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The Transfiguration of Samuel Chase: A Rebuttal

Raoul Berger

Professor Stephen Presser's attempt to rehabilitate Justice Samuel Chase and his portrayal of Thomas Jefferson as a "demagogue" who had scant regard for the rule of law¹ led me to dissent.² Since the appearance of my response, Presser has published a book³ elaborating his thesis and, thereafter, a reply to my dissent.⁴ His valiant efforts are worthy of a better cause. In a brilliant study, *The Limitations of Science*, the mathematician-physicist J.W.N. Sullivan observed, "The rigorous criticism, the complete lack of indulgence, that is shown by the scientific world, is one of its most agreeable characteristics. Its one simple but devastating criterion [is], 'Is it true?'"⁵ To the extent that legal scholarship would approach scientific integrity, that must be our criterion, even though, to quote Thomas Huxley, "[t]he great tragedy of science [is] the slaying of a beautiful hypothesis by an ugly fact."⁶

1. Stephen B. Presser, *The Original Misunderstanding: The English, the Americans, and the Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. U. L. REV. 106 (1989).

2. Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 B.Y.U. L. REV. 873.

3. STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* (1991).

4. Stephen B. Presser, *Et tu Raoul? or The Original Misunderstanding Misunderstood*, 1991 B.Y.U. L. REV. 1475. I do not stand in the relation of Brutus to Caesar. John Henry Newman wrote that "he loved . . . Truth better than dear friends." J.H. CARDINAL NEWMAN, *APOLOGIA PRO VITA SUA* 110 (1989).

Lord Annan, former vice-chancellor of the University of London, observed that "[p]ublication is all imperative: as a scholar you must expose yourself to criticism." Noel Annan, *Hint: It's More Than One Idea*, N.Y. TIMES, May 24, 1992, § 9 (Book Review), at 12.

5. J.W.N. SULLIVAN, *THE LIMITATIONS OF SCIENCE* 277-78 (1933). Andrei Sakharov said, "Profound thoughts arise only in debate, with a possibility of counterargument." William Safire, *One Good Man*, N.Y. TIMES, Dec. 18, 1989, at A19.

6. THE OXFORD DICTIONARY OF QUOTATIONS 266, para. 19 (2d ed. 1955).

Writing of the "epidemic of Francophilia"⁷ which swept the country in the wake of the French Revolution, Presser notes that Chase's fear that anarchy might spread to our shores may in retrospect seem "fantastic and paranoid."⁸ Viewed even in his own times, it was not his function as a judge to halt the tide.⁹ Presser emphasizes that Chase sought to infuse his profound religious convictions into the law.¹⁰ They did not, however, deter him from cornering the Baltimore flour market in 1778 on inside information that Congress was seeking flour for the troops in New England.¹¹ Hamilton branded him as "'abandoned as any [public character] the history of past or present times can produce.'"¹² More reprehensible was Chase's conduct on the bench. But Presser thinks it "wrong of Berger, and virtually every other American legal historian, to dismiss Chase as simply a bigoted Federal bully,"¹³ an "American Jeffreys,"¹⁴ who was "almost universally described as 'grossly partisan,'"¹⁵ and, as Presser notes, became "the hated symbol of partisanship."¹⁶ Are all historians out of step

7. PRESSER, *supra* note 3, at 75.

8. *Id.* at 180.

9. Goebel observed that the hegemony of Parliament drastically shrank a court's discretion "to indulge its own ideas of policy," a view that travelled to America. JULIUS GOEBEL JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 228 (1971). James Wilson, for example, "anticipated no adventurous pronouncements on policy by the bench." *Id.*

Judge Richard Peters, who sat with Chase, eschewed involvement in French issues, considering that such issues "should be left to the executive branch." PRESSER, *supra* note 3, at 60.

10. Presser, *supra* note 4, at 1483-89; see *infra* text accompanying notes 68-71.

11. PRESSER, *supra* note 3, at 25. Presser refers to Chase's "monstrously self-serving pecuniary adventures." *Id.* at 181. The idea "that a judge who is corrupt and debauched in private life may be pure and upright in his judgment," wrote Thomas Cooley, is "false to human nature," and "a contradiction to general experience." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 440 (1868).

12. PRESSER, *supra* note 3, at 25 (quoting 1 THE PAPERS OF ALEXANDER HAMILTON 580 (Harold C. Syrett & Jacob E. Cooke eds. 1961)). Writing about Chase's appointment to the Court, John Adams said, "his Character has a Mist about it of suspicion and Impurity He has been a warm Party Man." *Id.* at 195 n.16 (quoting 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 835 (Maeva Marcus et al. eds., 1985)).

13. Presser, *supra* note 4, at 1476.

14. *Id.* at 1478. Tradition "has made the name of 'Judge Jeffreys' a byword of infamy." 12 ENCYCLOPEDIA BRITANNICA 994 (14th ed. 1929).

15. PRESSER, *supra* note 3, at 21 (quoting JOHN C. MILLER, THE FEDERALIST ERA 1789-1801, at 235 (1960)).

16. *Id.* at 27. His flaws, says Presser, were most "grievous." *Id.* at 213 n.45.

but Presser? In a similar context Justice Frankfurter rejected the notion that the Court may say "everybody on the Court has been wrong for 150 years."¹⁷ Presser has therefore undertaken a sisyphean task.

I. THE TRIAL OF JAMES CALLENDER

My critique of Chase's conduct in the Callender trial¹⁸ is dismissed by Presser because the defense engaged in "a calculated attempt . . . to embarrass Chase and the Adams administration."¹⁹ Let that be assumed, and it does not justify Chase's prejudicial conduct.²⁰ What counts is that Callender was denied a fair trial in violation of due process, for a "fair trial in a fair tribunal is a basic requirement of due process."²¹ Chase constituted an *unfair* tribunal; in the words of Edward Corwin, he came to the case with the "evident disposition to play the 'hanging judge.'"²² Before demonstrating that Chase had prejudged the case, let me brush in some background.

A. *The Alien and Sedition Acts*

Callender was charged with violation of the Sedition Act of 1798 for contemptuous utterances about President John Adams.²³ Presser notes that the Acts were "ill-conceived" and

17. *Green v. United States*, 356 U.S. 165, 192-93 (1958) (concurring opinion).

18. Berger, *supra* note 2, at 879-82.

19. Presser, *supra* note 4, at 1480-81.

20. Even published strictures should not, Justice Holmes declared, prevent a judge from "performing his sworn duty", e.g., to be impartial. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 424 (1918) (Holmes, J., dissenting).

21. *In re Murchison*, 349 U.S. 133, 136 (1955).

22. Edward S. Corwin, *Samuel Chase*, in 4 *DICTIONARY OF AMERICAN BIOGRAPHY* 36 (Allen Johnson & Dumas Malone eds., 1930). This "he is still commonly made out to be in the work of virtually all late twentieth century legal and constitutional historians." PRESSER, *supra* note 3, at 13. Charles Warren refers to Chase's "prejudiced and passionate conduct of the trials of two Republicans, Thomas Cooper and James T. Callender." 1 *CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY* 273 (1924).

23. SAUL K. PADOVER, *JEFFERSON* 110 (Mentor abr. ed. 1952). Chase explained that Callender's offense was "to assert that Adams, as a professed aristocrat, was an enemy to the republican government." PRESSER, *supra* note 3, at 135.

Jefferson too "was made the target of such abuse and defamation as was never before heaped upon any public figure in America. The Federalists portrayed him as a thief, a coward, a libertine, an infidel, and an atheist." PADOVER, *supra*, at 116. But his administration did not turn to the courts; "No matter how greatly the newspapers abused their freedom, Jefferson felt, it was vital for democracy that freedom not be checked." *Id.* at 143. See also ALBERT J. NOCK, *JEFFERSON* 236-38 (1926).

that "more and more [the Federalists] were perceived by the American voting public as the party of brutish reaction and pampered aristocracy."²⁴ The "usual American scholars' opinion of these Acts and the period of their implementation is that they reflected a 'reign of terror' " by the Federalists.²⁵ The antecedent English opposition thinkers "had correctly realized that the English law of seditious libel was a profound impediment to the statement of their political views."²⁶ In his biography of Jefferson, Saul Padover considers that the "Federalists were out to destroy republicanism, Jeffersonianism."²⁷ Such statements are dismissed by Presser as "opinions of mostly twentieth century historians (who relied principally on Jeffersonian propaganda),"²⁸ postulating that Samuel Eliot Morison, Dumas Malone, and Justice Frankfurter had the wool pulled over their eyes.²⁹ Consider two Federalist appraisals free of Jeffersonian virus: Marshall viewed the Sedition Act as "useless and unwise";³⁰ Hamilton "feared the effect of the repressive legislation. 'Let us not establish a tyranny.' "³¹

"For many years in America there had been a fear of judicial discretion," and provision for tenure "rekindled some of those old fears about judicial arbitrariness."³² Federalists responded to this fear "by asserting that the judicial function . . . would simply be one of lawfinding, and not law making."³³ Where did the Constitution authorize judges "to restrain the

24. PRESSER, *supra* note 3, at 3.

25. *Id.* at 118. Presser rejects the "reign of terror" because the Federalists' "feeble efforts"—fines of a "few thousand dollars, and no more than a few months in prison"—hardly compares with the "same fear of treason [that] caused Hungarians to put to death a man who translated the Marseillaise . . . into Magyar. Similarly, the governments of Austria, Rumania [sic], and Russia, during this period, regularly meted out to dissidents sentences of death, sixty years in chains" *Id.* at 119. But they fled to America in order to escape such enormities. "It could have been worse" is a small extenuation.

26. *Id.* at 93.

27. PADOVER, *supra* note 23, at 108.

28. Presser, *supra* note 4, at 1480 (citing Berger, *supra* note 2, at 880). The Federalist fear of democracy is exemplified by Gouverneur Morris's statement in the Senate: "Why are we here? . . . To save the people from their greatest enemy; to save them from themselves." MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION 697 (1970).

29. See *infra* text accompanying notes 36-41.

30. PADOVER, *supra* note 23, at 109.

31. *Id.*

32. PRESSER, *supra* note 3, at 29.

33. *Id.*

dangerous majoritarian trends in some of the states"?³⁴ The English Puritans, whose views travelled to America, feared the "judges' imposition of their personal views."³⁵

Chase, an "ardent Federalist,"³⁶ agitated for passage of the Act "and then threw himself into the forefront of Federalist judges who pushed hard for enforcement,"³⁷ thereby, wrote Samuel Eliot Morison, "confound[ing] political opposition with sedition."³⁸ The Federalist judiciary, Dumas Malone concluded, "amounted to an arm of that party,"³⁹ and its object "was the silencing of the opposition press."⁴⁰ Thus, as Felix Frankfurter observed, "[t]he judicial system was drawn into the vortex of politics."⁴¹ In his *State Trials*, Francis Wharton stated

34. *Id.*

35. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 891 (1985). The Tory Chief Justice Hutchinson of Massachusetts said that if "the Will of the Judge would be the Law . . . this tends to a State of Slavery." Morton J. Horowitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 287, 321 (Donald Fleming & Bernard Bailyn eds., 1971).

36. Alexander P. Humphrey, *The Impeachment of Samuel Chase*, 33 AM. L. REV. 827, 836 (1899). Presser notes "Chase's zealous campaigning for Adams." PRESSER, *supra* note 3, at 161. And he finds Chase's campaigning "more perplexing really than his conduct in the *Fries*, *Cooper*, and *Callender* trials." *Id.* at 141. Judges, said Hamilton, were to be independent to guard against "those ill humors, which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves." THE FEDERALIST NO. 78, at 494 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). Judges were not to stir up such "humors." In the Federal Convention, James Wilson explained that judicial independence was designed to remove judges from "every gust of faction." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 429 (Max Farrand ed., 1911) [hereinafter RECORDS].

