to those of his fellow Virginians. To be as persuasive as possible, in the face of a largely hostile opposing populace, Wythe adduced as many reasons as he could in favor of the continuing validity of the British debts.⁵⁷

three in MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 96, 121-22, 106 (1888).

52. Holt, *John Blair*, *supra* note 40, at 170, 191-92 (quoting Letter from James Ritchie to William Molleson (Feb. 1, 1792), in vol. 14, Foreign Office ser. 4, Public Record Office, London).

53. *Page v. Pendleton*, Wythe’s Reports, *supra* note 29, at 211 (Va. Ch. 1793); KIRTLAND, *supra* note 3, at 219.

54. Holt, *John Blair*, *supra* note 40, at 169-70 (quoting Letter from Alexander McCaul to James Ritchie (Feb. 1, 1792), in 14 Foreign Office ser. 4, Public Record Office, London).

55. *Page*, Wythe’s Reports, *supra* note 29, at 211 n.(a).

56. *Id.* For Henry’s argument in 1791, see WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 219-58 (rev. ed. 1850).

57. Some of Wythe’s arguments seem tendentious or erroneous to me, and I speak in the text only to

Wythe noted at the outset that victory in the Revolutionary War did not free British debtors, for war cannot extinguish antecedent obligations of the citizens whose nations are at war. And to the argument (enshrined in the 1787 statute) that American debts were not due until England fulfilled its obligations to return or pay for slaves and to evacuate the forts, Wythe forthrightly replied that he had no power to order the king to do anything, stating that this was a political issue and implying (correctly, I think) that the treaty provisions were separate and the obligations under them also separate.⁵⁸ The most important of Wythe's arguments was that Article IV of the Treaty had been rendered the supreme law of the land by the Constitution, and thus had been "abrogated the acts of every state in the union, tending to obstruct the recovery of british debts from the citizens of those States,"⁵⁹ such as the loan-office scheme.

However, Wythe was so thoroughly convinced of the new bourgeois contractual morality that in fact he completely ignored the chief legal argument made by the debtors. (Something similar has happened to other true believers in the new system.⁶⁰) He felt deeply that people who refused to pay their debts were uncivilized, barbaric—beyond the pale.⁶¹ However, an entire society does not rest its actions upon open immorality.⁶² The debtors had a clear and sophisticated legal position, one however entirely premodern, anticommercial, and inconsistent with the rules of capitalism. It was thus likely unrecognizable to those, like Wythe, who were convinced of bourgeois morality. It was an older tenet of the law of contracts, that "consideration" (which is necessary for a legally complete contract, and is what each party gives up, something important and meaningful, as they enter into a contract) is *substantive* and must exist throughout the term of the contract. If one party destroys the other party's consideration, the debt is extinguished. "[W]hen a British army lands in France," Henry thundered, "they plunder nothing. . . . Were we thus treated? . . . No sir. What became of our agriculture? Our inhabitants were mercilessly and brutally plundered, . . .

those I consider valid and pertinent to the issues of this essay.

58. Page, Wythe's Reports, *supra* note 29, at 212, 217-18.

59. *Id.* at 217.

60. *E.g.*, Massachusetts judges, convinced of the necessity of modern contract rules, similarly ignored their own law to the contrary in 1824. See 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, 728 (Massachusetts court, energetically instructing workers that quitting before the end of the contract meant no recovery of pay earned but not paid, quickly passes by an earlier rule allowing servants who quit to recover for work done). Modern authors uncritically believing that capitalism must be correct may suffer the same blindnesses. Compare Peter Karsten, "Bottomed on Justice": A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880, 34 AM. J. LEGAL HIST. 213, 221-25 (1990) (asserting that there was no such earlier rule), with TOMLINS, *supra* note 6, at 273-78 & nn.48, 49, 52, 53, 58 (giving evidence for the earlier rule as claimed by Holt).

61. See Page, Wythe's Reports, *supra* note 29, at 211 n.(a), 212 n.(b).

62. Henry said as much in his argument: "I am not willing to ascribe to the meanest American the love of money, or desire of eluding the payment of his debts No, sir. He had nobler and better views. But he thinks himself well entitled to those debts, from the laws and usages of nations, as a compensation for the injuries he has sustained." WIRT, *supra* note 56, at 249.

[o]ur slaves carried away, our crops burnt, . . . [the] disability to pay debts [was] produced by pillage and devastation, contrary to every principle of national [natural] law.”⁶³ The debtors essentially argued that *there were no longer any debts to enforce*.⁶⁴

Wythe had made his arguments from positive law—that is, their authority rested upon rules made by government—and they would be entirely sufficient for us. But Wythe was, of course, not entirely modern. He had been reared in a natural law atmosphere⁶⁵ and the heart of his opinion (though single-mindedly pursuing a modern, commercial *goal*) rests upon what, for him, was law higher than what mere humans might say or do in legislative or executive action. It was law founded upon “consent of those, who were members of the community, when the laws were instituted,” and, more deeply, upon what he variously called “natural reason,” “the law of nature, called common law, because it is common to all mankind,” and (as we have seen) “the cardinal virtues . . . understood . . . in all . . . civilized coun-

63. *Id.* at 238-39 (reporter mistranscribes “national” for “natural”). Henry soon made the legal argument explicit:

Describe the nature of a debt: it is an engagement or promise to pay—but it must be for a valuable consideration. . . . Notwithstanding the equity and fairness of the debt when incurred, if the security of the property received was afterward destroyed, the [obligation] has proved defective . . . [T]he [obligation] was destroyed by the very offenders who come here now and demand payment. Justice and equity cancel the obligation as to the price that was to be given for [the property received], because the [consideration] is destroyed For this long catalogue of offences committed against the citizens of America, every individual of the British nation is accountable The individuals, and the nation they compose, are one.

Id. at 239-40 (I have substituted modern words for some of those Henry used.); *see also* Holt, *supra* note 38, at 1443. Henry was well aware of the economic forces behind the legal claims.

“Though every other thing dear to humanity is forfeitable [during a war, by capture or killing], yet *debts*, it seems, must be spared! Debts are too sacred to be touched? It is a mercantile idea that worships Mammon instead of God The principle is to be found in the day-books, journals and ledgers of merchants; not in the writings or reasonings of the wise and well-informed”

WIRT, *supra* note 56, at 256.

64. Interestingly enough, Jefferson and Wythe differed on these points. Jefferson, as U.S. Secretary of State, sounded much like Henry in a lengthy 1792 note to George Hammond, the representative of the British government, responding to the latter’s complaint about nonpayment of the British debts. His entire discussion of the debt situation was premised, as was Henry’s (and the Virginia statute of 1787), on the allegedly prior refusal of the British government to return or pay for the escaped slaves and to remove its troops from the various forts on American soil. *See* Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 JEFFERSON PAPERS, *supra* note 7, at 551-92, esp. §§ 26-29, 38, at 568-71, 577-78. While he forbears to claim that the devastation wrought by the marauding British armies went so far as to cancel the debts, *see id.* § 35, at 574-75 (Jefferson thought it did however provide a practical reason for not collecting the debts immediately), he explicitly claimed that “that universal devastation, which took place in many of these States during the war” was sufficient legal ground for juries to lessen or deny interest during such a “general national calamity . . . where the loss has been produced by the act of the Creditor [A] nation as a Society, forms a moral person, and every member of it is personally responsible for his Society.” *Id.* § 54, at 591-92 (emphasis omitted).

