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NORTH CAROLINA LAW REVIEW

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Volume 65 | Number 5

Article 2

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6-1-1987

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## Recommended Citation

Lewis F. Powell Jr., *A Tribute to Two Professors: Eugene Gressman and George Wythe*, 65 N.C. L. REV. 851 (1987).

Available at: <http://scholarship.law.unc.edu/nclr/vol65/iss5/2>

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# A TRIBUTE TO TWO PROFESSORS: EUGENE GRESSMAN AND GEORGE WYTHE\*

LEWIS F. POWELL, JR.†

We are here this evening to honor Eugene Gressman. He is a lawyer whose name is closely associated with the Supreme Court Justices. For many years, he and Bob Stern—now joined by Stephen Shapiro—have been advising lawyers how to persuade us to grant certiorari, and then how to brief and argue their cases before us. His famous book, *Supreme Court Practice*,<sup>1</sup> now in its sixth edition, is the “bible” on practice before our Court.

I accepted the invitation to speak because of my personal admiration for Professor Gressman. It is fair also to say that I welcome the opportunity to be on this beautiful campus for the first time—the site of a famous University.

In view of the accolades so well expressed by those who have preceded me, I will add only a few words about Eugene Gressman’s career. It is unique in that he has attained distinction as a successful practicing lawyer, a widely read author, and a distinguished professor of law.

His knowledge of the Supreme Court is not second hand. He served as a law clerk to Justice Frank Murphy for five years—an unusually long tenure for a clerk. This did occur during the War, but Justice Murphy was so pleased with Gene he refused to release him.

Perhaps because of this unique experience, Gene has had a “love affair” with the Court over the intervening decades. In addition to writing his famous book, and keeping it up to date, he has argued at least a dozen cases before the Supreme Court. Also he has filed numerous briefs, petitions, and jurisdictional statements.

On the personal side, Gene and I have similar families. He married well, as did I. Many of you here know Nan Gressman, a gifted artist. The Gressmans—as we do—have four children, and two of their children—like two of ours—are lawyers.

I had the special parental privilege of moving the admission to our Court of our lawyer son and daughter, and their respective lawyer spouses. So too, Gene moved the admission of his two lawyer sons.

In thinking of what I might say substantively, I thought of the first professor of law in this country. His name is George Wythe—a name now rarely recognized outside of Virginia.

George Wythe, like Eugene Gressman, distinguished himself as a practicing

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\* Address prepared for the University of North Carolina retirement dinner in honor of William Rand Kenan, Jr., Professor of Law Eugene Gressman, April 10, 1987.

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1. R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* (6th ed. 1986).

lawyer and also as a famous professor. Wythe was born in 1726, and died in 1806. He was a major participant in the historic events that created our country. In this bicentennial year, it therefore seemed appropriate to talk about what a lawyer—and professor of law—accomplished at a very different time in our history.

As often was true in those days, Wythe was largely self-educated, although his remarkable mother taught him at an early age to translate the Greek New Testament into English.

When he wanted to become a lawyer, Wythe could not go to England to study at one of the Inns of Court. That was then done only by a few sons of the wealthiest colonial families. Rather, he “read law” in the office of his uncle—a practicing lawyer.

After a short period of practice before county courts, Wythe moved to Williamsburg—then the capital of Colonial Virginia and the seat of the House of Burgesses and the General Court. He soon was regarded as one of the leading trial lawyers of his day. He was known for his meticulous preparation of cases. This often included research into Roman as well as English law, and, of course, the Virginia cases and statutes.

Wythe’s ethical standards would surprise many members of our profession today. If he believed a cause was unjust, he would decline to take the case. If he learned that a client had not revealed relevant evidence, Wythe would withdraw from the case and return any fee that had been paid. It hardly need be said that if lawyers today refused to take cases when they disagreed with the client, the adversary system would be in deep trouble.

Although eminently successful in the practice, Wythe basically was a scholar. Increasingly, he devoted his time to teaching. His most famous pupil, Thomas Jefferson, began his legal studies under Wythe in about 1762. There is some question as to how long Jefferson was a student of Wythe; possibly Jefferson received formal instruction during portions of four years.

Wythe required Jefferson to read and also “digest” a number of books. He started—of course—with Lord Coke’s treatise on Littleton. Included among the prescribed “parallel reading,” were the works of John Locke and other philosophers.

The influence of Locke on Jefferson is evident in the Declaration of Independence. Locke perceived that the purpose of government is to preserve the natural rights of man. The most famous words in the Declaration of Independence came almost verbatim from Locke: “We hold these truths to be self evident, that all men are created equal; that they are endowed, by their creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness . . . .”

Wythe, as a teacher, also emphasized the practical aspects of preparation for the bar. The young Jefferson regularly was sent to court to observe and summarize the arguments of lawyers, and to do exercises in the drafting of pleadings—in the ancient English forms.

The teacher-pupil relationship matured into an intimate and life-long friendship. On one occasion, Jefferson wrote that Wythe had had "the most salutary influence on the course of my life."

In 1779 Jefferson—then Governor of Virginia—secured Wythe's appointment as Professor of Law and Police at the College of William and Mary. He thus became the first professor of law in America. He was second in the English speaking world after Blackstone, who became the Vinerian Professor Law at Oxford in 1758. Isaac Parker, the first professor of law at Harvard, was not appointed until 1815.