Nor did Chase limit himself to the hustings. His "principal jeremiad" was his now infamous charge to a Baltimore grand jury, criticizing the extension of suffrage. PRESSER, *supra* note 3, at 39. According to Presser, Chase engaged in dangerous moves to control Jeffersonian influence on popular institutions like the jury, and to criticize universal suffrage, since it would lead to a demagogically inspired "mobocracy." *Id.* at 149. Chase conceived that "it was the judiciary's job to restrain democratic tendencies in the populace . . ." *Id.* at 148. See also CLAUDE G. BOWERS, *JEFFERSON IN POWER* 273-74 (1936).

Presser explains that Chase was convinced that he could "apply a jurisprudence which *was* above faction" because it rested on "the one true constitutional faith." Presser, *supra* note 4, at 1483. The fact remains that he was the "most fanatical Federalist on the bench." PETERSON, *supra* note 28, at 635.

37. Irving Dilliard, *Samuel Chase*, in 1 JUSTICES OF THE UNITED STATES SUPREME COURT 185, 194 (Leon Friedman & Fred L. Israel eds., 1969).

38. SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 353 (1965).

39. 4 DUMAS MALONE, *JEFFERSON AND HIS TIMES* 458 (1970).

40. *Id.* at 466.

41. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME*

that the Sedition Act "was pressed by Judge Chase with inquisitorial energy, and executed with intolerant vigour."⁴² Understandably the Jeffersonians "came to regard the courts as a political adjunct of the hated Federalists."⁴³ It did not require misrepresentation by defense counsel to "excite public indignation against the court and the government."⁴⁴ Presser recognizes that the Federalists were swept from office in 1800 because of their "zealous prosecution of seditious libel and the other blatant examples of transplanted English . . . jurisprudence employed by . . . Chase in the *Fries* and *Callender* cases."⁴⁵ Although the Act was not directly tested in the Supreme Court, it declared in 1964 that "the attack upon its validity has carried the day in the court of history."⁴⁶

B. *The Trial*

Now for the facts that prove the gross partiality of the "hanging judge." Luther Martin, Chase's chief counsel in the subsequent impeachment proceedings, testified therein that he had obtained Callender's book; underscored "a great portion of the book"; thought it "ought to be prosecuted"; and, learning that Chase was to sit on circuit in Richmond, gave it to him.⁴⁷ A respected lawyer, John Mason, testified that Chase told him that if Virginia would "furnish a jury of good and respectable men, he would certainly punish Callender," and thereby teach the people "to distinguish between liberty and licentiousness of the press."⁴⁸ Chase admitted that "the atrocious and profligate libel" had "excited" his "indignation," and that he feared lest an "atrocious offender" would escape punishment.⁴⁹ To James

COURT 21 (1927).

42. FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES* 45 (1849).

43. 4 MALONE, *supra* note 39, at 21.

44. Presser, *supra* note 4, at 1481 n.22 (citing 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 203 (1919) (quoting Luther Martin's argument at the Chase impeachment trial)). Albert Beveridge, no Jeffersonian, wrote that the "manners and methods [of the nationalist judges] in the enforcement of the Sedition Act aroused against them an ever increasing hostility. . . . Finally the very name and sight of National judges became obnoxious to most Americans. In short, the assaults upon the National Judiciary were made possible chiefly by the conduct of the National judges themselves." 3 BEVERIDGE, *supra*, at 29-30.

45. PRESSER, *supra* note 3, at 94.

46. *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

47. 14 ANNALS OF CONG. 245-46 (1852). PRESSER, *supra* note 3, at 232 n.9.

48. 14 ANNALS OF CONG. 216-17 (1852).

49. *Id.* at 135-36.

Triplett, he remarked, "it is a pity you have not hanged the rascal."⁵⁰ Can it be doubted that Chase had prejudged the case and was not an impartial judge? Presser answers that "our contemporary ideas about judicial objectivity cannot serve as useful standards for evaluating the jurisprudence of the late eighteenth century."⁵¹ Hamilton, who reflected "late eighteenth century" standards, declared, "[w]ho would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?"⁵² Blackstone stated that the "tyrannical partiality of judges" was a "crime of deep malignity."⁵³

Throughout the trial Chase exhibited his partiality. Albert Beveridge, not infected with Jeffersonianism, noted the "sarcastic contempt" with which Chase treated defense counsel and noted that Chase's frequent interruptions were "extremely well calculated to abash and disconcert counsel."⁵⁴ Marshall, an attendant at the trial, later testified that Chase plainly exhibited "disgust" with the way counsel was conducting the defense.⁵⁵ Presser himself notices Chase's "extraordinary condescension" to defense counsel "and his pointed humor at their expense,"⁵⁶ the more damaging because, as Chase frequently stressed, they were only "young gentlemen."⁵⁷ In his impeachment trial, Chase acknowledged that "vexatious interruptions of counsel" and "manifestations of 'indecent solicitude' for the conviction of a most notorious offender" are "no doubt improper

50. *Id.* at 217-18.

51. PRESSER, *supra* note 3, at 174. But Presser does not shrink, after Jefferson's alleged "approval of extra-legal means of apprehending Burr," to presume that Jefferson was "pronouncing his guilt before benefit of trial." Presser, *supra* note 4, at 1491; *see infra* note 95.

52. THE FEDERALIST NO. 65, at 429 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). THOMAS HOBBES, LEVIATHAN 80 (Everyman's Library 1943) (1651) ("[I]f a man be trusted to judge, between man and man, it is a precept of the law of nature, that he deal equally between them.").

53. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 (1769).

54. 3 BEVERIDGE, *supra* note 44, at 190.

55. 14 ANNALS OF CONG. 537 (1852).

56. PRESSER, *supra* note 3, at 134. Chief Justice Rehnquist observes that there is an "obligation upon the judge to refrain from ridiculing or making light of the lawyers." WILLIAM H. REHNQUIST, GRAND INQUESTS 84 (1992).

57. When "young gentlemen" comes from the mouth of a Justice three times in as many minutes, WHARTON, *supra* note 42, at 8, it is manifestly belittling, designed to suggest to the jury that defendant's counsel are still immature, in judgment as well as in years.

and unbecoming in a judge" but were not defined as a crime.⁵⁸ Even so, they deprived Callender of the impartial trial guaranteed by due process.

Such behavior was designed to prejudice the jury, who identify defense counsel with the defendant. At length, defense counsel threw up their briefs. For Presser, this was merely part of their campaign to discredit Chase and Adams.⁵⁹ But Henry Adams, scarcely influenced by "Jeffersonian propaganda," said in his *History of the United States* that Chase's "overbearing manner had twice driven from his court the most eminent counsel of the circuit."⁶⁰ Against this, Presser quotes Albert Beveridge's quotation of Luther Martin's statement at the Chase impeachment trial that Callender's lawyers sought "'to hold up the prosecution as oppressive' in order to 'excite public indignation against the court.'"⁶¹ A statement by a lawyer for a client condemning the conduct of opposing counsel gains nothing by being quoted by Albert Beveridge. Indeed, why should evaluations by disinterested scholars like Frankfurter and Morison be kissed off as tinctured by "Jeffersonian propaganda" whilst the testimony of Chase's attorney is regarded as gospel truth? Martin's statement needs to be juxtaposed with his later remarks. In 1810, he appeared before Chase on circuit in Baltimore, somewhat more inebriated than usual. When Chase said to him, "I am surprised that you can so prostitute your talents," Martin replied, "Sir, I never prostituted my talents except when I defended you and Colonel Burr," and turning to the jury, he added confidentially, "a couple of the greatest rascals in the world."⁶² *In vino veritas*.

Merrill Peterson concluded that the *Callender* trial was a "travesty of justice."⁶³ Nevertheless, Presser maintains that because of the "machinations of Callender's defense counsel,"

58. PRESSER, *supra* note 3, at 157.

59. *Id.* at 134.

60. 2 HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA* 147-48 (1962).

61. Presser, *supra* note 4, at 1481 n.22. Martin was Chase's chief counsel in the impeachment hearings. See *supra* text accompanying note 47.

62. PAUL S. CLARKSON & R. SAMUEL JETT, *LUTHER MARTIN OF MARYLAND* 280 (1970).

63. PETERSON, *supra* note 28, at 635. Claude Bowers wrote, "No one with an elementary sense of common decency can read in Wharton's 'State Trials' the outrageous miscarriages of justice with feelings other than those of loathing and disgust." BOWERS, *supra* note 36, at 269.

the "trial itself was *stacked against Chase*,"⁶⁴ a man, Presser notes, still commonly regarded as a "‘rabid partisan’, a courtroom bully who wrongfully used the bench as a ‘political stump.’"⁶⁵ This, Presser considers, is the view of "those who ought to know better,"⁶⁶ preferring the "more astute historians" who regard Chase as "conciliatory," and "disinterested."⁶⁷ Measured by the record, such "astuteness" is laughable.

C. *Adjudication and Religion*

That Chase was hag-ridden by his drive to enforce the Sedition Act is hardly deniable. To my statement that Chase's "‘religiously inspired’ convictions did not excuse his judicial partisanship. So was the Inquisition,"⁶⁸ Presser retorts that this is "dubious history, and maybe even dubious manners."⁶⁹ Since when is a statement of an undeniable fact—the Inquisition also was religiously inspired—a breach of scholarly manners? Certainly it is not "dubious history." The Inquisition punished heretics, those who departed from Catholic orthodoxy.⁷⁰ Presser's defense of Chase nicely fits into this pattern: "Chase's religion, and the moral basis for his jurisprudence which religion furnished him, convinced him . . . that [he] could apply a jurisprudence which *was* above faction . . . the one true constitutional faith."⁷¹ People were burned at the stake for departures from the "one true faith"—Galileo was forced to recant his view that the earth revolved around the sun for precisely such a departure. Presser explains Chase's passionate enforcement of the Sedition Act, but he fails to absolve him from prejudicial partiality. It is of no avail that Chase could "convince himself that *he* was not a partisan."⁷² How could he be if there was but one true faith and if those who differed were guilty of "partisan, popular excesses"?⁷³ Chase confused his own prejudices with Holy Writ, and this at a time when

64. PRESSER, *supra* note 3, at 133 (emphasis added).

65. *Id.* at 8. Presser acknowledges that Chase had some "tragic," "grievous" flaws. *Id.* at 234 n.45.

66. *Id.* at 8.

67. *Id.* at 19.

68. Berger, *supra* note 2, at 885.

69. Presser, *supra* note 4, at 1483.

70. 12 *ENCYCLOPEDIA BRITANNICA* 377 (14th ed. 1929).

71. Presser, *supra* note 4, at 1483.

72. *Id.* at 1484.

73. *Id.*

American opinion was moving towards the conception that "it was the job of the law to liberate the individual from the moral dictates of the community,"⁷⁴ let alone from those of an overbearing judge.