65. On natural law, see CASTO, *supra* note 10, at 2, 34-36 (noting Blackstone suffered the same ambivalence as Wythe, asserting modern commercial values in a partially natural law exposition), 158-59, 192-95; Holt, *John Blair*, *supra* note 40, at 176; and 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, 186-87 (Kenneth R. Bowling & Donald R. Kennon eds., 2000).

tries.”⁶⁶ One of the fundamental tenets of natural law, which no legislature could contravene, Wythe knew, was “to deal faithfully,” that is, to pay debts (in the kind of “money which their people had before obliged themselves to pay”) and to fulfill promises.⁶⁷ These tenets “are perceived intuitively to harmonize with our innate notions of rectitude,” as we have elevated ourselves from that “barbarism” which approved “acquirement by conquest.”⁶⁸ Except for the first (“the prohibition to kill or wound our fellow men”), the tenets Wythe listed are hallmarks of liberal, bourgeois morality: “the prohibition . . . to defame [our fellow men], to invade their property . . . to deal faithfully, [and] to make reparation for injury.”⁶⁹

For Wythe, life was either civilized or barbaric, and civilized life was founded upon the right of individuals to have their reputations unsullied, to own property exclusively and individually and to have that property safe from invasion and theft (“peiracy”),⁷⁰ to be repaid for injury, and to have promises and deals completed and enforced as understood by the contracting parties.⁷¹ To violate a property agreement, a contract, or a commercial obligation was to violate the most sacred aspect of civilized life. A mere legislature surely could not do so. The modern values of commerce were the acme of civilization, for Wythe “innate,” unquestionable, and excellent—even though Wythe used the older natural law language to uphold them. He felt so strongly about such values that he risked the severe opprobrium and distaste of the large majority of his fellow Virginians in stating them, in making British debts viable.⁷² (It apparently did not concern this deeply upright man that he, himself, had made payments into the loan office. When the same issue came before Wythe’s former Virginia colleague as Chancellor, John Blair, now a United States Supreme Court justice, that worthy uniformly recused himself from hearing it because of his own payments into the loan office.)⁷³

66. Page v. Pendleton, Wythe’s Reports, *supra* note 29, at 215 n.(e) (source of first three quotes), 211 n.(a) (fourth quote).

67. *Id.* at 215 n.(e) (first quote), 216 (second quote).

68. *Id.* at 215 n.(e) (first quote), 212 n.(b) (second quote).

69. *Id.* at 215 n.(e). Property, in the modern, bourgeois view, is exclusive and private, is individually owned, is not limited to what one might reasonably be able to use, is not shared, and is not communally owned. See KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 33-34 (Maurice Dodd ed., S.W. Ryazanskaya trans., 1972) (1859); MARX & ENGELS, *supra* note 12, pt. II. People—especially merchants—have an important property in their reputations (though elites in an earlier, feudal socioeconomic formation also demanded such protection, they would not have imagined reputation to be something that common people could claim protection for), and since property is basically exchange value, every injury to it or deprivation of it is quantifiable and deserves recompense.

70. Page, Wythe’s Reports, *supra* note 29, at 212 n.(b).

71. Note that the modern law school first-year curriculum in the bourgeois United States almost universally contains precisely these subjects: property, criminal law, torts, and contracts.

72. For other cases in which Wythe favored mercantile and creditor interests, loosening old strictures in their favor, see *Love v. Donelson*, published in pamphlet form (Va. Ch., n.d., but after 1801), listed in KIRTLAND, *supra* note 3, at 283, discussed in *id.* at 248-50; and *Norton v. Rose*, 2 Va. (2 Wash.) 233 (Ct. App. 1796) (reversing Wythe), discussed in KIRTLAND, *supra* note 3, at 247-48.

73. Holt, *John Blair*, *supra* note 40, at 170 & 191-92 nn.31 & 32.

Those fellow Virginians were probably less devoted than Wythe was to the values of commercialism. Southerners lived in a mixed socioeconomic world, with slavery rather than wage labor the dominant mode of organizing labor—and the South had a ruling group which openly displayed the values of feudal aristocracy (rather than those of shopkeepers or industrialists), such as patronage, the opulent display of wealth, a consciousness of social class, an open contradiction between humans as laborers and humans as property itself⁷⁴—but with commerce quite important too, especially in tobacco (soon cotton), in a few other staple crops, and in slaves. Wythe's lack of ambivalence about bourgeois values may have grated, perhaps subconsciously, as much as did his attack on their pocketbooks and on their deep sense that the British had, through wanton pillage and arson, destroyed the ability of Virginians to farm, destroyed (that is) the consideration which underlay the debts and thus forfeited the debts themselves.

It was of course expected that Wythe's opinion would be soon reversed. However, probably following Blair's example, three of the Court of Appeals judges recused themselves from hearing the appeal, and *Page* was sent to a specially constituted appellate court. After many continuances, the appeal was dropped by the plaintiff in November 1799.⁷⁵ While Wythe's decision and much of his opinion was sustained by the United States Supreme Court in 1796 in *Ware v. Hylton*,⁷⁶ and despite his status as venerated elder statesman, he reaped what he had sown: Virginia public opinion was severely upset and angered by *Page*. One of his biographers notes, "[W]e know from several sources that Wythe was intensely unpopular in his native country after this case," while another says, "The old Chancellor was never forgiven . . . by some leading families in the state."⁷⁷

74. See generally EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974); MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

75. Edmund Randolph, writing soon after Wythe rendered his opinion in *Page*, said: "Mr. Wythe indeed, as chancellor, has determined against the British debtor; but his decree will, it is conjectured, be reversed in the Court of Appeals, unanimously." Letter from Edmond Randolph to George Washington (June 24, 1793), in CONWAY, *supra* note 51, at 151, 153. For the subsequent history of the case, see 5 MARSHALL PAPERS, *supra* note 36, at 326 n.9.

76. 3 U.S. (3 Dall.) 199 (1796). James Wilson, concurring in *Ware*, like Wythe rested both on the positive law ground that the Treaty abrogated the loan-office statute and payments thereunder, and upon natural law grounds—with the latter much more important to him. See CASTO, *supra* note 10, at 192-95. For the legal proceedings in *Ware*, and why it was substituted for *Jones v. Walker* as the Virginia test case on the British debts, see 5 MARSHALL PAPERS, *supra* note 36, at 295-329.

77. CLARKIN, *supra* note 3, at 191; BLACKBURN, *supra* note 3, at 125. Wythe was not the only Virginian to rule against their neighbors on the question of repayment of British debts. Even though he had to recuse himself from all cases involving the loan-office issue, see *supra* note 73 and accompanying text, former Virginia Chancellor and Supreme Court Justice John Blair, sitting in various federal circuit courts, uniformly and at least once proactively ruled against the debtors on all other issues. See Holt, *John Blair*, *supra* note 40, at 170. So far as I am aware, however, Blair suffered none of the public opprobrium meted out to Wythe for his defiance of his neighbors' economic desires and beliefs.

Pleasants,⁷⁸ Wrights,⁷⁹ and the Rights of Slaves as Human Beings

The economic foundation of Virginian prosperity and the rights and freedoms litigated in the previously discussed cases rested on the enslavement of human beings, overwhelmingly African in origin. The tobacco was grown by slave labor. The fine mansions and public buildings were built by slave labor. The leisure, education, and sophistication of Virginia's white elites—who wrote magnificently and fought desperately for independence and “freedom” during the Revolution—rested upon the backs of African and African-American people deprived of freedom. While many elite Virginians, recognizing the contradiction, claimed during 1775-1810 to desire the abolition or amelioration of this cruel, bleak, inhumane labor arrangement, most actually received too much benefit from it to do anything consistent with those supposed desires. A very few—like George Washington and (as we shall see) the wealthy Quaker John Pleasants—freed their slaves, but only upon their own deaths (thus accepting slavery's economic benefits during the interim), or when the slaves reached a certain age, 30 in Pleasants' case (thus accepting the benefits of their labor during the best years of the slaves' lives). The result was a culture unwilling either to discuss slavery meaningfully or to tolerate genuine attacks on it.