Some of Wythe's lectures were based on Blackstone's Commentaries, then widely read in the colonies. Wythe continued to believe in preparing his students for practice and he conducted both moot courts and moot legislatures.

John Marshall was one of Wythe's first students at the College of William and Mary. Marshall, also largely self-educated, studied law under Wythe only for six months. Marshall then was an officer in George Washington's army, and he studied under Wythe during a lull in the Revolutionary War. Marshall's notebook has come down to us, and it is full of scribbings—not only about law but about Maria Ambler, whom he later married.

Another of Wythe's famous students was Henry Clay, later a distinguished Senator and candidate for president, and also a professor of law.

I now summarize briefly Wythe's participation in the great political events of his time. Wythe was a bold and decisive champion of independence from Great Britain. As a member of the Virginia House of Burgesses, he drafted the remonstrance against the Stamp Act. He approved of Patrick Henry's famous declaration "Give me liberty or give me death." He was one of seven Virginians who signed the Declaration of Independence, drafted—of course—by his pupil Thomas Jefferson. He also was a delegate to the Constitutional Convention of 1787, and joined in drafting the rules of procedure for the Convention.

Later, he may have been the decisive figure in the ratification by the State of Virginia. At the State's Convention, he served as Chairman of the Committee of the Whole, and presided over the acrimonious debates that lasted for almost a month. Patrick Henry led the fight against the Constitution. Wythe took the floor, and made the final and eloquent appeal for ratification. Virginia's vote was close: 89 to 79. Had Virginia, the largest colony, failed to ratify, it is doubtful we would have had a United States.

When Virginia created a High Court of Chancery in 1778, with both original and appellate jurisdiction of suits in equity, Wythe was one of its three members. He later became the sole Chancellor of Virginia. Perhaps his most famous decision was in *Commonwealth v. Caton*<sup>2</sup> in which he enunciated the principle of judicial review. He is reported to have said:

[I]f the whole legislature . . . 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;

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2. 8 Va. (4 Call.) 634 (1782).

and, pointing to the constitution, will say to them, here is the limit of your authority; and hither shall you go, but no further.<sup>3</sup>

There is reason to believe that Marshall, who is said to have been present in the courtroom when Wythe delivered this opinion, was profoundly influenced by his former professor.<sup>4</sup>

Wythe had lived for years in the handsome colonial brick house that still stands on the Palace Green in Williamsburg. It was built for Wythe and his bride by his father-in-law in 1755. Much of his teaching was done in this residence. George Washington used it as his headquarters before the battle of Yorktown. Wythe also had a small home in Richmond, after he became Chancellor.

Wythe's death was tragic. In his old age, and "widowed," he lived with two of his former slaves, his housekeeper Lydia Broadnax and a youth named Michael Brown. Wythe had educated Brown, and provided for him in his will. Wythe's grandnephew, George Wythe Sweeney—age nineteen—also had moved into the Wythe residence.

On a Sunday morning in 1806, in his eighty-first year, Wythe was poisoned by his grandnephew, Sweeney. The grandnephew was the primary beneficiary under Wythe's will, and stood to inherit even more if the former slave Brown should die.

But Sweeney was unwilling to wait. He had forged Wythe's name on several checks drawn on the Bank of Virginia, probably to cover gambling debts. He also was suspected of stealing a globe that Wythe had intended to bequeath to Jefferson.

To hasten his inheritance, and perhaps to cover up his forgeries, Sweeney put arsenic in Wythe's coffee. Wythe drank the poisoned coffee while reading the morning newspaper. He lingered for two weeks, long enough to disinherit Sweeney. The young former slave, Michael Brown, and Wythe's faithful housekeeper, Lydia, also drank the coffee. She recovered but Michael died.

It is ironic that the murderer of this great man, who had devoted his life to the pursuit of justice, was never punished. Sweeney was tried for the murders of Wythe and Brown and found not guilty for lack of evidence. The results of an autopsy were inconclusive. Moreover,—as strange as it seems—under the law at that time Lydia Broadnax, a black person, was not permitted to testify against a white person.

Sweeney's family retained the able lawyer William Wirt, later Attorney General of the United States. Wirt was then a young lawyer eager to make his name and his fortune in Richmond. Wirt's co-counsel was Edmund Randolph, a leading citizen and lawyer—who incidentally had written the codicil disinheriting Sweeney.<sup>5</sup>

The participation of these prominent men, who knew Wythe well, has led to

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3. *Id.* at 635.

4. Another early Virginia opinion believed to have influenced the decision in *Marbury v. Madison* was *Kemper v. Hawkins*, 3 Va. 20 (1793), written by Judge Spencer Roane.

5. Randolph was a delegate to the Constitutional Convention and introduced the Virginia Plan.

reasonable speculation that Wythe forgave Sweeney before he died. This speculation cannot be verified from contemporary records, but it is consistent with George Wythe's almost saintly character.

At least Sweeney left Virginia in disgrace, and reportedly came to a "bad end" in the west.

The drama of Wythe's death may have overshadowed the importance of his contributions to the founding of our country—a country in which the Rule of Law has retained its force and vitality for two centuries.

I conclude with a final and personal tribute to Gene Gressman. As a nationally known lawyer and widely respected author and professor, he has had a constructive influence on several generations of lawyers. Gene is not retiring from teaching, but certainly—as is made clear here tonight—he will be greatly missed at this fine law school.