II. THE TRIAL OF JOHN FRIES

A. *Fries' Rebellion in Eastern Pennsylvania*

John Fries, himself a Federalist,⁷⁵ was prosecuted for treason and sentenced to death for leading an armed "rebellion" in Pennsylvania. Presser dismisses my criticism because it relies on "a general secondary source, which utterly distorts the facts of the Eastern Pennsylvania rebellion . . . and which undoubtedly relies on spurious Jeffersonian accounts."⁷⁶ This impressionable "secondary source," Samuel Eliot Morison, wrote that when federal assessors arrived in Bucks County to survey real estate for a direct tax, "they were attacked by irate housewives with broomsticks and boiling water, and . . . Fries put himself at the head of the rabble which drummed the official out of the county."⁷⁷

Initially, Presser was very much of the same mind: "The insurgency involved much display of armed might by the insurgents, much marching around and saber-rattling, and an armed attack on a federal marshal that resulted in the forced liberation of some federal prisoners whom the marshal had in his custody."⁷⁸ He notes that "[i]t seems to be the currently accepted wisdom of American historians that Federalist conduct in suppressing [the rebellion] did go too far The Fries rebellion is habitually dismissed by modern American histori-

74. PRESSER, *supra* note 3, at 175-76.

75. PETERSON, *supra* note 28, at 622.

76. Presser, *supra* note 4, at 1481. The evidence, states Presser, "appears to have all but disappeared." PRESSER, *supra* note 3, at 31. Therefore he relies on long-hand annotations on newspaper clippings written in 1860 by Jacob Rice, from which Presser deduces that "Rice appears to have some *firsthand* knowledge of the Fries Rebellion." *Id.* at 32 (emphasis added). Since the rebellion took place in 1799, Rice must have been a nine-year-old observer, scarcely the sort of "firsthand" knowledge to explode the "accepted wisdom of American historians." They too had access to the newspaper clippings. See also *id.* at 226 n.20.

77. MORISON, *supra* note 38, at 355.

78. Presser, *supra* note 1, at 131. Jefferson wrote to Abigail Adams, "I like a little rebellion now and then The spirit of resistance to government is so valuable on certain occasions that I wish it to be always kept alive." NOCK, *supra* note 23, at 116.

ans as a minor incident."⁷⁹ Now Presser takes a grimmer view: "The rebellion was a serious uprising of thousands of armed insurgents bent on taking the law into their own hands."⁸⁰ "Although there was no real bloodshed," he observes, "there was . . . much marching around by armed troops in uniform and at least one overt act of rebellion—the liberation of prisoners from the custody of a federal marshal by means of armed militia."⁸¹ Did this amount to "treason" or "levying war" against the United States?

Apparently Presser relies on the English rule, adopted by the Court in the Whiskey Rebellion case, of "*constructive* levying of war" by "armed opposition to execution of a United States statute."⁸² But Article III, Section 3 of the Constitution declares that "[t]reason against the United States shall consist *only* in levying war against them."⁸³ "Only" was not inadvertent. Aware, in the words of James Wilson, that "numerous and dangerous excrescences" had disfigured the English law of treason, the Framers delimited treason and thereby, as Wilson assured the Pennsylvania Ratification Convention, put it beyond the power of Congress to "extend the crime and punishment of treason."⁸⁴ "Only" levying war was treasonable; "constructive" levying of war constituted the very "extension" of the crime that the Framers plainly meant to prevent.⁸⁵

B. *The Aaron Burr Conspiracy*

Presser's treatment of Fries is in marked contrast to his indulgent portrayal of the Aaron Burr conspiracy. Burr set afoot an extensive, planned conspiracy, into which he sought to draw England and Spain and to "make Louisiana an independent republic, which Mississippi Territory would surely decide

79. PRESSER, *supra* note 3, at 31.

80. Presser, *supra* note 4, at 1481. *But see* REHNQUIST, *supra* note 56, at 48 ("Fries's Rebellion does not seem to have been a great threat to the nation No shots were fired, there were no injuries, and the crowd soon dispersed.")

81. PRESSER, *supra* note 3, at 104.

82. *Id.* at 102 (emphasis added).

83. U.S. CONST. art. III, § 3, cl. 1 (emphasis added).

84. 2 THE WORKS OF JAMES WILSON 663 (Robert G. McCloskey ed., 1967). *See also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 469 (Jonathan Elliot ed., 1836).

85. Blackstone adverts to the "great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons." 4 BLACKSTONE, *supra* note 53, at 75.

to join."⁸⁶ Burr and Blennerhasset, "commanding an advance guard [of] . . . flatboats, had reached the mouth of the Cumberland River" when co-conspirator General Wilkinson betrayed Burr's conspiracy "to dismember the Union."⁸⁷ Burr was acquitted by Marshall on the ground that "the mere gathering of forces with intent to promote secession was not treason if the expedition collapsed."⁸⁸ Certainly, the threat by Fries' "rabble" was less ominous than the planned gathering of Burr's forces. Morison concluded that Burr was engaged in "the most formidable secession conspiracy prior to 1860."⁸⁹ Against Morison, a renowned historian, Presser counters with the view of a novelist, Gore Vidal, that Burr was "railroaded" by the Jeffersonians.⁹⁰

The Oxford English Dictionary defines "railroaded" as "to rush (a person or thing) *to* or *into* a place, *through* a process."⁹¹ Peterson remarks on Jefferson's "first hesitant steps to cope with the conspiracy, a conspiracy so strangely public by then that men wondered at the timidity of the government."⁹² Henry Adams "bitterly . . . arraign[ed] Jefferson for inexcusable lassitude and indifference in failing to strike months before he did."⁹³ When Jefferson did act, "[i]t was wrung from him by a resolution in the House, pressed by his most virulent enemy, John Randolph."⁹⁴ All of which is incompatible with "railroading."⁹⁵

86. MORISON, *supra* note 38, at 369.

87. *Id.* at 370. For detailed accounts of the Burr conspiracy, see BOWERS, *supra* note 36, at 366-426; PETERSON, *supra* note 28, at 841-54.

88. MORISON, *supra* note 38, at 370. But Marshall, who presided, also stated that "the evidence was sufficient to hold Burr to answer on a charge of organizing an expedition against Spain"—a misdemeanor. REHNQUIST, *supra* note 56, at 118. So here *was* a criminal conspiracy. Compare *infra* text accompanying note 96.

89. MORISON, *supra* note 38, at 370.

90. Presser, *supra* note 4, at 1491 n.84.

91. 8 OXFORD ENGLISH DICTIONARY 114 (1969).

92. PETERSON, *supra* note 28, at 847.

93. BOWERS, *supra* note 36, at 398.

94. *Id.*

95. Presser disposes of the Burr conspiracy—"if there was one," see *infra* text accompanying note 96, by reference to Jefferson's alleged "approval of extra-legal means of apprehending Burr (and, presumably pronouncing his guilt before benefit of trial)." Presser, *supra* note 4, at 1491. Apprehension of one who twice had fled the jurisdiction, see PETERSON, *supra* note 28, at 853, does not amount to a pronouncement of guilt. Presser cites to Berger, *supra* note 2, at 896-98, which merely quotes his own statement that Jefferson excused his "failure to observe the niceties of federal law in prosecuting his arch-enemy Aaron Burr." My article then proceeds to refute Presser's construction of Jefferson's action. One who reads Peterson's

"We now know," Presser asserts, "that Burr's conspiracy—if there was one—was not the danger Jefferson claimed it was."⁹⁶ But it bore a quite different aspect to contemporaries. After investigating the participation of Senator John Smith of Ohio, a Senate Committee, chaired by Senator John Quincy Adams, "warmly commended the administration for suppressing the conspiracy that would, 'in a very short lapse of time, have terminated not only in war, but in a war of the most horrible description.'"⁹⁷ Justly did the Committee obliquely attribute the acquittal to the "curtain of artificial rules" invoked by Marshall.⁹⁸ The high-minded Adams was not one to lend himself to a white-wash of Jefferson. Whatever the merits, Marshall's strict construction of applicable standards⁹⁹ is at a long remove from Chase's easy invocation of treason in the *Fries* case. "Sabre-rattling" was not likely to result in "a war of the most horrible description."

C. *The Trial of John Fries*

To recur to the *Fries* trial, Presser has yet other objections to my critique of Chase's conduct. In the first trial before Judge Richard Peters, Fries' renowned lawyers, Alexander Dallas and William Lewis, were permitted to argue at length that treason under American law differed from that of England.¹⁰⁰ When Peters declared a mistrial because one juror had prejudged the case,¹⁰¹ it was retried before Chase, who barred such argument.¹⁰² Presser considers that this was "clearly good law in

extensive account of the conspiracy will appreciate Jefferson's forbearance in dealing with a deep-dyed villain. PETERSON, *supra* note 28, at 841-54.

96. Presser, *supra* note 4, at 1491 (emphasis added).

97. PETERSON, *supra* note 28, at 873.

98. *Id.*

99. Corwin, who was "antipathetic to Jefferson, and generally sympathetic toward Marshall, has concluded that 'Marshall's conduct of Burr's trial is the one serious blemish on his judicial record.' " BOWERS, *supra* note 36, at 423 (quoting 3 EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 2 (1919)). Marshall, it is to be borne in mind, was a bitter enemy of Jefferson. 2 PAGE SMITH, JOHN ADAMS 1064 (1962).

100. Presser, *supra* note 1, at 131.

101. *Id.*

102. Presser, *supra* note 4, at 1482. Chase had drafted an opinion on the applicable law *before* trial, which was concededly unprecedented, and which he delivered to defense counsel, who then withdrew from the case "since the court had prejudged what they wished to argue." PRESSER, *supra* note 3, at 110. Presser considers that their "real motive" was to present Chase as "a harsh and cruel judge" in order to create "sympathy for Fries." *Id.* at 112. Julius Goebel was closer to the

England, and probably in America as well."¹⁰³ "Clearly" it was not. During the debates on passage of Fox's Libel Bill in 1791, Lord Loughborough, who had served as Chief Justice of Common Pleas, said that the "bill was a declaratory bill . . . to declare and explain what was understood to be . . . the law of the land."¹⁰⁴ Presser maintains, however, that the Fox Act pertains only to seditious libel;¹⁰⁵ but Charles James Fox stated in course of the enactment debate that "it was the practice of the jury to judge of law and fact" with respect to "every other criminal indictment."¹⁰⁶ Nevertheless, Presser insists that the Fox Act required the "deferential jury [to] make its determination under the direction of the court."¹⁰⁷ How is this to be reconciled with Chase's understanding that "in criminal cases nothing could prevent the jury from applying whatever law it saw fit"?¹⁰⁸ Lord Loughborough stated that "as Chief Justice he had ever deemed it his duty, in cases of libel, to state the law as it bore on the facts, and to refer the combined considerations to the jury," whose "decision was final."¹⁰⁹ So too, Lord Camden, likewise a former Chief Justice of Common Pleas, said that "[t]he judge should interpose nothing but his advice; if he attempted to control them, there was an end to trial by jury."¹¹⁰ Earlier, Blackstone observed, "If the judge's opinion must rule the verdict, the trial by jury would be useless."¹¹¹ Manifestly, Presser's reading of the Fox Libel Act as "preserving the essential premise that the jury was obligated to

mark in viewing the withdrawal "to maintain the honor of the bar." *Id.* Eminent counsel would not gamble with the life of a man accused of treason in order to arouse popular sympathy. *See also supra* note 60 and accompanying text.

103. Presser, *supra* note 4, at 1482.

104. 29 PARL. HIST. ENG. 731 (1817). Lord Camden said the purpose of the bill was not to "alter the law, but merely to remove doubts that ought never to have been entertained." *Id.* at 732. For a more detailed discussion, see Raoul Berger, *The Jury's Role in Capital Cases Is Immune from Judicial Interference*, 1990 B.Y.U. L. REV. 639.