George Wythe's relationship to this fundamental socioeconomic institution was deep, complicated, and even more contradictory than it was for most of his neighbors. Wythe's mother Margaret was a Quaker, Margaret's grandfather the notorious and militant Quaker preacher George Keith and his Philadelphia congregation had published the first Quaker anti-slavery tract in 1693,⁸⁰ and the Quakers were known for abhorrence to the institution of human slavery. Quakers in Virginia in 1768 disallowed the further purchase of slaves by Friends. The Henrico Quarterly Meeting in 1774 advised its membership to petition the General Assembly to allow manumission of slaves, and success was eventually obtained in this regard in 1782.

78. Pleasants v. Pleasants, 6 Va. (2 Call) 319 (Ct. App. 1799) (misdated 1800 in the report); *Virginia: In the High Court of Chancery, March 16, 1798 . . .* ([Richmond, 1800?]) (pamphlet containing all of Wythe's rulings in *Pleasants*) [hereinafter *Wythe's Decree in Pleasants*], discussed in 5 MARSHALL PAPERS, *supra* note 36, 541-49 (for the proper dating, see *id.* at 544 n.8); James H. Kettner, *Persons or Property? The Pleasants Slaves in the Virginia Courts, 1792-1799*, in LAUNCHING THE “EXTENDED REPUBLIC”: THE FEDERALIST ERA 136, 136-55 (Ronald Hoffman & Peter J. Albert eds., 1996); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 69-71 (1975).

79. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806), discussed in NOONAN, *supra* note 36, at 33-60; COVER, *supra* note 78, at 51-55; A. Leon Higginbotham, Jr. & F. Michael Higginbotham, “Yearning to Breathe Free”: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia, 68 N.Y.U. L. REV. 1213, 1239-41 (1993); KIRTLAND, *supra* note 3, at 148-49; BROWN, *supra* note 3, at 266-67. Cover's is the best of these. We do not have Wythe's opinion in the Chancery Court—probably styled *Wright v. Hudgins*—and must divine what he held from the opinions in the Court of Appeals reversing his decision, and Judge St. George Tucker's bench notes and the other papers collected in his case file on the appeal.

80. See DILL, *supra* note 3, at 4-6.

Quakers were instrumental in founding the Virginia Abolition Society in 1790.⁸¹

Wythe himself was never a Quaker, but he was decidedly opposed to slavery. Jefferson wrote to a prominent British abolitionist, in 1785, that Wythe's "sentiments on the subject of slavery are unequivocal."⁸² A historian of slavery in Virginia, cautiously and properly finding that "the anti-slavery pronouncements of Virginia's statesmen were so rarely accompanied by any positive efforts against slavery as to cast doubt on their sincerity," nevertheless placed Wythe alone on a pedestal: "[O]nly George Wythe seemed to take the position that Negroes held the full attributes of humanity . . . Like the Quakers, Wythe entertained a direct concern for the Negroes which took precedence over the safety, convenience, or profit of their masters."⁸³ The record is in fact more equivocal.

Wythe owned many slaves, seventeen in 1784. After his wife's death in August 1787, Wythe began to exhibit a decidedly less opulent lifestyle; in that year he gave thirteen slaves to his wife's relatives and he took advantage of the Quaker-backed emancipation law by setting free at least five others in that and the succeeding years—though he still owned at least two slaves as late as 1797. The three household blacks who served him in the years before his death in 1806 had all been freed.⁸⁴ One of them, the cook Lydia Brodnax, had been freed upon his wife's death in 1787 and apparently lived in a house of her own (which Wythe owned).⁸⁵ Another, a teen named Michael Brown, whose care was entrusted to Jefferson by Wythe's will, was apparently being taught Latin, Greek, and natural science by Wythe—contrary to Jefferson's published belief that blacks were, as to whites, "in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid."⁸⁶

81. Kettner, *supra* note 78, at 139-40 & n.10, 136-37 & n.2.

82. Letter from Thomas Jefferson to Richard Price (Aug. 7, 1785), in 8 JEFFERSON PAPERS, *supra* note 7, at 356, 357.

83. ROBERT MCCOLLEY, SLAVERY AND JEFFERSONIAN VIRGINIA 124, 136 (1964).

84. DILL, *supra* note 3, at 52-53; BROWN, *supra* note 3, at 266-67; Letter from Henry Clay to B.B. Minor (May 3, 1851), in Minor, *supra* note 29, at xxxv (when Clay wrote down an early version of Wythe's will, before he left Richmond in 1797, the will emancipated all slaves). For Wythe's opulent lifestyle during his political career and marriage, see BLACKBURN, *supra* note 3, at 44, 59-60; CLARKIN, *supra* note 3, at 70. Wythe suffered terribly from his wife's passing, becoming "silent and grave; . . . [full of] gentle sadness," *id.* at 173 (quoting Nathaniel Beverly Tucker (internal quotation marks omitted)), and "isolated almost completely from human contact," *id.* at 186. According to Henry Clay who as a teen was his clerk from 1794-96, "Mr. Wythe's personal appearance and his personal habits were plain, simple, and unostentatious. . . . [H]e generally wore a [plain] grey coating." Letter from Henry Clay, *supra*, at xxxv.

85. KIRTLAND, *supra* note 3, at 146-47.

86. Thomas Jefferson, *Notes on Virginia*, in 3 JEFFERSON WRITINGS, *supra* note 26, at 87, 245. See generally *id.* at 244-50; Thomas Jefferson, *Autobiography*, in 1 JEFFERSON WRITINGS, *supra* note 26, at 1, 68. Constantin Francois Volney, who voted in the French revolutionary assembly to abolish slavery and "who understood that race was invented merely to divide the workers apart," PETER LINEBAUGH & MARCUS REDIKER, THE MANY-HEADED HYDRA: SAILORS, SLAVES, COMMONERS, AND THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC 342 (2000), visited Jefferson at Monticello in 1796 and watched with bemused disgust as the great libertarian's field slaves actually obeyed their master and worked only when his eyes were turned toward them. "The master took a whip to frighten them . . . those

Federal circuit judge and legal historian John Noonan finds Wythe as insincere on slavery as the rest of his Virginia cohorts. When Wythe, Jefferson, and Pendleton were tasked with complete revision of the laws of Virginia after 1776, the only ameliorative slave bills they actually submitted to the General Assembly were ones “eliminating some of the cruel punishments inflicted upon slaves and banning the further importation of slaves.”⁸⁷ Thus, in fact “they *maintained* slavery” and the inhuman notion that a person could be utterly rightless, a piece of property. “[T]hey proposed no law by which their enjoyment of human liberties was recognized.”⁸⁸ Noonan notes that, contemporaneously and notoriously, Blackstone had stated that negroes were humans and had the absolute rights vested in them by the “immutable laws of nature,”⁸⁹ and that Edmund Burke “in 1792 proposed a code [drafted 12 years earlier!] for the amelioration of the conditions of slavery in the British colonies. . . . [A]ccepting the slaves as human beings, Burke worked toward their enjoyment of human liberties.”⁹⁰ Wythe, Jefferson, and Pendleton did draft a bill which would have gradually emancipated all slaves, educating them at public expense—and would have sent these recently freedpersons overseas (fully equipped with weapons, seeds, animals, and knowledge)—but the “emancipation [was] so gradual that it would guarantee the planters of Virginia slave labor for several generations, and the entire project was [so costly that it was] dependent on a federally subsidized removal of all free Negroes.”⁹¹ The bill, however, was never submitted to the legislature. As Jefferson later hinted, social economics trumped ideology: “[T]he public mind would not yet bear the proposition.”⁹² Slaves were too important for planter profits, power, and leisure.