105. Presser, *supra* note 4, at 1487.

106. 29 PARL. HIST. ENG. 564, 597 (1817).

107. PRESSER, *supra* note 3, at 93.

108. Presser, *supra* note 4, at 1488.

109. 29 PARL. HIST. ENG. 1296-97 (1817).

110. *Id.* at 731. In 1771, John Adams asked, "[I]s it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience?" 2 THE WORKS OF JOHN ADAMS 253-55 (Charles F. Adams comp., 1855).

111. PRESSER, *supra* note 3, at 209 n.15 (quoting 4 BLACKSTONE, *supra* note 53, at 343, 354-55).

follow the law as laid down by the judge"¹¹² is at war with the drafters' explanation.

Some references to similar early American practice are cited in my earlier article.¹¹³ In the colonial scheme, Shannon Stimson recently wrote that "juries held the central place in colonial courts"; colonials considered that "juries rather than judges spoke the last word on law enforcement."¹¹⁴ William Nelson observed that the jury's power "to 'find law' was almost unlimited."¹¹⁵ Presser himself refers to "the truism that the American jury was to be the judge of both fact and law."¹¹⁶ Indeed, this was the view of Chase; in his pre-trial opinion, he stated, "It is the duty of the court in this, and in all *criminal* cases, to state to the jury, their opinion of the law arising on all the facts; but the jury are to decide . . . both the law and the facts"¹¹⁷ So pronounced was this attachment to jury finality as to both law and fact that, as Presser observes, Federalist attempts "to curtail the discretion of the criminal jury" were "a major cause of the fall from political grace of the Federalists."¹¹⁸ Albeit, *Fries* posed an issue of "constitutional law"—at a time when the very conception of "constitutional law" was abhorning—it was "law" nonetheless, and defense counsel could logically claim under accepted tenets that the jury had a right to pass on it. Indeed, Presser notes that in *Van Horne's Lessee v. Dorrance*,¹¹⁹ Justice "Paterson was apparently prepared to give the jury this power even where great constitutionally protected rights were at stake and where it was the duty of the court to 'adhere to the Constitution and declare [a statute] null and void.'"¹²⁰

The foregoing facts run counter to Presser's contention that jury ascendancy violated the rule of law—the requisites of

112. PRESSER, *supra* note 3, at 53.

113. See Berger, *supra* note 104, at 641-42.

114. SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 48 (1990) (quoting William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978)). Americans believed that "the expansive participation by the jury in legal decisions was an essential safeguard to the liberty of the people. This required that the jury be given the latitude to pass on questions both of 'law' and 'fact.'" PRESSER, *supra* note 3, at 17.

115. STIMSON, *supra* note 114, at 49.

116. PRESSER, *supra* note 3, at 111.

117. REHNQUIST, *supra* note 56, at 67.

118. PRESSER, *supra* note 3, at 67.

119. 2 U.S. (2 Dall.) 304 (1795).

120. PRESSER, *supra* note 3, at 65.

certainty. Doubtless certainty is a desideratum; but we may not impute to Camden, Loughborough, and Kent ignorance of the varying nature of jury verdicts. Rather, preservation of jury control as a bulwark against oppression loomed larger than absolute fealty to certainty. Then too, the rule of law was satisfied by the settled "law"—that expressed by Lords Camden, Loughborough, and by Charles James Fox—which gave juries the final word. As Presser repeatedly reminds us, we may not substitute present views for those that prevailed at the time of the *Fries* trial.¹²¹

Presser urges that "Fries's [wily] counsel, seeing political capital to be made and believing that they could maneuver for a pardon of Fries, refused to go on with the trial."¹²² "Astounding," states Presser, "Berger appears to have accepted uncritically the Jeffersonian fabrication that Chase drove Fries's counsel from the case."¹²³ In his *History of the United States*, Henry Adams, who cannot be charged with "uncritical" acceptance of "Jeffersonian fabrications," wrote that Chase's "overbearing manner had twice driven from his court the most eminent counsel of the circuit."¹²⁴

Presser dwells on Chase's "extraordinary gesture" of offering "to act both as counsel for the defense and as judge[]," though he notes that "Chase was doing no more than 'following common law tradition.'"¹²⁵ But he notes that "Chase did not abandon his protection of the prosecution's interests"—in the presence of the prosecutor.¹²⁶ When the prosecutor "declined to sum up the evidence against Fries" because "Fries had no

121. See *supra* note 51 and accompanying text.

122. Presser, *supra* note 4, at 1482. "Wily [and eminent] counsel" would not gamble with the life of a client in the hope that the Federalist President would pardon him.

123. *Id.*

124. 2 ADAMS, *supra* note 60, at 147-48. See also *supra* text accompanying note 60. Rehnquist, however, considers, "There is good reason to think . . . that Fries's attorneys withdrew at least in part to increase the chances of a presidential pardon for him if he were convicted." REHNQUIST, *supra* note 56, at 89. Julius Goebel came to a contrary conclusion. See *supra* note 102. Rehnquist notes that William Lewis, counsel for Fries, "was a fierce guardian of the independence of the bar, and of the fullest right of defense on behalf of an accused criminal, so it is understandable that he was deeply offended by Chase's manner of proceeding at the Fries trial." REHNQUIST, *supra* note 56, at 62. Lewis said, "I will never permit my hand to be tainted with a prejudged opinion in any case, much less in a capital one." *Id.* at 63.

125. PRESSER, *supra* note 3, at 112-13.

126. *Id.* at 113.

counsel to give a countersummary, Chase announced that fairness to the government required a summing up," and unless the prosecutor did so, "then he, Chase, would."¹²⁷ This is but one of many illustrations of Chase's allying himself with the prosecution, indeed of pressing beyond the prosecutor's express desire.

Chase sentenced Fries to death, and President Adams pardoned him. According to Presser, the pardon was procured by Fries's counsel "from the popularity-seeking Adams."¹²⁸ My interpretation, he opines, "seems to stretch the facts."¹²⁹ The facts are that Thomas Adams, son of the President, told William Lewis that "his father wished to know the points and authorities which Mr. Dallas and he [had] intended to rely on, in favour of Fries, if they had defended him on the trial."¹³⁰ John Adams, himself a respected lawyer, had written in 1771 that the jury "determine[d] both the fact and the law . . . [I]s it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinions, judgment and conscience."¹³¹ Dallas's attempt to argue the point of law¹³² inferably struck a sympathetic chord in Adams. The dour President was hardly a "popularity seeker." In truth, he despised "a mean itch for popularity."¹³³ That he acted on the promptings of his own conscience is attested by the fact that almost a decade later he recalled the Fries pardon "with infinite satisfaction . . . which will console me in my last hour."¹³⁴ Such testimony transcends speculation that Adams was motivated by a drive to win reelection.

III. THE CHASE IMPEACHMENT PROCEEDINGS

Presser maintains that Chase was acquitted because "the impeachment charges had no real substance," and he chides me for neglecting to address his argument that "Chase's *rulings* violated no law."¹³⁵ Compared to Chase's gross partiality, the

127. *Id.*

128. Presser, *supra* note 4, at 1482.

129. *Id.* at 1482-83.

130. WHARTON, *supra* note 42, at 645.

131. 2 ADAMS, *supra* note 60, at 253-55.

132. See *supra* text accompanying notes 100-102.

133. PETERSON, *supra* note 28, at 703.

134. WHARTON, *supra* note 42, at 646. "Adams, to his great credit . . . pardoned Fries." REHNQUIST, *supra* note 56, at 49.

135. Presser, *supra* note 4, at 1489 (emphasis added). Charles Warren remarked

"rulings" were trivial, so I focused on the charge made in article 4, paragraph 5 of the Articles of Impeachment that Chase's conduct was marked by "an indecent solicitude . . . for the conviction of the accused . . . highly disgraceful to the character of a judge, as it was subversive of justice."¹³⁶ Blackstone, it will be recalled, stated that the "tyrannical partiality of judges" was a "crime of deep malignity."¹³⁷ Chase's blatant partiality not only deprived Callender of the fair trial promised by the Due Process Clause, but it also violated a statute. By the Judiciary Act of 1789, a Justice was sworn to "administer justice without respect to persons" and "impartially discharge and perform all the duties incumbent upon him."¹³⁸ Thus, Chase's incontrovertible partiality violated the statute, and his denial of due process subverted the Constitution. Blackstone wrote that "the first and principal [high misdemeanor] is the *mal-administration* of such high officers, as are in the public trust and employment. This is usually punished by the method of parliamentary impeachment"¹³⁹ English judges, Justice Story observed, had been impeached "for acting grossly contrary to the duties of their office."¹⁴⁰ Elsewhere, I have collected examples of such impeachable offenses.¹⁴¹

Presser has neglected to comment on these facts; his conclusion that Berger "is still wrong" in arguing that "Chase should have been convicted,"¹⁴² rests on the alleged propriety of Chase's "rulings" during the trial. Presser's view is espoused by Chief Justice Rehnquist in his recent *Grand Inquests*.¹⁴³ He considers that even if Chase's rulings during the *Callender*

on Chase's "arbitrary and unusual rulings" in the Fries case. 1 WARREN, *supra* note 22, at 273.

136. 14 ANNALS OF CONG. 86 (1852). Marshall, who testified in the impeachment trial, "admitted that the refusal to hear Callender's lawyers on the constitutionality of the Sedition Act was unusual. He admitted he had never known another instance where, as in the case of John Taylor, the question to be asked the witness had to be reduced to writing." BOWERS, *supra* note 36, at 285. Whether or not such rulings violated the law, they undoubtedly exhibited bias. For a compact account of the impeachment trial see *id.* at 277-91.

137. 4 BLACKSTONE, *supra* note 53; see also *supra* text accompanying note 53.

138. Judiciary Act, ch. 20, § 8, 1 Stat. 76 (1789).

139. 4 BLACKSTONE, *supra* note 53, at 121.

140. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 800 (5th ed. 1905).

141. See RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 67-68 (1973).

142. Presser, *supra* note 4, at 1489.

143. REHNQUIST, *supra* note 56.

trial were erroneous, they were not, roughly speaking, unlawful.¹⁴⁴ But when they all run one way, against the defendant, when they are "arbitrary,"¹⁴⁵ "highly unusual,"¹⁴⁶ and "extraordinary,"¹⁴⁷ they are *evidence of bias*. By the Judiciary Act of 1789, a Justice was to be sworn to "*impartially* discharge all the duties incumbent upon [him]."¹⁴⁸ Violation of that oath subverted the rule of law. Rehnquist notes Chase's "thoroughly partisan attitude during parts of the proceedings against John Callender,"¹⁴⁹ his breach of the "obligation . . . to refrain from ridiculing . . . the lawyers,"¹⁵⁰ ridicule which Chase directed solely against counsel for defendant and which inevitably prejudiced the jury. Justice Berkeley was impeached in England because, *inter alia* he "did much discourage complainant's counsel."¹⁵¹

What Rehnquist justly regards as "most damaging" to Chase were "incidents that occurred before he ever reached Richmond to try the case."¹⁵² These incidents—detailed in the testimonies of Luther Martin and John Mason before the Senate—are recounted above,¹⁵³ and again by Rehnquist.¹⁵⁴ They reveal, he acknowledges, "rather clear bias of Chase against Callender."¹⁵⁵ But he remarks that they "were not referred to in the Articles of Impeachment."¹⁵⁶ Let us look at the Articles.

Article II alleged that in trying Callender, Chase was "prompted by a similar spirit of persecution and injustice."¹⁵⁷ "*Prompted* by a similar spirit of persecution" seems quite clearly to refer to a spirit that antedated the trial. Presumably that was the Senate's understanding, for it admitted the oral testimony of preexisting bias. Are we to assume that Chase's galaxy of counsel and the Senate unthinkingly admitted damaging

144. *Id.* at 78-86.

145. 1 WARREN, *supra* note 22, at 273. *See also supra* note 135.

146. REHNQUIST, *supra* note 56, at 83.

147. *Id.* at 82.

148. Judiciary Act, ch. 20, § 8, 1 Stat. 76 (1789) (emphasis added). *See also supra* text accompanying note 138.

149. REHNQUIST, *supra* note 56, at 108.

150. *Id.* at 84.

151. 3 STATE TRIALS 1283, 1287-88 (T.B. Howell ed., 1816).

152. REHNQUIST, *supra* note 56, at 86.

153. *Supra* text accompanying notes 47-50.

154. REHNQUIST, *supra* note 56, at 86.

155. *Id.* at 86-87.

156. *Id.* at 86.

157. 14 ANNALS OF CONG. 86 (1852).

evidence of which the pleadings gave no notice? Moreover, that testimony serves to explain *why*, as article IV, paragraph 5 charges, Chase's conduct of the trial was marked by "an indecent solicitude . . . for the conviction of the accused."¹⁵⁸ It furnishes the *motivation* for Chase's "extraordinary" rulings, his "partisan attitude" throughout the trial. Motivation, if memory serves me, need not be pleaded. In any event, we are not re-trying Chase, but asking, in light of uncontroverted facts, what should be the verdict of history? In this, we follow in the footsteps of the Court; for, as Chief Justice Rehnquist reminds us, in 1964 the Court opined that the Sedition Act of 1798 "did violate the First Amendment."¹⁵⁹

Lastly, Rehnquist observes that no law required a "federal judge to disqualify himself on account of bias."¹⁶⁰ That, however, did not absolve Chase from conducting the *Callender* trial in impartial fashion.¹⁶¹ The Supreme Court declared that "a fair trial in a fair tribunal is a basic requirement of due process."¹⁶² Judicial impartiality, Thomas Hobbes observed, is "a law of nature."¹⁶³ Hamilton put it simply: "[W]ho would be willing to stake his life and estate upon the verdict of a jury acting under the auspices of judges who had *predetermined* his guilt."¹⁶⁴ English judges, Justice Story declared, had been impeached "for acting grossly contrary to the duties of their office."¹⁶⁵ For me, as for Blackstone, "tyrannical partiality of judges" is a "crime of deep malignity."¹⁶⁶

The impeachment failed narrowly, Presser notes, not for lack of evidence, but, in great part, because the prosecution was led by the "ineffective and disorganized" John Randolph.¹⁶⁷ "A worse champion than Randolph for a difficult

158. *Id.*

159. REHNQUIST, *supra* note 56, at 89 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

160. REHNQUIST, *supra* note 56, at 87.

161. Rehnquist observes that Chase "should have refrained from making the statements attributed to him." *Id.* at 88.

162. *In re Murchison*, 349 U.S. 133, 136 (1955). *See also supra* text accompanying notes 21-22.

163. HOBBS, *supra* note 52, at 80.

164. THE FEDERALIST NO. 65, at 429 (Alexander Hamilton) (emphasis added) (Benjamin F. Wright ed., 1961). *See also supra* text accompanying note 52.

165. 1 STORY, *supra* note 140. *See also supra* text accompanying note 140.

166. 4 BLACKSTONE, *supra* note 53, at 140. *See also supra* text accompanying note 53.

167. PRESSER, *supra* note 3, at 156.

cause," wrote Henry Adams, "could not be imagined."¹⁶⁸ Moreover, he had alienated his fellow Republicans by his savage attack on the Administration's compromise of the Yazoo Indian Territory Land Fraud, "with a ferocity all but insane in its violence."¹⁶⁹ As a result, enough disaffected Republicans voted with the Federalist bloc to block the conviction by a narrow margin. The acquittal, my own detailed study of the impeachment proceedings convinces me, represents a failure of justice. These facts call for detailed rebuttal; the facts are not to be dismissed as the views of "Jefferson and his partisans," nor as a mere ebullition of Republican politics. It was the Federalists who played politics: "The Federalist senators, sitting as jurors, *had caucused on their vote against conviction before the trial began.*"¹⁷⁰

Where Chase maintained that his acts, though "improper" were not defined as a crime, Presser urges that they "violated no law."¹⁷¹ Since he follows in Chase's footsteps, inferably Presser too insists that, lacking an indictable crime, there is no basis for impeachment. The historical sources to the contrary are marshalled elsewhere.¹⁷² Here it must suffice to note that Article I, Section 3, Clause 7 of the Constitution provides that "[j]udgment in Cases of Impeachment shall not extend further than to *removal* from Office . . . but the Party convicted shall *nevertheless* be liable and subject to *Indictment*, Trial, Judgment and Punishment."¹⁷³ "Removal from office" is customarily not regarded as "punishment" for a crime; punishment is generally limited to fines and imprisonment. Moreover, "punishment" is made the subject of a separate, undeniable criminal proceeding. If, therefore, removal be regarded as criminal, it would run afoul of the Fifth Amendment's ban of double jeopardy. Then too, since there is no federal common law of crimes,¹⁷⁴ the impeachment provision, as Justice Story pointed out, would be a "nullity" until Congress specified what con-

168. 2 ADAMS, *supra* note 60, at 151.

169. 3 BEVERIDGE, *supra* note 44, at 174. Randolph's acts "in connection with the settlement of the Yazoo [Indian Land] Fraud claims had antagonized a considerable number of the members of his own party." REHNQUIST, *supra* note 56, at 110. For a discussion regarding Randolph's actions in connection with the Yazoo fraud, see 3 BEVERIDGE, *supra* note 44, at 575-79.

170. BOWERS, *supra* note 36, at 280.

171. Presser, *supra* note 4, at 1489; see also *supra* text accompanying note 135.

172. See Berger, *supra* note 141, at 53-102.

173. U.S. CONST. art. I, § 3, cl. 7 (emphasis added).

174. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

stitutes impeachable conduct.¹⁷⁵ No Congress has essayed to define or codify impeachable acts. In employing the English terms "high crimes and misdemeanors," the Framers adopted the meaning given to them by English practice.¹⁷⁶

IV. THE MIDNIGHT JUDGES

Presser asserts that Berger is "himself consumed by partisanship when he attempts to defend the Jeffersonian sacking of the 'midnight judges.'"¹⁷⁷ After being overwhelmingly swept from office by the Jeffersonian victors in 1800, the lame-duck Federalist-dominated Congress created twenty-odd judgeships, and "[a]t the last hour," Adams "appointed sixteen Federalists to the new circuit [court] judgeships."¹⁷⁸ Let a respected historian, Merrill Peterson, hopefully not "consumed by partisanship," describe the events:

On March 3 the Senate was in session late into the night confirming a last batch of nominations, and Adams spent his final hours in the executive chair hurriedly signing nocturnal commissions. The indecency of the proceeding capped two crowded months of Federalist office-packing. What was this for unless to stack the cards against the new regime?¹⁷⁹

Presser blandly replies, "there is nothing untoward about appointing judges whenever the President has a vacancy to fill."¹⁸⁰ But here, numerous "vacancies" were created at the last minute to saddle Federalist judges on the incoming administration. Presser recognizes that "most American historians" regard the Judiciary Act of 1801

as a blatant attempt to entrench the Federalists on the bench before Adams's term ended, thus to secure the one branch of the national government not yet lost to the Federalists. This

175. 1 STORY, *supra* note 140, § 798.

176. Since "high crimes and misdemeanors" are not defined by a federal statute, said Story, resort "must be had either to parliamentary practice and the common law . . . or the whole subject must be left to the arbitrary discretion of the Senate." 1 STORY, *supra* note 140, §§ 796, 798. See also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820).

177. Presser, *supra* note 4, at 1484.

178. Leonard W. Levy, *Judiciary Act of 1801*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1077 (1986).

179. PETERSON, *supra* note 28, at 668. The proceedings were "a blatantly partisan measure designed, in part, to make the judiciary a fortress against the rising Republicanism of the nation." *Id.* at 631.

180. Presser, *supra* note 4, at 1484.

motive on the part of the Federalists seems clear, but often lost sight of is the fact that the Federalists were equally motivated by the need to create several badly needed reforms in the judiciary which would have made the delivery of federal justice more comprehensive and more convenient.¹⁸¹

"Needed reforms" was merely a facade for the "stacked deck."¹⁸²

Understandably, Jefferson moved to repeal the Judiciary Act which created the judgeships. Presser labels the repeal as blatantly "unconstitutional."¹⁸³ The power of one legislature to repeal an Act of its predecessors is rooted in the common law.¹⁸⁴ Furthermore, Article III of the Constitution gives Congress power to establish inferior courts;¹⁸⁵ the power to establish carries with it the power to abolish. Against this, Presser urges that judges may be removed from office only by impeachment.¹⁸⁶ But the right to tenure cannot limit Congress's power to disestablish a court. Tenure was not designed to compel continuance of a useless court until the death of the incumbent. A judge may have a right to continuance of salary but not to the performance of functions no longer needed. This is not a case—Presser's horrible example—of a congressional attempt to circumvent the impeachment process by abolishing the office of a particular judge,¹⁸⁷ but an honest effort to undo a flagrant

181. PRESSER, *supra* note 3, at 5. "Gouverneur Morris explained that the act was necessary because the Federalists were 'about to experience a heavy gale of adverse wind; can they be blamed for casting many anchors to hold their ship through the storm.'" REHNQUIST, *supra* note 56, at 50 (quoting RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 15 (1971)).

182. The Republicans "regarded it, with considerable justification, as a piece of political chicanery." REHNQUIST, *supra* note 56, at 50. "The Sedition Act of 1798 was rightly thought by the Jeffersonians to have been used on occasion as a means of silencing hostile criticism of the administration by the opposition press." *Id.* at 275-76.

Merrill Peterson considers that "the figures showed clearly that the dockets were not so crowded as to warrant an expensive addition to the system." PETERSON, *supra* note 28, at 696. The Federalist Wolcott let the cat out of the bag: "there is no way to combat the state opposition but by an efficient and extended organization of judges, magistrates, and other civil officers." *Id.* at 631.

183. Presser, *supra* note 1, at 157. In 1803, the "Supreme Court—consisting entirely of Federalist appointees—upheld the constitutionality of the repeal[er]." REHNQUIST, *supra* note 56, at 52.

184. See Presser, *supra* note 4, at 1485.

185. U.S. CONST. art. III, § 1.

186. Presser, *supra* note 4, at 1485-86.

187. *Id.*

attempt on a wholesale scale by a defeated party to perpetuate its control of the judiciary.

Presser recognizes that "Chase could convince no other Supreme Court Justice to challenge the Jeffersonians on their view of the repealability of judgeships."¹⁸⁸ Marshall, he states, failed to "acknowledge the blatant unconstitutionality of the Jeffersonian-controlled federal legislature's repeal of the 1801 Judiciary Act [enacted by a Federalist 'controlled Congress']," and "to protest against the Jeffersonian's sacking of the Federalist 'midnight judges.'"¹⁸⁹ To Presser, this appears to be a "shirking of the responsibility for fidelity to the Constitution on the part of the judiciary."¹⁹⁰ Those Justices were not, however, "consumed by [Jeffersonian] partisanship"; and it would appear that it is Presser that is the partisan, seeing "blatant unconstitutionality" which was hidden from the Justices.