Half the property cases Wythe heard, in Noonan’s opinion, involved the disposition of slaves. Noonan recounts two of them, in which the Chancellor ordered slaves transferred as property (quoting Wythe) “with as little judicial ceremony as a single quadruped, or article of house or kitchen furniture.”⁹³ While in none of these cases did Wythe “conclude [consistent with his beliefs] that slavery could not exist,”⁹⁴ Noonan does not however note that in at least two cases—not property cases but instances in which enslaved persons asked for their freedom—Wythe went beyond the existing

whom he looked at directly worked the best, those whom he half saw worked least, and those he didn’t see at all, ceased working altogether” *Id.* at 344 (reminiscence Volney wrote). Volney left the little mountaintop of freedom in sadness and anger. *Id.* at 341-44. For the invention of race in Virginia in order to divide the black workers from the white ones, see EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

87. BROWN, *supra* note 3, at 189.

88. NOONAN, *supra* note 36, at 52.

89. See WILLIAM BLACKSTONE, 1 COMMENTARIES *124.

90. NOONAN, *supra* note 36, at 49-50, 52.

91. MCCOLLEY, *supra* note 83, at 130; see BROWN, *supra* note 3, at 189-90; NOONAN, *supra* note 36, at 46-54.

92. Jefferson, *Autobiography*, *supra* note 86, at 68.

93. *Fowler v. Saunders*, Wythe’s Reports, *supra* note 29, at 322, 327 (Va. Ch. 1798); see *Turpin v. Turpin*, Wythe’s Reports, *supra* note 29, at 137 (Va. Ch. 1791); NOONAN, *supra* note 36, at 54-58.

94. NOONAN, *supra* note 36, at 56.

law, and far beyond his elite Virginia contemporaries, courageously to rule against slavery and in favor of freedom. In both, Wythe challenged the legal and ethical basis of slavery.⁹⁵

The wills of emancipating Quakers John Pleasants (died 1771) and his son Jonathan (died 1776) came before Wythe in 1798. Both wills were written and took effect before Virginia (at Quaker urging, as we have seen⁹⁶) reversed its prior course in 1782 (overturning a 1748 statute) to allow masters to free slaves.⁹⁷ John's other sons Robert and Samuel emancipated 90 slaves in 1782 and 1783, partially fulfilling the desires of their relatives, but John's grandson Samuel Jr. and Charles Logan, the husband of John's daughter Mary, balked at setting free the many slaves they had inherited from the two emancipators.⁹⁸

There were at least five major legal difficulties. First, the law of Virginia in 1771 and 1776 forbade emancipation; could wills effective at those dates nevertheless free slaves in the future? Second, since the wills' emancipatory effect would occur only when the General Assembly passed a suitable statute, at an unknown time in the future as seen from the perspective of the dates of the testators' deaths, the legatees of the slaves would suffer under a condition restraining their sale or mortgage of the slaves for an indefinite time, and unreasonable "restraints on alienation" were void.⁹⁹ Third, the 1782 act required emancipators to provide support and maintenance for emancipatees who were minors, enfeebled persons, or persons over 45, while neither Pleasants will made any such provision. Fourth, both Pleasants had set the date of freedom to be at age 30, whenever an enslaved person might reach that age, including all those slaves born after their deaths. The Rule Against Perpetuities under Virginia law at that time required property rights to vest (i.e., be free from conditions) within lives in being at the effective date of the conveying instrument (in these instances, the death dates of John and Jonathan) plus a "reasonable" period thereafter,¹⁰⁰ but for any person born to a female slave (who was not yet alive at the death of John or Jonathan, whichever was relevant) after the death of the owner, the

95. See *id.* at 56-57. Noonan's treatment of *Hudgins v. Wrights* is unduly dismissive of Wythe's efforts. See *id.* at 56, 180-81.

96. See Kettner, *supra* note 78 and accompanying text.

97. 11 HENING, *supra* note 39, at 39.

98. Kettner, *supra* note 78, at 137-39, 142-47.

99. OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 249-50 (5th ed. 1989).

100. So the law was stated in the appellate arguments of both John Warden and John Marshall, attorneys for the Pleasants estates, *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 329-30 (1799). As the Rule Against Perpetuities universally exists today (where it has not been abolished), instead of lives in being plus a "reasonable" period, the time limit is lives in being plus twenty-one years. See generally BROWDER, *supra* note 99, at 246-49. Edmund Randolph argued, for the appellants, that the 21-year-period was the law in Virginia at the time, and thus the 30-year-period made the condition too remote, see *Pleasants*, 6 Va. (2 Call) at 332-33, and Spencer Roane, the only appellate judge to discuss the matter in detail, agreed with Randolph that the 21-year-period was the law in Virginia, *id.* at 336. See generally JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 671-74 (7th ed. 2005) [hereinafter DUKEMINIER & JOHANSON]; Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

condition would be void, and it was questionable whether 30 years was too long to be a “reasonable time.” And fifth, it was doubtful whether anyone else but a Pleasants slave could bring suit.¹⁰¹ Robert Pleasants as executor of both his father and his brother, plus one of Jonathan’s slaves named Ned, sued the recalcitrant members of the family to force emancipation.

Wythe’s decree was founded upon the humanity of slaves and the importance of human freedom. Openly favoring freedom over property rights,¹⁰² he cut through the many legal tangles to order freedom (immediately for some, at least at age 30 for others) for more than 400 slaves.¹⁰³ In his opening sentence he described “men, women and children detained in slavery”—not “slaves” or “Negroes”—seeking the “blessing” of “the right to freedom” and “deliverance from thralldom.”¹⁰⁴ These people were desirous of “the *restitution*”—not the obtaining—“of a right, of which they . . . could not have been deprived without violation of equitable *constitutional* principles.”¹⁰⁵ He wondered whether “the doctrine of perpetuities”—a property notion—could ever be “applicable to any cases, in which human liberty is challenged.”¹⁰⁶ Wythe did not enlarge, in *Pleasants*, on the possible constitutional source of the slaves’ “right” of freedom, but the tenor of his language leads at least the modern reader to see it as the heart of the opinion.

In Wythe’s view, it was utterly appropriate for these petitioners to seek the meliorative benefits of the law of equity.¹⁰⁷ Wythe found that the wills of John and Jonathan Pleasants had imposed a trust upon the legatees of their slaves, to emancipate them if and when the General Assembly permitted it, and trusts were properly construed and effectuated by equity courts. The establishment of such a trust did not violate Virginia law when the wills became effective, Wythe concluded, because such law must be construed narrowly when the rights claimed might be protected by “equitable constitutional principles.”¹⁰⁸ Therefore the 1748 statute must be confined to over-

101. The case is a difficult one, and the report of the arguments of the attorneys is not very clear. I have extracted these five points of law (others were also argued) from the arguments made in the Court of Appeals, especially those of lawyers John Wickham, Warden, and Marshall, *Pleasants*, 6 Va. (2 Call) at 324-33; from the discussion in Kettner, *supra* note 78, at 148-52; from the discussion in COVER, *supra* note 78, at 70-71; and from the discussion in 5 MARSHALL PAPERS, *supra* note 36, at 541-49.

102. Wickham argued, when Wythe’s decree was appealed, for the appellants: “[A]lthough it may be true that liberty is to be favored, the rights of property are as sacred as those of liberty.” *Pleasants*, 6 Va. (2 Call) at 324.

103. For the number, see 5 MARSHALL PAPERS, *supra* note 36, at 541.

104. *Wythe’s Decree in Pleasants*, *supra* note 78, at 2.

105. *Id.* (emphasis added).

106. *Wythe’s Decree in Pleasants*, *supra* note 78, at 3. Surprisingly, the constitutional language of Wythe in *Pleasants* has not been previously noted.

107. Throughout his opinion, Wythe was at pains to emphasize the distinction between equity and law, and the important function of courts of equity “to foster and effectuate conscientious fideicommissa,” that is, fiduciary desires. *Id.* at 2. Thus, the opinion is consistent with Kirtland’s observations about Wythe’s jurisprudence as a whole. See *supra* note 11.

108. *Wythe’s Decree in Pleasants*, *supra* note 78, at 2. Wythe’s language is often obscure and his syntax terribly complicated. He put what is said in the text this way: “ampliation of the statute . . . is reprobated . . . where the defendants, in a court of equity, are invoking its aid to hinder the restitution of a right, of which they . . . could not have been deprived without violation of equitable constitutional principles.” *Id.*

turning attempted present manumissions, not future ones. Moreover, the heir and executor of John Pleasants and a principal legatee of his slaves, and the executor of Jonathan—Robert Pleasants—as one of the trustees was “the proper party to vindicate that freedom.”¹⁰⁹

Wythe joined together the two issues of restraints upon alienation and violation of the Rule Against Perpetuities, after (as we have seen) doubting whether such property rules apply to issues of human freedom. He concluded that, first, for slaves still alive who were in existence at the deaths of the testators, and for slaves still alive born to mothers who were in existence at the deaths of the testators, neither rule applied because all were either lives in being or were born within lives in being. (For this latter group, Wythe probably ruled contrary to a modern understanding of the Rule Against Perpetuities.) All such slaves who had attained the age of 30 at the time of the passage of the emancipation act in 1782 he declared free, and all other such slaves he declared free upon their attaining age 30. Second, for all slaves still alive “born since the said statute was enacted”—that is, born to mothers technically free since 1782 or who would be freed after 1782 at age 30—Wythe left out of existing perpetuities doctrine to declare them “at their birth intitled to freedom.”¹¹⁰ In essence, Wythe applied what is today called the “wait and see” doctrine—he did not apply perpetuities law strictly, construing matters as of the effective dates of the instruments (1771 and 1776) without taking into account anything that happened thereafter, but saw that the statute allowing emancipation was passed in 1782, “not [as Wythe put it] after an intolerable length of time,”¹¹¹ thereby giving an insufficiently short time to allow the birth of slaves by 1782 to a slave mother conceived after either 1771 or 1776, for whom the condition of reaching age 30 would be too remote and void, thereby voiding the entire gift since, under perpetuities law (the “all or nothing” rule), if the gift to *any* member of the donee group was void, the entire gift (including gifts to legatees which did not violate the time period) was void.¹¹² “Waiting” until 1782 showed no possible actual invalidities under perpetuities restrictions. Wythe here also went beyond the wills—which both clearly gave a slave freedom only at age 30—probably because under existing Virginia law the offspring of a free mother would be free. Wythe totally ignored the requirement of the 1782 emancipation statute that persons freed at age 45 or older, or enfeebled when freed, must be given support from the emancipator or his or her estate.

109. *Id.* at 3. It is astounding to the modern reader that no notice is taken in Wythe’s opinion that the slave Ned was also a petitioner and was undoubtedly a proper party to demand his own freedom, and thus to raise all the important issues in the case. Procedural difficulties, discussed on the appeal by Judge Carrington, probably prevented Ned’s case from being useful. See *Pleasants*, 6 Va. (2 Call) at 349 (Carrington, J., concurring).

110. *Wythe’s Decree in Pleasants*, *supra* note 78, at 3.

111. *Id.*

112. For the modern “wait and see” doctrine, including the “all or nothing” rule, see DUKEMINIER & JOHANSON, *supra* note 100, at 686-87, 698-700.

In his most significant departure from existing practice, Wythe decreed an accounting for the “profits, to which [the freed slaves] who have been wrongfully detained[,] are intitled,”¹¹³ because they had been free since 1782 (or since they had attained the age of 30 after that date) and had been working for no pay.¹¹⁴ For Wythe, the “freedom” accorded to the Pleasants slaves by emancipation—indeed, as he hinted, a “right” “restor[ed]” to them under the Virginia Constitution—was not abstract, but meant that they should have the full dignity of being waged workers. Where he could not ingeniously fashion equitably useful rules or arguments to give them such freedom, he cut through or ignored legal difficulties and even the clear intent of the emancipators.

When Jackey Wright presented her petition for freedom to him in late 1805 or early 1806, Wythe went even further. Wright had courageously halted a procession of slaves being taken “to one of the Southern states” in Petersburg, Virginia—probably not coincidentally the home of the person who would become her attorney, George Keith Taylor (a brother-in-law of John Marshall).¹¹⁵ She and her children had been living in slavery, apparently in rural northeastern Mathews County, Virginia, and had been sold by Holder Hudgins to one Cox, a slaver. Wright, however, knew that she was in fact a free person, as were her children. At Petersburg she applied to the Chancellor of the Richmond Chancery District of Virginia, Wythe, for a writ *ne exeat*, that is, an order preventing her from being taken from the state while she pursued her claim of freedom.¹¹⁶

Slaves in Virginia had but one statutorily given legal right, the right to claim freedom.¹¹⁷ Since “all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britain, brought into this country by sea, or by land, were slaves[,] . . . the descendants of the females [among them] remain slaves, to this day, unless they can prove a right to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.”¹¹⁸ Wright had not been emancipated, as had been the Pleasants slaves, so she had to take the latter course. It presented many difficulties, among which were burdens of proof. Wright claimed to be an Indian. “American Indians brought into this country since the year [1691], and their descendants in the maternal line, are free.”¹¹⁹ In law, since she had been

113. *Wythe's Decree in Pleasants*, *supra* note 78, at 3.

114. Such a ruling was “an unprecedented action by a Virginia judge in a suit for freedom.” 5 MARSHALL PAPERS, *supra* note 36, at 542.

115. Petition of Wright, “Hudgins v. Wrights” folder, Box 71, Tucker-Coleman Collection, Manuscripts and Rare Books Department, Earl Gregg Swem Library, College of William and Mary [hereinafter Tucker Papers] (source of quote).

116. *Id.*

117. 1 SAMUEL SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA, 1792-1806, BEING A CONTINUATION OF HENING 363-65 (AMS Press, Inc. 1970) (1835), *discussed in* MCCOLLEY, *supra* note 83, at 159-61.

118. *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 137 (1806) (Tucker, J.).

119. *Id.* at 138 (Tucker, J.). A very few Indians were enslaved in Virginia by acts of 1679 and 1682. These acts were repealed, but the date of repeal was in some doubt. Many took the date to be 1705, the date of a compilation of Virginia laws in which the repealing act appeared, but Judge St. George Tucker

enslaved, was she presumed to be black, thus having the burden of proving her freedom, or was she presumed to be the Indian she claimed she was, with the burden of proof then placed upon those claiming her to be a slave?