V. ORIGINAL INTENTION

For his views on original intention, Presser relies on Jefferson Powell's "brilliant article"¹⁹¹ without examining my thorough-going refutation of Powell.¹⁹² Powell published his article when he was but three years out of law school. A practiced historian knows, as Harold Laski wrote to Justice Holmes, that there is a hierarchy of authority.¹⁹³ The studies of a veteran of sixty years of publication, whom Presser himself describes as "a renowned scholar,"¹⁹⁴ are not lightly to be dismissed on the word of a fledgling. Original intention is at the heart of the current debate regarding the role of the Supreme Court, so its

188. *Id.* at 1486. Richard Ellis stated that "Chase vigorously campaigned behind the scenes for the Supreme Court to declare the repeal law unconstitutional, but the other Justices did not go along with him." Richard Ellis, *Samuel Chase*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 293 (1986). See also Berger, *supra* note 2, at 887 n.107.

189. PRESSER, *supra* note 3, at 163.

190. *Id.*

191. *Id.* at 6 (citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985)).

192. Raoul Berger, "Original Intent" in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986); Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1055-77 (1989).

193. 2 HOLMES-LASKI LETTERS 1463 (Mark D. Howe ed., 1953). Albert Jay Nock alludes to the "great peril . . . [of] the inability to appraise and grade one's authorities, the tendency to accept whatever appears on the printed page as authoritative." NOCK, *supra* note 23, at 287.

194. Presser, *supra* note 4, at 1475.

history deserved Presser's independent canvass. Instead, he finds that Powell is "correct,"¹⁹⁵ and dismisses my refutation because the "legal academy" awards the palm to Powell,¹⁹⁶ of which more later.

Although Powell recognizes that the English common lawyers' references to "intention" often "sounded remarkably like contemporary intentionalists,"¹⁹⁷ he maintains that they looked for the intent exclusively in the words themselves—a confessedly "curious usage"¹⁹⁸—this despite their constant differentiation between words and intention. Powell is confuted by the common law. For the benefit of the readers who will not scurry to the library to determine for themselves wherein lies the truth, let me set forth a few highlights.

(1) The fifteenth century sage, Chief Justice Frowyck, recounted that the judges demanded of the "makers" of the Statute of Westminster (1285) what certain words meant, and they "answered." "And so," he continued, "in our dayes have those that *were the penners & devisors of statutes bene the grettest lighte for exposition of statutes.*"¹⁹⁹

(2) Lord Chancellor Hatton wrote circa 1587 that "whensoever there is *departure from the words to the intent*, that must be well proved that there is such a meaning."²⁰⁰

(3) Matthew Bacon epitomized such precedents in his *New Abridgment*: "Everything which is within the Intention of the Makers of a statute is, although it is not written in the Letter thereof, as much within the Statute as that which is within the Letter."²⁰¹

(4) Samuel Thorne, a leading legal historian, concluded that "[a]ctual intent . . . is controlling from Hengham's day to

195. PRESSER, *supra* note 3, at 243 n.45.

196. Presser, *supra* note 4, at 1493-94. Reviewing my *Government by Judiciary*, Lord Beloff, an Oxford emeritus and long-time student of American constitutional law, concurred, saying, "The quite extraordinary contortions that have gone into proving the contrary make sad reading for those impressed by the high quality of American legal historical scholarship." Max Beloff, Book Review, THE TIMES (London), April 7, 1978, (Higher Education Supplement), at II.

197. H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1533 (1987).

198. *Id.*

199. A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES 151-52 (Samuel Thorne ed., 1942) (emphasis added) [hereinafter DISCOURSE].

200. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES OF ACTS OF PARLIAMENT: AND THE EXPOSITION THEREOF 14-15 (1677) (emphasis added).

201. 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 647-48 (3d ed. 1768).

that of Lord Nottingham [1678]."²⁰²

This rule represents sound common sense, reflected in the statement of John Selden, a preeminent seventeenth-century scholar: "[A] Man's Writing has but one true sense, which is that which the Author meant when he writ it."²⁰³ Who can better explain what was meant than the writer himself? Neither Powell nor Presser comment on these and other similar materials that were spread before them.

Instead, Presser rests on the "conclusions of the legal academy," citing a recent article by Hans Baade,²⁰⁴ which merits attention if only because it betrays the sorry state of activist historical endeavors. Baade unearthed an English copyright case from 1769,²⁰⁵ wherein one of four judges—in one sentence—rejected recourse to legislative history, this being, Baade affirms, the rule "first articulated in *Millar v. Taylor*,"²⁰⁶ thus confirming that prior thereto the common law was to the contrary. Shortly thereafter the House of Lords rejected the copyright views expressed in *Millar*, without taking notice of Justice Willes' "legislative history" remark.

For his opinion that the *Millar* view prevailed in the United States, Baade invokes an assumption of counsel in *Wheaton v. Peters*²⁰⁷ that *Millar* was known to the Framers.²⁰⁸ Certainly the *Wheaton* court did not assume that *Millar* was part of the "corpus of the common law of the United States."²⁰⁹ The Court stated that "there can be no common law of the United States," and found that no such copyright doctrine obtained in Pennsylvania, "the state in which the controversy originated."²¹⁰

Baade is not the first to attack my views. Richard Saphire wrote in 1983 that refuting Berger "has become somewhat of a cottage industry,"²¹¹ and the stream of "refutations" flows un-

202. DISCOURSE, *supra* note 199, at 126.

203. JOHN SELDEN, TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 10 (2d ed. 1696).

204. Presser, *supra* note 4, at 1493 n.94 (citing Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991)).

205. *Millar v. Taylor*, 98 Eng. Rep. 201 (1769).

206. Baade, *supra* note 204, at 1108.

207. 33 U.S. (8 Pet.) 591 (1834).

208. Baade, *supra* note 204, at 1009.

209. *Id.*

210. *Wheaton*, 33 U.S. (8 Pet.) at 658. All this and much more is documented in a forthcoming article in the *Texas Law Review*. Raoul Berger, *Original Intent: A Response to Hans Baade*, 70 TEX. L. REV. 1535 (1992).

211. Richard B. Saphire, *Judicial Review in the Name of the Constitution*,

abated. But the corpse will not stay buried. As Eric Foner wrote in a similar situation, the fact that "a generation of scholars has directed its energies to overturning" my thesis indicates that it is to be taken seriously.²¹² Presser, who criticizes my resort to a secondary source, who "undoubtedly" succumbed to "Jeffersonian propaganda"—Samuel Eliot Morison,²¹³ that soft-touch—"uncritically" embraces his own secondary sources, and what sources—Powell and Baade!

Presser off-handedly refers to "the frequently discredited idea of turning back the clock,"²¹⁴ a phrase drawn from Chief Justice Earl Warren's opinion in *Brown v. Board of Education*²¹⁵—Warren, who had no taste for digging in the library²¹⁶—and from Paul Brest. Without doubt, Brest attempted to discredit original intention; he it was who challenged the "assumption" that judges are "bound by the text or original understanding of the Constitution."²¹⁷ Understandably for him there was no need to turn back the clock to impede an imperial judiciary. Marshall, on the other hand, regarded "intention as the most sacred rule of interpretation."²¹⁸

The importance of original intention resides in the fact that ours is a government by consent of the governed, and as James Iredell said, the people choose "to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other."²¹⁹ The postulates are cogently summarized by Richard Kay:

To implement real limits on government the judges must have reference to standards that are external to, and prior to,

8 U. DAYTON L. REV. 745, 753 (1983).

212. Eric Foner, *The Slaveholder as Factory Owner*, N.Y. TIMES, May 23, 1982, § 7 at 27.

213. Presser, *supra* note 4, at 1481.

214. PRESSER, *supra* note 3, at 168.

215. 347 U.S. 483, 492 (1954).

216. Fred Rodell of Yale rejoiced that Warren was not a "look-it-up-in-the-library" intellectual in his "off-hand dismissal of legal and historical research." Fred Rodell, *It Is the Warren Court*, N.Y. TIMES, March 13, 1966, § 6 (Magazine) at 30. Warren preferred his Einsteinian formula: "Is it Fair?" See *id.*

217. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 224 (1980) (emphasis added). See Raoul Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1 (1981).

218. JOHN MARSHALL, DEFENSE OF MCCULLOCH V. MARYLAND 167 (Gerald Gunther ed., 1969).

219. 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 146 (Griffith J. McRee ed., 1858).

the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their inception. Recourse to the intention of the framers in judicial review, therefore, can be understood as indispensable to realizing the idea of government limited by law.²²⁰

Lastly, the Founders adopted the Constitution on the basis of representations that its words did not entail certain feared consequences; they voted for the text *as explained* to obviate those fears. To repudiate such representations, said Justice Story in similar context, would constitute a fraud upon the people.²²¹

A. *Calder v. Bull*

Apparently, Presser attaches considerable importance to Chase's statement made in one of four seriatim opinions in *Calder v. Bull*:²²² "[A] strong statement that there were certain unwritten 'vital' or 'fundamental' principles which circumscribed the activities of both state and federal legislatures."²²³ These "supraconstitutional principles"²²⁴ sounded like "natural law" jurisprudence.²²⁵ They were immediately rejected by Justice Iredell: "[T]he Court cannot pronounce [an Act] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."²²⁶

More importantly, the Constitution itself provides that it "shall be the *supreme* law of the land"; it leaves no room for a supersupreme law. As Chief Justice Marshall stated in *Marbury v. Madison*,²²⁷ a written Constitution was designed to define and limit the delegated powers.²²⁸ That signifies,

220. Richard Kay, Book Review, 10 CONN. L. REV. 801, 805-06 (1978).

221. "If the Constitution was ratified under the belief, sedulously propagated . . . that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?" 1 STORY, *supra* note 140, § 1084.

222. 3 U.S. (3 Dall.) 386 (1798).

223. PRESSER, *supra* note 3, at 87.

224. *Id.* at 42.

225. *Id.* at 88.

226. *Calder*, 3 U.S. at 399.

227. 5 U.S. (1 Cranch) 137 (1803).

228. *Id.* at 176.

Philip Kurland points out, that "government is the creature of the Constitution and cannot do what it does not authorize."²²⁹ Such considerations applied with special force to judges, for Americans had a "profound fear of judicial discretion,"²³⁰ which was intensified by the Puritans' fear of judicial warping of the law by "twisted construction."²³¹

When called upon to adopt a federal common law of crimes in *United States v. Worrall*,²³² Chase declared, "the constitution of the Union is the source of *all* the jurisdiction of the national government; so that the departments of the government *can never assume* any power, that is *not expressly* granted by that instrument."²³³ Although *Calder* appears to be inconsistent with *Worrall*,²³⁴ Presser finds a "similarity in the principles" of these cases. In *Worrall* "respect for individual rights required" that the crime be first defined, while *Calder* asserted by way of illustration, that "no legislature could pass [an] *ex post facto* law[]" and the like.²³⁵ That is *Presser's* fine distinction;²³⁶ but throughout, *Worrall* emphasized the judicial lack of authority to draw jurisdiction outside the Constitution.²³⁷ Before long the Supreme Court in *United States v. Hud-*

229. PHILIP KURLAND, *WATERGATE AND THE CONSTITUTION* 7 (1978). Presser recounts that in 1804, Chase himself declared that "the judge [has] as his simple task the declaration of the law as it has been given to him in a written constitution or statute." PRESSER, *supra* note 3, at 185.

230. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 298 (1969).

231. See Berger, *supra* note 2, at 892-93.

232. 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

233. *Id.* at 779 (emphasis added).

234. See Presser, *supra* note 4, at 1480. This is viewed by Presser as illustrative "of the complexity and multileveled nature of early American federal jurisprudence." PRESSER, *supra* note 3, at 177. He explains that Chase *et al.* drew from "complex and competing ideologies" which "often led them to take inconsistent political or legal positions." *Id.* at 45. This is an elegant way of saying that he played both sides of the street, choosing conflicting doctrines as suited the occasion.

235. Presser, *supra* note 4, at 1480. This was gratuitous because Article I, Section 9, Clause 3 of the Constitution provides that "no *ex post facto* law shall be passed." See also U.S. CONST. art I, § 10, cl. 1.

236. Referring to a "sophisticated argument," Presser opines that it is "difficult to believe that such a refined analysis would have appealed to many late eighteenth century minds." PRESSER, *supra* note 3, at 88. See also *id.* at 218 n.41, 219 n.61.

237. In *Worrall*, Chase stated, "[A]ll the judicial authority of the federal courts, must be derived, either from the constitution of the United States, or from the acts of congress made in pursuance of that constitution." 28 F. Cas. at 776. And he said, "[C]ommon law authority, relating to crime and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction." *Id.* at 779.

son & Goodwin²³⁸ rejected common law crimes and confirmed that when the operations of a court are "confined to certain specific objects," it may not assume a "much more extended" jurisdiction "applicable to a great variety of subjects."²³⁹ The fact is that Chase "switch[ed] back and forth," from natural law to instrumentalism, regarding "styles of judicial reasoning [as] simply political tools."²⁴⁰

For his view that the law of nature was incorporated in American law, Presser avouches James Wilson who, starting with the proposition that the law of nations was part of American law, concluded that "[t]he law of nations was 'the law of nature.'"²⁴¹ By that logic, Article I, Section 8, Clause 10 limits access to the "law of nature"; it authorizes Congress "[t]o *define . . . Offences against the Law of Nations.*"²⁴² The genesis of this provision is instructive. Initially it was proposed to confer jurisdiction on the *Court* in cases concerning the law of nations.²⁴³ This unrestricted grant was changed so that *Congress* could "declare the Law and Punishment . . . of Offences against the Law of Nations."²⁴⁴ Madison observed that "no foreign law should be a standard farther than is expressly adopted."²⁴⁵ Ultimately, Congress was empowered to "define" such offenses.²⁴⁶ Gouverneur Morris explained that this was necessary because "the law of [nations] [was] often too vague and deficient to be a rule."²⁴⁷

Therefore, unless Congress defines such offences against the law of nations to include the law of nature, natural law has no application in that context. And unless an *offense* against the law of nations is involved, Congress, by necessary implication, has no authority to legislate in the premises.

B. Deference and Democracy

No doubt "the excesses of the French Revolution convinced Chase and his fellows that democracy had to be tempered with

238. 11 U.S. (7 Cranch) 32 (1812).

239. *Id.* at 33.

240. PRESSER, *supra* note 3, at 166.

241. *Id.* at 71.

242. U.S. CONST. art. I, § 8, cl. 10 (emphasis added).

243. 2 RECORDS, *supra* note 36, at 136.

244. *Id.* at 168.

245. *Id.* at 316.

246. *Id.* at 570, 614.

247. *Id.* at 615.

legislative, judicial and constitutional restraints."²⁴⁸ But the issues are whether the Framers contemplated the restraints and whether the Constitution authorized judges to fashion them. Chase was sailing in the teeth of a democratic storm that before long blew the Federalists out of office. He was, I earlier wrote, "utterly insensitive to the democratic tide that was lapping at his feet even as he labored."²⁴⁹ It is no answer that he had, in his "personal odyssey," arrived at "a mature set of beliefs based on English conservative political and judicial principles,"²⁵⁰ including belief in "a structured society, the inevitability of different social classes, and the subordination of the lower orders to the upper."²⁵¹ After casting their votes, the people, "according to the Federalist judges[,] . . . were henceforth to refrain from harmful criticism of their properly constituted officials and were to obey them unquestioningly."²⁵² Such notions were completely out of tune with the nascent democratic forces, who had before them the Founders' harsh criticisms of George III.

Consider Chase's charge to a Baltimore jury, criticizing the change in the Maryland Constitution extending suffrage as signifying that "our republican constitution will sink into a mobocracy."²⁵³ He animadverted upon the "late[r] reformers'" doctrine that all men "are entitled to enjoy equal liberty and equal rights" as a "mighty mischief,"²⁵⁴ never mind the affirmation in the Declaration of Independence that "all men are created equal."²⁵⁵ Presser cites Wilson's alleged belief in a

248. PRESSER, *supra* note 3, at 179 n.13.

249. Berger, *supra* note 2, at 876, *quoted in* Presser, *supra* note 4, at 1479.

250. Presser, *supra* note 4, at 1479.

251. PRESSER, *supra* note 3, at 18. The English conservatives' "world of deference" contemplated "hierarchical control, and a single set of correct answers to political problems . . . to be elaborated and pronounced from top down. Sovereignty in England . . . rested not in the people but in the 'holy trinity' of crown, lords, and commons." *Id.* at 51. Those views were shared by Alexander Hamilton, who stated in the Federal Convention that communities are divided into "the rich and well born, the other the mass of the people. . . . Nothing but a permanent body can check the imprudence of democracy. Their turbulent and uncontrollable disposition requires checks." 1 RECORDS, *supra* note 36, at 299. John Jay forthrightly declared that "those who own the country should govern the country." NOCK, *supra* note 23, at 216. Small wonder that Americans were attracted rather by the views of English "radical intellectuals." WOOD, *supra* note 230, at 15.

252. PRESSER, *supra* note 3, at 17.

253. BOWERS, *supra* note 36, at 274.

254. *Id.*

255. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

"limited franchise,"²⁵⁶ but it was not embraced by Chase's own state, Maryland. Wilson wrote:

This darling privilege of freemen should certainly be extended as far as considerations of safety and order will possibly permit. The correct theory and the true principles of safety require, that every citizen whose circumstances do not render him necessarily dependent on the will of another [e.g. a slave] should possess a vote.²⁵⁷

In the Federal Convention Pierce Butler said, "[t]here is no right of which the people are more jealous than that of suffrage."²⁵⁸ He was joined by others.²⁵⁹

Chase's idea of "enlightened judicial leadership," says Presser, led him "to seek to implement restrictions on legislatures through the 'supra-constitutional principles' found in *Calder v. Bull*"²⁶⁰—principles that ran counter to the limited delegations of the Constitution. As Wilson flatly stated in the Pennsylvania Ratification Convention, "the supreme power . . . resides in the PEOPLE . . . they can distribute it" as they will.²⁶¹ They did not empower judges to insulate themselves from criticism or to apply "supra-constitutional principles." Those in whom the "supreme power resides" have no need to defer to agents to whom they delegated limited power. And as I earlier wrote, "The very idea of 'deference' . . . was repugnant to . . . self-reliant American[s]."²⁶² It was to escape from such class-ridden notions that they braved the ocean.

VI. THOMAS JEFFERSON

Presser charges that Jefferson was a "demagogue," which his dictionary defines as a "leader who obtains power by means of impassioned appeals to the emotions and prejudices of the populace."²⁶³ *The Oxford English Dictionary* adds "an unprin-

256. Presser, *supra* note 4, at 1479 n.10.

257. 1 WORKS OF JAMES WILSON, *supra* note 84, at 406-07.

258. RECORDS, *supra* note 36, at 202.

259. *Id.* at 201-03. Jefferson's "unhesitating advocacy of a broadly [based] popular suffrage and of equal representation of the people in the legislature held the promise of making his constitution a vital instrument of democratic government." PETERSON, *supra* note 28, at 105-06.

260. Presser, *supra* note 4, at 1479.

261. PENNSYLVANIA HIST. SOC'Y, PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 316 (John B. McMaster & Fredrick D. Stone eds., 1888).

262. Berger, *supra* note 2, at 874.

263. Presser, *supra* note 4, at 1490 n.76 (quoting THE AMERICAN HERITAGE

cipld or factious popular orator."²⁶⁴ Since oratory is the medium of demagogy, and since Jefferson was no orator²⁶⁵ and delivered no orations, Presser is driven to argue that the "impassioned appeals" were made by proxy, by "partisan scribblers."²⁶⁶ All credit to Presser for suggesting demagogy by proxy. Federalist "scribblers" waged a massive campaign of vilification,²⁶⁷ so by Presser's test, the Federalists were a party of demagogues.

Whatever Adams' reaction in the heat of political strife,²⁶⁸ his mature judgment expressed in his old age to Jefferson was, "your administration will be quoted by philoso-

DICTIONARY 379 (2d College ed. 1985)). Presser invokes Justice Story's charge that Jefferson was a demagogue, "the evil-minded genius behind the spreading disintegration of the country." *Id.* at 1489 n.72 (quoting JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 119 (1971)). Powell, whose authority Presser prefers to mine, wrote that according to the consensus, Story was "an opponent of 'democracy' intent on frustrating the results of the political process" by "the creation of a body of 'anti-majoritarian' constitutional law." H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1287 (1985). Story's *Commentaries*, Powell observes, "were a massive self-vindication . . . as well as an indictment of the man Story personally despised"—Thomas Jefferson. *Id.* at 1300 n.103.

Jefferson "shunned popularity," and was "self-effacing." PETERSON, *supra* note 28, at 334. Abigail Adams, who along with John, had long enjoyed close friendship with Jefferson, wrote, "He is one of the choice ones of the earth." *Id.* at 302. Another long-time friend, Lafayette, who was in close contact with him during his five-year stay in France, wrote to a friend in America, "He is everything that is good, upright, enlightened and clever, and is respected and beloved by every one that knows him." *Id.* at 316. The very antithesis of a "crafty politician." John Quincy Adams, who came into Congress in 1803, said, "You can never be an hour in this man's company without something of the marvelous." *Id.* at 727. "Lincoln was unstinting in his admiration for Jefferson." GARRY WILLS, LINCOLN AT GETTYSBURG 85 (1992).

264. 3 OXFORD ENGLISH DICTIONARY 1727 (1969).

265. PETERSON, *supra* note 28, at 655. Peterson noted his "deficiencies as a speaker." *Id.* at 21. In fact, Jefferson "shrank from the impassioned political bitterness that raged around him." 12 ENCYCLOPEDIA BRITANNICA 992 (14th ed. 1929). He "was not, in his nature, born for the public He held back, begrudging commitment to the public role." PETERSON, *supra* note 28, at 30. In 1792, "Jefferson found himself brought forward—less by his friends than by his enemies—as the 'generalissimo' of a political party on which he meant to mount his own ambition at the hazard of government itself It was not a role he coveted." *Id.* at 466. He "became a candidate for the presidency . . . in spite of himself. He did not seek the office but the office sought him." *Id.* at 543; *see also id.* at 552. In the election of 1796, he wrote Madison that "should [Jefferson] and Adams end in a tie, he wished the chance to go to the New Englander." *Id.* at 557. *See also* NOCK, *supra* note 23, at 261.