First Wright had to substantiate her maternal descent. Her petition traced through her mother Phoebe Wilson (now apparently free herself) and her grandmother Betty Mingo, to great-grandmother Frances Wilson, whom she claimed to be an Indian. She claimed that, in each generation, there had been no intermingling of African blood, including with respect to her own children. Apparently one white person was ready to testify to the truth of this lineage.¹²⁰ Witnesses for the defendants, however, said that Phoebe Wilson was the daughter of Hannah, who in turn was the daughter of Butterwood Nan, the daughter of an Indian father. Petitioner's witnesses testified that, when young, Phoebe's daughter Jackey was "perfectly white" with blue eyes; and defendants' witnesses said that Hannah was Phoebe's mother, was copper-colored with long straight black hair, was reputed to be an Indian and called "Indian Hannah," and was reputedly free, threatening her master with a suit for freedom but lacking the resources.¹²¹ This pedigree, probably because it was supported by key defendant witnesses, was accepted by the courts.

Wythe ruled that Jackey Wright and her children were free, resting on alternative grounds. First, he inspected them visually—Phoebe, Jackey, and the children being present in court.¹²² Wythe saw persons with no markers of Negro descent, and held that Wright and her children "were the descendants of free white men and Native American women."¹²³ (Defendant's attorney Edmund Randolph was highly upset at this mode of judicial decision-making. He thought only witness testimony should be allowed, and that "[j]udges ought to sit in the dark."¹²⁴) But more importantly, in the summary of reviewing Court of Appeals Judge St. George Tucker,

[t]he Court of Chancery [alternatively] decreed that the burthen of proof was on the defendants, as claiming a right to hold the peti-

thought the actual repeal occurred in 1691. *See id.* at 135-36, 138-39.

120. Petition of Wright, *supra* note 115. The testimony of Diana Farrell to support Wright's claimed pedigree was "wa[i]ved," apparently by Wright's attorney Taylor, apparently because of the strength of the alternative pedigree given by the testimony of witnesses for Hudgins and Cox, the defendants. *See id.* (Farrell's name and her proposed testimony crossed out of petition); Bench notes of Judge St. George Tucker, "Hudgins v. Wrights" folder, Box 71, Tucker Papers, *supra* note 115. Apparently Phoebe Wilson was in court for the hearing, but did not testify herself about her lineage. The conflicting lineages are a mystery I cannot solve. Since no Indians are listed as presenting testimony, probably it was illegal for them to do so.

121. All of this comes from the Petition Taylor drew up and had printed on Wright's behalf, which summarizes defendants' testimony too. Tucker's bench notes confirm the testimony, though often not in such detail, and add that defendant's key witness Robert Temple also testified that he had seen Butterwood Nan, who he thought was Hannah's mother and Phoebe's grandmother. *See* Bench notes, *supra* note 120.

122. *See* COVER, *supra* note 78, at 51.

123. Petition of Wright, *supra* note 115 (summary by Taylor of Wythe's ruling).

124. Bench notes, *supra* note 120.

tioners in slavery; that freedom is an inherent blessing, of which according to the [Virginia Constitution's] bill of rights, they could not be deprived; and therefore [since defendants had introduced no evidence of African descent] that they were free.¹²⁵

The mysterious basis for Wythe's constitutional assertion in *Pleasants*, and for his use there of the word "restitution" with respect to the slaves' freedom, is now cleared up. Human freedom, for Wythe, was an "inherent" natural law right of *all* humans, confirmed by the language of the first article of Virginia's 1776 Declaration of Rights, which recited that "all men are by nature equally free."¹²⁶ This reasoning could shake slavery to its roots. It forced Virginians to confront the humanity of their slaves, the inhumanity of their treatment of slaves, and the legal basis for slavery itself, all in the context of their own revolutionary heritage of seeking freedom. It is indeed merely an evidentiary argument—dealing with burdens of proof—and it is true that Wythe applied these beliefs only to instances in which enslaved persons claimed their freedom, as Noonan says, not in the scores of other cases before him in which slaves were treated as property by the pleaders and existing legal categories. Moreover, in *Page* Wythe had been so inflamed over what he saw as violations of the natural law of contracts that he overthrew decades of practice to overturn them—risking social opprobrium—but he did not so utilize another principle of natural law in the slavery cases. The many conflicts in Wythe's life and culture over the fundamental socioeconomic institution of slavery were apparent, even here. But Wythe went further than any other Southern antebellum judge I know of. As Edmund Randolph recognized, in arguing before the Court of Appeals that Wythe's decree should be reversed, "the grounds of the decree are subversive of slavery."¹²⁷

At least three aspects of these slavery cases demonstrate once again Wythe's bourgeois modernity. First, comparing *Page* with *Pleasants* and *Wrights* as a matter of rhetoric,¹²⁸ we can conclude that commerce and contract rights were more important to him than the enslavement of human beings.¹²⁹ In the former decision he went further than in the latter two, he overturned more of his neighbors' economic practices, and he was more direct and forthright (dealing substantively with the issue, not remaining ensconced inside the procedural law of evidence). Repaying debts was more fundamental to civilized life than were the freedom and the humanity of the

125. *Id.*

126. 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 24, at 3813.

127. Bench notes, *supra* note 120.

128. If we move from mere words to the purely economic level, we can readily spot another reason for the differences in Wythe's approach to the two cases. Despite the millions at stake in the British debt cases, many more millions—and a whole way of life, for whites—were at stake in the slavery cases.

129. The rhetoric of most moderns today overlooks or denies the inherently oppressive operation of capitalism, see *infra* note 131, since most are uncritically assured that commerce and profits are wonderful, of primary importance, and in any case inescapable and inevitable. Like Wythe, as a matter of rhetoric, then, they judge the operation of capitalism as being more important than the workers it grinds down.

enslaved. Second, Wythe's concept of "freedom" for enslaved humans was not abstract, idealized, rosilily disconnected from culture and context, but it was also no deeper or more complicated than "freedom" as it was supposed to exist in bourgeois society. Wythe in *Pleasants* essentially awarded the freed slaves their back pay. He treated them as, and apparently fully expected them to become, wage laborers, working for employers just as did white (and free black) people in similar socioeconomic positions in the free states. As many workers and others were then beginning to realize,¹³⁰ those were positions in which the freed slaves would *also* be essentially unfree, enthralled by the grossly superior socioeconomic power of employers.¹³¹ Unlike the contemporary visiting Frenchman Volney, there is no indication that Wythe possessed the essentially socialist understandings "that race was invented merely to divide the workers apart,"¹³² or that "free" wage workers had a very restricted socioeconomic position too.

Third, despite Wythe's magnificence in *Pleasants* and *Wrights*, Noonan is correct to suggest that, like Jefferson and most of his other contemporaries, he was abysmally confused and ambivalent over the proper social location of African Americans within bourgeois culture. Wythe did not free all of his own slaves immediately upon passage of the 1782 statute; he was willing to hold some people in slavery until they reached the age of 30 (as was also the supposedly freedom-devoted, humane Quaker John Pleasants!); and the property he wanted to bestow by will upon the freed servants who stayed on to serve him was to be held for them in trust, not to be held by them outright.¹³³ Despite Wythe's giving an excellent Enlightenment education to one of them, the youth Michael Brown, because of his apparent be-

130. See generally LINEBAUGH & REDIKER, *supra* note 86.

131. Marx explains clearly that politically "free" wage workers are exploited by the fact of working for capitalists. Capitalist employers, thanks to their economic position and superior economic and political power, take from each worker most of the excess value (over what is necessary for the worker's maintenance as a human being) the worker creates in each work period. Capital's superior economic situation (which allows this theft, disguised in the legal form of a contract) derives from the facts that (1) workers have no capital—no control over their own means of production—and (2) all employers are capitalists, so there is no one else to work for; thus, confrontation with starvation makes them available to work for capitalists who do control the means of production. See Karl Marx, *Value, Price and Profit*, in WAGE-LABOUR AND CAPITAL & VALUE, PRICE AND PROFIT 29-62 (Int'l Publishers Co. 2d prtg. 1978) (1865) [hereinafter WAGE-LABOUR] (especially the portions on "surplus value"); MARX, *supra* note 69, at 201 ("An individual who has neither capital nor landed property of his own is dependent on wage-labour from his birth as a consequence of social distribution."); Karl Marx, *Wage-Labour and Capital*, in WAGE-LABOUR, *supra*, at 15, 30 ("The existence of a class which possesses nothing but the ability to work is a necessary presupposition of capital."). Skilled workers, who do in a sense have capital in their skill, are constantly reduced to unskilled status by capitalists. See HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974). Workers, then, to improve their situation, must struggle with capital both to gain a greater part of the surplus, and ultimately to attempt to replace wage labor and the capitalist organization of work in order to terminate their oppressive circumstances. "The question resolves itself into a question of the respective powers of the combatants." Marx, *Value, Price and Profit*, *supra*, at 58. Wythe—like most moderns today—saw only "freedom" in wage labor.

132. LINEBAUGH & REDIKER, *supra* note 86, at 342, discussed and quoted in *supra* note 86.

133. See Wythe's will and its codicils, in Minor, *supra* note 29, at xxxvii-xxxix (except that there was an outright gift of "fuel" to Brodnax).

lief that “Negroes held the full attributes of humanity,”¹³⁴ he did not treat *all* blacks in the same fashion. The same ambivalence pervades our bourgeois culture today: racism from whites (even if unconscious to the whites, it is nevertheless racism) still holds most African-Americans in its thrall, despite generations of freedom-fighting, civil rights acts, militant demonstrations, and consciousness-raising—because it is socioeconomically important in bourgeois capitalism for workers to be divided against each other.¹³⁵

Although on appeal Wythe’s decrees of freedom for many of the Pleasants slaves and for Jackey Wright and her children were affirmed, and although Wythe obtained the vote of appellate judge (and former student) Spencer Roane to uphold the grant of freedom at birth for offspring of the Pleasants slaves born after 1782,¹³⁶ the Court of Appeals reversed him on all of his revolutionary, slavery-threatening points.

In *Pleasants*, slaves who had been sold or mortgaged, or who might be subject to the debts of the legatees, would not receive their freedom until it could be accomplished equitably to all parties.¹³⁷ Slaves above the age of 45 and those still infants who had been born after their mothers reached 30 were not to be freed until Robert Pleasants, the legatees, “or any other” person posted sufficient bond that they “not become chargeable to the public.”¹³⁸ Subject to the debt limitation (above), all slaves between the ages of 30 and 45 were to be immediately freed, along with those adults born after their mothers had reached 30; but (as argued by John Wickham for appellants) “a new species of property” was created by the court,¹³⁹ unknown to the system of estates at common law, which kept each person in each successive generation enslaved until age 30 with all of the increase born to females under that age not free—as Wythe and Roane had declared—but still enslaved until *they* attained 30.¹⁴⁰ The Court unanimously disapproved of Wythe’s awarding of “profits” (back pay) to freed slaves.¹⁴¹

134. MCOLLEY, *supra* note 83, at 136.

135. “Labour cannot emancipate itself in the white skin where in the black it is branded.” 1 KARL MARX, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION 287 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Int’l Publishers Co. 1947) (1889). See generally W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (The Free Press 1998) (1935); BRIAN KELLY, RACE, CLASS, AND POWER IN THE ALABAMA COALFIELDS, 1908-21 (2001); Staughton Lynd, *History, Race, and the Steel Industry*, 76 RADICAL HISTORIANS’ NEWSL. 1 (1997).

136. *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 339 (Ct. App. 1799) (Roane, J.) (“[S]uch children are not the children of slaves. They never were the property of the testator or legatees [T]he great principle of natural law . . . [is] that the children of a free mother are themselves also free. The condition[] of the will then, as applicable to such children, . . . is void, as being contrary to law.”). Roane also followed Wythe in applying what we now call “wait and see”: “The contingency has happened, within the limits. The effect is, that the limitation over has thenceforth become vested, in interest, in all the appellees, then in esse” *Id.* at 338. Finally, Roane agreed with his teacher that freedom for the slaves had been properly put into trust, not violating the 1748 statute. *Id.* at 341.

137. *Pleasants*, 6 Va. (2 Call) at 354-55.

138. *Id.* at 354.

139. *Id.* at 328.

140. *Id.* at 356. On remand, Wythe freed 185 slaves as either between 30 and 45 or born after their mothers reached 30, but 246 Pleasants slaves remained in slavery, with their offspring born to them when under the age of 30 also still enslaved. Kettner, *supra* note 78, at 153.

141. *Pleasants*, 6 Va. (2 Call) at 343 (Roane, J.); 348-49 (Carrington, J.); 350 (Pendleton, P.).

The Court was even more emphatic in its reversal of *Wrights*. The first ground of Wythe's decree—that anyone could plainly see a total lack of Negro markers in Wright and her children—was upheld, and the *Wrights* were free.¹⁴² Although the Virginia Constitution was not mentioned in the opinion of Judge Roane or in the decree concurred in by all the participating members of the court, it was unanimously held to be the law that whites and Indians were presumptively free, while blacks were presumptively slaves, with the burden of proof in the first instances on those claiming enslavement, but in the instance of blacks on them to prove freedom—an almost impossible task.¹⁴³ The Court explicitly disapproved of “the Chancellor's principles and reasoning . . . as . . . relates to native Africans and their descendants, who have been and are now held as slaves by the citizens of this state.”¹⁴⁴ Judge St. George Tucker, Wythe's student and his immediate successor in the chair of law at William and Mary, who had in 1796 submitted a plan to the General Assembly for the gradual emancipation of all slaves and who had opposed slavery as cruel and undemocratic in his widely distributed 1803 Virginia edition of Blackstone,¹⁴⁵ said: “I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom” to slaves.¹⁴⁶ The institution of slavery was not going to be threatened by Wythe's ruling, and not even an openly antislavery judge would come close to agreement with him. Economics was much more important than ideology.

His ruling in *Wrights* probably subjected Wythe to even greater public opprobrium than had that in *Page*.¹⁴⁷ And it may have affected the inquiry into his apparent murder.¹⁴⁸ On the morning of Sunday, May 25, 1806, the

142. *Hudgins v. Wrights*, 11 Va. (1 Hen. & Mun.) 134, 139-41 (Tucker, J.); 141-42 (opinion of Roane, J., concurred in by Fleming & Carrington, JJ., & Lyons, P.).

143. *Id.* at 139 (Tucker, J., Indians and whites presumptively free); 140 (Tucker, J., blacks presumptively unfree); 141 (Roane, J., blacks presumptively slaves); 144 (decree of Court that whites and Indians are presumptively free; Africans, presumptively slaves). “Often the greatest barrier to slaves in court was not the bias of white jurors, but the onerous burdens of proof placed on them in freedom suits.” Higginbotham & Higginbotham, *supra* note 79, at 1237.

144. *Wrights*, 11 Va. (1 Hen. & Mun.) at 144.

145. See CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804, at 149-53 & n.20 (1987). Tucker had said in his pamphlet,

Whilst we were offering up vows at the shrine of liberty . . . we were imposing upon our fellow men, who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained . . . [H]ow perfectly irreconcilable a state of slavery is to the principles of a democracy, which form the *basis and foundation* of our government.

Id. at 150 (quoting from Tucker's edition of Blackstone, in which his pamphlet arguing for gradual abolition was included as an appendix).

146. *Wrights*, 11 Va. (1 Hen. & Mun.) at 141.