266. Presser, *supra* note 4, at 1490 n.74.

267. PADOVER, *supra* note 23, at 116, 143; *see also supra* note 23.

268. Presser, *supra* note 4, at 1490 n.74.

phers as a model of profound wisdom."²⁶⁹ That is not the earmark of demagoguery. Presser's view of Jefferson as a demagogue, i.e. "unprincipled," is not shared by American historians. "The secret of his power," Samuel Eliot Morison wrote, "lay in the fact that he appealed to and expressed America's idealism, simplicity, and hopeful outlook,"²⁷⁰ a far remove from demagoguery. It is needless to recapitulate the documented particulars of my defense of Jefferson against Presser's charges.²⁷¹ One who studies those materials is unlikely to conclude that Jefferson was "committed to a philosophy that the end justifies the means [e.g. the Louisiana Purchase]," or that he often "ignor[ed] . . . the rule of law,"²⁷² whereas Chase "put the rule of law at the center of his politics," this of the "American Jeffreys."²⁷³ Presser's comparison of Jefferson's "departure from the law,"²⁷⁴ e.g. the Louisiana Purchase, which Congress all but forced on him,²⁷⁵ with Richard Nixon's coverup of the Watergate break-in, speaks for itself.²⁷⁶ Nor did I "praise Jeffer-

269. 2 PAGE SMITH, JOHN ADAMS 1111 (1962). Adams said, "Mr. Jefferson and I have grown old and retired from public life. So we are upon our ancient terms of good will." *Id.* at 1113.

270. MORISON, *supra* note 38, at 359. "Jefferson, because he had a thorough trust and confidence in the people, became the idol of American democracy." 12 ENCYCLOPEDIA BRITANNICA 989 (14th ed. 1929).

271. Berger, *supra* note 2, at 892-902.

272. Presser, *supra* note 4, at 1492.

273. *Id.*

274. *Id.*

275. Berger, *supra* note 2, at 895-96. Madison later wrote, "The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits." PETERSON, *supra* note 28, at 280. Rehnquist recounts:

At first Jefferson himself drew up drafts of an amendment to the Constitution which would authorize the acquisition of Louisiana, but then word came . . . that Napoleon was having seller's remorse about the transaction and would seize upon any reason to avoid it. Jefferson then urged his supporters in Congress to ratify the purchase.

REHNQUIST, *supra* note 56, at 56.

276. Presser, *supra* note 4, at 1492. Another far-fetched Presser analogy takes off from Jefferson's comment after the 1792 "massacres" in France: "For such a cause, Jefferson explained, 'I would have seen half the earth desolated.'" PRESSER, *supra* note 3, at 153. This, Presser remarks, "strangely foreshadows the attitude of the American troops in South Vietnam, who piously destroyed villages in order to 'save' them from the Viet Cong." *Id.* In Vietnam, the troops were invaders seeking to stifle a native democratic movement. In France, wrote Leonard Woolf, the Revolution "destroyed an ancient, malignant growth in European society, and this was essential for the future of European civilization." LEONARD WOOLF, BEGINNING AGAIN 215 (1964). The executions, a deplorable concomitant of revolutions, were a reaction to centuries of feudal oppression whereby the people meant to cast off the shackles of a despotic regime. Jefferson's sympathy with a suffering people's

son for his extra-legal actions,"²⁷⁷ which he himself sought to explain. To wrest from Jefferson's *Notes on the State of Virginia* "a contempt for the common man" collides with the facts.²⁷⁸ Nor did Chase and Jefferson have "in common . . . their beliefs in the need for some deference [i.e., subservience] in society."²⁷⁹ To the contrary, Jefferson had "faith in the wisdom of

struggle, even when excessive, is not to be equated with the conduct of a soldiery ordered to impose the views of a misguided administration upon the Vietnamese.

277. Presser, *supra* note 4, at 1492. Typical is Presser's renewed charge that Jefferson approved the "extra-legal means of apprehending Burr." *Id.* at 1491. Jefferson explained why General Wilkinson was justified in (1) "seizing [the] notorious conspirators," and (2) "sending them to the seat of government, when the written law gave them a right to trial in the territory." Berger, *supra* note 2, at 897. This, Jefferson explained, was due to "[t]he danger of their rescue, of their continuing machinations . . . [S]alvation of the city, and of the Union itself . . . constituted a law of necessity and self preservation." WRITINGS OF THOMAS JEFFERSON 1232-33 (Viking Press 1984) (1895-99). Contained in a private letter to a correspondent, it recalls Lincoln's later suspension of habeas corpus in Maryland because of the secessionists' threat to Washington. Such judgments have to be made on the scene. Poindexter, sent by Jefferson to report, proposed that Burr be sent to Washington so that the Supreme Court could determine the place of trial. BOWERS, *supra* note 36, at 393. In the circumstances, Jefferson's conduct did not display arbitrary disregard for the rule of law.

278. Presser, *supra* note 4, at 1490. His arguments are discussed in Berger, *supra* note 2, at 898-901.

Presser builds on Jefferson's *Notes on the State of Virginia*, published in 1785. PETERSON, *supra* note 28, at 153. There Jefferson, viewing vast pools of ignorance, proposed a sweeping educational program: three years of free schooling at the elementary level, followed by education at State expense of gifted people selected through a winnowing process. The fact that the well-to-do could continue their education at their own expense does not indicate that Jefferson was committed to keeping the common man in his place. The States were in dire financial straits and could not undertake free education at all levels.

In truth, Jefferson "knew absolutely no social distinctions," and had "an unlimited faith in the honesty of the people; a large faith in their common sense." 12 ENCYCLOPEDIA BRITANNICA 991 (14th ed. 1929). He believed that talent was "scattered with equal hand through all" conditions of men. PETERSON, *supra* note 28, at 114. In short, he believed in training a meritocracy drawn from all walks of life. While serving as minister to France, Jefferson concluded that the "immense majority was in bondage to its masters." NOCK, *supra* note 23, at 88.

His hatred of exploitation of the poor by the rich was unremitting. See PETERSON, *supra* note 28, at 382, 350; Berger, *supra* note 2, at 899-900. At a time when suffrage was tied to property, he urged manhood suffrage. PETERSON, *supra* note 28, at 282.

279. Presser, *supra* note 4, at 1492. Throughout, Jefferson's sympathies were with the common man. Thus, he rejected Hamilton's schemes for funded debt and bank stock because they "would further enrich the privileged financial class at the expense of the mass of people." PETERSON, *supra* note 28, at 460. "The aristocracy of England," Jefferson observed, "have the laws and government in their hands [and] have so managed them as to reduce the eleemosynary class or paupers, below the means of supporting life, even by labour." NOCK, *supra* note 23, at 104.

the masses";²⁸⁰ he advocated "the control of the people over . . . their government," and considered that the "mass of the citizens is the safest depository of their own rights."²⁸¹ Presser notes Jefferson's "faith in public opinion and in democracy generally," being "poles apart from Chase."²⁸² This does not smack of "contempt for the common man."

A word too about Presser's view that "Jefferson's notion of states' rights was . . . constitutionally untenable" and "ultimately led to our civil war."²⁸³ Presser refers to the Kentucky and Virginia Resolutions, which, like a too tightly coiled spring, recoiled from the "odious" Alien and Sedition Acts. And as the Encyclopedia Britannica remarks, "They are not to be judged by constitutional principles established later by courts and war."²⁸⁴ Lastly, the Britannica concludes that "the ideas [Jefferson] advocated have become the very foundation of American Republicanism. No other man's ideas have had anything like an equal influence upon the institutions of the country,"²⁸⁵ least of all Chase's. This is the answer to the issue Presser framed: "whether Jefferson or Chase better expressed noble ideals fit for American jurisprudence."²⁸⁶

VII. CONCLUSION

Presser "confess[es] to a degree of naivete and a romantic streak" in cherishing the ideal that "ours is a government of laws, not of men."²⁸⁷ One need not be a Don Quixote to share that belief; law is indispensable to the maintenance of society. But a "bigoted Federalist bully"—so Chase is regarded by "every other legal historian"—is hardly the happiest exemplar of the reign of law. Even a Sancho Panza can perceive that the bully on the block is not the law's *beau ideal*. Presser's "project of making a noble stand for the rule of law . . . through reliance

280. PRESSER, *supra* note 3, at 161.

281. WRITINGS OF THOMAS JEFFERSON, 1394-95 (Viking Press 1984) (1895-99). He preferred the "majority opinion of the community" to that "of self-styled guardians of the public interest." PETERSON, *supra* note 28, at 703.

282. PRESSER, *supra* note 3, at 154.

283. Presser, *supra* note 4, at 1491-92.

284. 12 ENCYCLOPEDIA BRITANNICA 989 (14th ed. 1929). In 1803, some leading New England Federalists conspired to secede from the Union on the ground that the Louisiana Purchase absolved the original states from their allegiance. MORISON, *supra* note 38, at 368.

285. 12 ENCYCLOPEDIA BRITANNICA 989 (14th ed. 1929).

286. Presser, *supra* note 4, at 1490.

287. *Id.* at 1477.

on Samuel Chase, the 'American Jeffreys,'²⁸⁸ is bizarre. It recalls an early German film, *The Cabinet of Dr. Caligari*, which had no horizontal or perpendicular lines; all were slanted in different directions, creating a disquieting disorientation.

Nor did Chase "articulate and activate the moral aspirations of the American people,"²⁸⁹ then or now. His attachment to conservative English principles of deference and subservience were at odds with the American commitment to the tenet "all men are created equal."²⁹⁰ Presser failed to read deferential principles into the minds of the Founders, still less supervening "supra-constitutional principles of government."

Lastly, I dissent from the implications of his final remarks that we "argue[d] like lawyers . . . about who was 'right,'" and that "good lawyers do not necessarily make good historians."²⁹¹ It little matters whether Presser or Berger is "right," but it is the duty of a scholar to vindicate the truth.

Nor am I prepared to admit that "good lawyers do not necessarily make good historians." Lawyers, to be sure, must espouse their client's cause, but they may not therefore impose upon the court.²⁹² A lawyer is an officer of the court, under a duty of scrupulous candor. One who distorts or conceals the facts invites disaster and sows distrust in the minds of the judge. Like the historian, therefore, the lawyer had best recount the facts honestly. Two eminent practitioners of the historical art, Hugh Trevor-Roper and C.R. Elton, agreed that the essence of "historical method" is to ground "detail upon evidence and generalizations upon details."²⁹³ That is the meth-

288. *Id.* at 1478.

289. *Id.* at 1477.

290. It was English radicalism, not conservative "deferential" thinking that won American hearts. PRESSER, *supra* note 3, at 52, 207 n.31. See also WOOD, *supra* note 230, at 16-17.

291. Presser, *supra* note 4, at 1495.

292. "Like Berger," writes Presser, "I too have in me some unstoppable cussedness, some irresistible desire to fly against conventional wisdom." *Id.* at 1478. "Speak for yourself, John." Sheer intellectual curiosity, not an "irresistible desire to fly against conventional wisdom," has launched me on my studies of impeachment, the fourteenth amendment, and federalism, etc. And I have ever bowed to the facts, however unpalatable the result. See, e.g., Raoul Berger, *Con-structive Contempt: A Post Mortem*, 9 U. CHI. L. REV. 602 (1942).

Presser charged that I am "consumed by partisanship," Presser, *supra* note 4, at 1478, but he would be hard-pressed to finger the "partisan" source of my Chase studies.

293. Hugh Trevor-Roper, *Book Review of Elton, The Practice of History*, THE TIMES (London), Oct. 15, 1967, at 33.

od both good lawyers and good historians employ—they draw rational conclusions from meticulously screened facts. Each must guard against imposing a theory upon recalcitrant facts; for each, Procrustes is a poor model.