147. See KIRTLAND, *supra* note 3, at 149.

148. Facts not specifically footnoted in this and the following text paragraphs come from the exhaustive and, I think, definitive investigations made into the matter by historians Julian P. Boyd and W. Edwin Hemphill in THE MURDER OF GEORGE WYTHE, *supra* note 28.

old man—already whispered to be senile, and having been asked by the Governor of Virginia to resign¹⁴⁹—came down with a violent disarrangement of his digestive system. Though he had long been subject to digestive attacks,¹⁵⁰ his freed cook Lydia Brodnax and the freed mulatto youth Michael Brown who lived with him simultaneously fell similarly ill. His great-nephew, favorite, and residuary legatee, George Wythe Sweeney—a fourth member of Wythe’s household, then about 17¹⁵¹—was notoriously profligate, had been caught stealing from Wythe for gambling money, and two days after the appearance of the mysterious household illness was charged with forging six checks on his benefactor and jailed. Sweeney did not become ill, and was soon suspected of poisoning Wythe, Brodnax, and Brown. Brown was also a beneficiary of Wythe’s will, but should he die before attaining his majority his share would pass to Sweeney.

The old man would not bail Sweeney, and—severely ill and abed himself—directed friends to search Sweeney’s room after Brown’s death on June 1. Strawberries laced with arsenic were found there—and the typically frugal vegetarian household supper on Saturday, May 24, had consisted of milk and strawberries. Statements gained during the criminal investigation demonstrated that Sweeney had inquired recently about arsenic and then had shown that he had found some; that a paper package full of arsenic was found in the yard next to the jail in which Sweeney was confined; and that Sweeney was known to have possessed a heavy packet made of paper when he came into the jail.¹⁵² The search of the trunk in Sweeney’s room had already confirmed his possession of a quantity of the same sort of paper. Brodnax (who alone recovered) stated that she had seen Sweeney reading Wythe’s will; moreover, she had seen him throw something into the boiling coffee kettle on Sunday morning, and then place a piece of white paper into the fire.

The evidence for Sweeney’s having poisoned Wythe seems quite strong. Several courts agreed at the time, as have commentators since 1806. After Brown died, Wythe immediately changed his will to eliminate his legacy, but more importantly, he also disinherited Sweeney. He then demanded that Sweeney’s room be searched, and, before he died on June 8, asked that he be autopsied. One can only conclude that Wythe, too, thought he had been poisoned by his namesake.

Sweeney was tried for the two murders but, amazingly enough, he was acquitted. While a newspaper report stated that the acquittal was due to the

149. Letter from William Browne to Joseph Prentis (Sept. 24, 1804) (Prentis Papers, University of Virginia Library), *quoted at length in* BROWN, *supra* note 3, at 283 (senility); W. Edwin Hemphill, *Examinations of George Wythe Swinney for Forgery and Murder: A Documentary Essay*, in *THE MURDER OF GEORGE WYTHE*, *supra* note 28, at 33, 33 (governor’s resignation request). Note that Sweeney’s last name is spelled variously in the sources; I use the spelling common in our family.

150. Hemphill, *supra* note 149, at 50 (testimony of Dr. James McClurg).

151. *Id.* at 41 n.27 (quoting June 10, 1806, letter from William Wirt to James Monroe stating that Sweeney was 16 or 17).

152. The jailor testified that he had found a heavy paper-wrapped package in Sweeney’s pocket but had not taken it from him. *Id.* at 45.

inadmissibility of Brodnax's testimony—even a free black could not testify against whites—it can be seen that her testimony would have been only supererogation, as there was still damning evidence from white persons about the poisoned strawberries and about Sweeney's quest for and possession of arsenic.

The real difficulty in the way of conviction, in my opinion, lay in the testimony, and the actions, of the doctors. James McCaw and James McClurg were old and good friends of Wythe, McClurg having been his fellow Constitutional Convention delegate. They performed autopsies on both Wythe and Brown, but remarkably enough their testimony was equivocal as to whether arsenic might have caused the two deaths. McClurg apparently said that bile, not arsenic, was the culprit in Wythe's instance.¹⁵³ In addition, they did not perform tests which, even in the juvenile state of forensic science at the time, could have conclusively demonstrated the presence of arsenic.¹⁵⁴ There are certainly other possible answers for this mystery,¹⁵⁵ but the doctors could have failed to perform tests which might have conclusively demonstrated that Wythe was murdered, because of lingering rancor over Wythe's relatively recent and notorious *Wrights* decision¹⁵⁶ and his open opposition to the economic backbone of their prosperity. The venerable old man was gone, and they may have not have wanted even so reprehensible a white man as Sweeney to receive capital punishment for the deaths of a mulatto youth to whom Wythe was giving a classical education to prove full Negro humanity, and of the only white judge of his era to have attempted judicially to undermine slavery.

CONCLUDING THOUGHTS

George Wythe's judicial opinions on judicial review, the rights of creditors, and the rights of African American slaves are surprisingly modern, consistent in content, argument, and result with what modern American judges might say on these subjects—despite the natural law language within which Wythe tended to phrase his views. They were, in the latter two instances, opinions which clashed gratingly against the more complicated and conflictual devotion his fellow Virginians had to a mix of modern and pre-modern sentiments on commerce and human rights, although the positions

153. William Wirt, the eminent Virginia attorney and a former student of Wythe, was convinced in part that he should defend Sweeney at his murder trial because "the eminent McClurg, amongst others, had pronounced that his death was caused simply by bile and not by poison." *Id.* at 55. This information was delivered to Wirt by Judge William Nelson of the General Court, a relative of the deceased Mrs. Wythe and another supposed friend of the Chancellor. *Id.*

154. *See id.* at 50-51 (testimony of the doctors); 52 (none of the doctors pursued arsenic identification very rigorously, while proper testing known at the time could have confirmed its presence).

155. *See id.* at 57-59.

156. The Court of Appeals did not reverse Wythe in *Wrights* until after Wythe's death. Thus, at the time of his murder, Wythe's ruling that blacks were just as presumptively free as whites was still good law.

of moderns on the status and position of African Americans within today's bourgeois culture are themselves quite ambivalent and confused.

There is no easy answer to the question of how Wythe, a relatively backwoods, self-educated petty aristocrat from eastern Virginia, reached a position so far ahead of most of his contemporaries. In large part it was the extensive reading he pursued throughout his adult life, in no small part his mother's Quaker heritage and values helped, and he was conversant with many other American Enlightenment "characters" (as he would have called them) during a time of tremendous social, intellectual, and civic ferment. However, his pupil and great friend Thomas Jefferson, who shared many of these formative experiences, including years of intellectual conversation with Wythe himself, in each of the three areas had an older, less modern sensibility and opinion.¹⁵⁷

Wythe's views were modern in the bourgeois sense, fully within an emerging culture of capitalism, far ahead of many of his contemporaries. Capitalism had been growing in England and around the Atlantic littoral, as an economic institution and as an enveloping cultural realm of ideas and beliefs consistent with the economic bases of this way of organizing production, since at least the sixteenth century.¹⁵⁸ I cannot account for Wythe's being so far ahead, but the ideas themselves were current in the Atlantic world of his time, and somehow he had absorbed them pretty fully. And, like many prophets major and minor, his devotion to his bourgeois principles and ideas—the basis of civilized life, for Wythe—led him to loneliness, social opprobrium, and perhaps even an unrequited involuntary passing from life.

157. For Jefferson's differing views, see *supra* notes 26 (judicial review), 64 (debt repayment), and 86 and accompanying text (humanity of slaves).

158. See 1 MARX, *supra* note 135; DAVID ROLLISON, *THE LOCAL ORIGINS OF MODERN SOCIETY: GLOUCESTERSHIRE 1500-1800* (1992); LINEBAUGH & REDIKER, *supra* note 86.