9-1-1992

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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 law led me to dissent. Since the appearance of my response, Presser has published a book elaborating his thesis and, thereafter, a reply to my dissent. 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?'..." To the extent that legal scholarship would approach scientific integrity, that must be our criterion, even though, to quote Thomas Huxley, "the great tragedy of science is the slaying of a beautiful hypothesis by an ugly fact."
Writing of the "epidemic of Francophilia" 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." Viewed even in his own times, it was not his function as a judge to halt the tide. Presser emphasizes that Chase sought to infuse his profound religious convictions into the law.

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. Hamilton branded him as "abandoned as any [public character] the history of past or present times can produce." 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," an "American Jeffreys," who was "almost universally described as 'grossly partisan,'" and, as Presser notes, became "the hated symbol of partisanship." 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 3, 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

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).
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.
31. Id.
32. PRESSER, supra note 3, at 29.
33. Id.
dangerous majoritarian trends in some of the states." The English Puritans, whose views travelled to America, feared the "judges' imposition of their personal views." 

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

34. Id.
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.
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

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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.
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." 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." 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?" Blackstone stated that the "tyrannical partiality of judges" was a "crime of deep malignity."

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." Marshall, an attendant at the trial, later testified that Chase plainly exhibited "disgust" with the way counsel was conducting the defense. Presser himself notices Chase's "extraordinary condescension" to defense counsel "and his pointed humor at their expense," the more damaging because, as Chase frequently stressed, they were only "young gentlemen." 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
and unbecoming in a judge" but were not defined as a crime.\textsuperscript{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.\textsuperscript{59} But Henry Adams, scarcely influenced by "Jeffersonian propaganda," said in his \textit{History of the United States} that Chase's "overbearing manner had twice driven from his court the most eminent counsel of the circuit."\textsuperscript{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.'"\textsuperscript{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."\textsuperscript{62} \textit{In vino veritas.}

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

\begin{footnotes}
\item[58. ] Presser, supra note 3, at 157.
\item[59. ] Id. at 134.
\item[60. ] 2 Henry Adams, History of the United States of America 147-48 (1962).
\item[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.
\item[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.
\end{footnotes}
the "trial itself was stacked against Chase," a man, Presser notes, still commonly regarded as a "'rabid partisan', a courtroom bully who wrongfully used the bench as a 'political stump.' This, Presser considers, is the view of "those who ought to know better," preferring the "more astute historians" who regard Chase as "conciliatory," and "disinterested." 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," Presser retorts that this is "dubious history, and maybe even dubious manners." 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. 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." 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." How could he be if there was but one true faith and if those who differed were guilty of "partisan, popular excesses"? 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," 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, 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." 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." 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." 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." 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." 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." 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." But Article III, Section 3 of the Constitution declares that "[t]reason against the United States shall consist only in levying war against them." "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." "Only" levying war was treasonable; "constructive" levying of war constituted the very "extension" of the crime that the Framers plainly meant to prevent.

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).
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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{89} Against Morison, a renowned historian, Presser counters with the view of a novelist, Gore Vidal, that Burr was "railroaded" by the Jeffersonians.\textsuperscript{90}

The Oxford English Dictionary defines "railroaded" as "to rush (a person or thing) to or into a place, through a process."\textsuperscript{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."\textsuperscript{92} Henry Adams "bitterly . . . arraigned Jefferson for inexcusable lassitude and indifference in failing to strike months before he did."\textsuperscript{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."\textsuperscript{94} All of which is incompatible with "railroading."\textsuperscript{95}

\textsuperscript{86} MORISON, supra note 38, at 369.
\textsuperscript{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.
\textsuperscript{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.
\textsuperscript{89} Id.
\textsuperscript{90} Presser, supra note 4, at 1491 n.84.
\textsuperscript{91} 8 OXFORD ENGLISH DICTIONARY 114 (1969).
\textsuperscript{92} PETERSON, supra note 28, at 847.
\textsuperscript{93} BOWERS, supra note 36, at 398.
\textsuperscript{94} Id.
\textsuperscript{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 read's Peterson's
“We now know,” Presser asserts, “that Burr’s conspiracy—if there was one—was not the danger Jefferson claimed it was.” 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.’” Justly did the Committee obliquely attribute the acquittal to the “curtain of artificial rules” invoked by Marshall. 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 standards 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. When Peters declared a mistrial because one juror had prejudged the case, it was retried before Chase, who barred such argument. 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. PETERTON, supra note 28, at 841-54.

96. Presser, supra note 4, at 1491 (emphasis added).
97. PETERTON, 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.”

“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.”

Presser maintains, however, that the Fox Act pertains only to seditious libel; 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.”

Nevertheless, Presser insists that the Fox Act required the “deferential jury [to] make its determination under the direction of the court.” 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”?

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.”

So too, Lord Camden, likewise a former Chief Justice of Common Pleas, said that “the judge should interpose nothing but his advice; if he attempted to control them, there was an end to trial by jury.” Earlier, Blackstone observed, “If the judge’s opinion must rule the verdict, the trial by jury would be useless.” 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.
107. Presser, supra note 3, at 93.
108. Presser, supra note 4, at 1488.
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).
follow the law as laid down by the judge"\textsuperscript{112} is at war with the drafters' explanation.

Some references to similar early American practice are cited in my earlier article.\textsuperscript{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."\textsuperscript{114} William Nelson observed that the jury's power "to 'find law' was almost unlimited."\textsuperscript{115} Presser himself refers to "the truism that the American jury was to be the judge of both fact and law."\textsuperscript{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 . . . ."\textsuperscript{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."\textsuperscript{118} Albeit, Fries posed an issue of "constitutional law"—at a time when the very conception of "constitutional law" was aborning—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 \textit{Van Horne's Lessee v. Dorrance},\textsuperscript{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.'"\textsuperscript{120}

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

\begin{itemize}
  \item \textsuperscript{112} \textsc{Presser, supra} note 3, at 53.
  \item \textsuperscript{113} \textit{See} \textsc{Berger, supra} note 104, at 641-42.
  \item \textsuperscript{114} \textsc{Shannon C. Stimson, The American Revolution in the Law} 48 (1990) (quoting William E. Nelson, \textit{The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence}, 76 \textit{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.' " \textsc{Presser, supra} note 3, at 17.
  \item \textsuperscript{115} \textsc{Stimson, supra} note 114, at 49.
  \item \textsuperscript{116} \textsc{Presser, supra} note 3, at 111.
  \item \textsuperscript{117} \textsc{Rehnquist, supra} note 56, at 67.
  \item \textsuperscript{118} \textsc{Presser, supra} note 3, at 67.
  \item \textsuperscript{119} 2 U.S. (2 Dall.) 304 (1795).
  \item \textsuperscript{120} \textsc{Presser, supra} note 3, at 65.
\end{itemize}
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 "Astonishingly," 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

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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.
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 . . . [T]he fact 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.” Blackstone, it will be recalled, stated that the “tyrannical partiality of judges” was a “crime of deep malignity.” 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.” 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 . . .” English judges, Justice Story observed, had been impeached “for acting grossly contrary to the duties of their office.” Elsewhere, I have collected examples of such impeachable offenses.

Presser has neglected to comment on these facts; his conclusion that Berger “is still wrong” in arguing that “Chase should have been convicted,” 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 Inquest. 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.


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

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


142. Presser, supra note 4, at 1489.

143. REHNQUIST, supra note 56.
trial were erroneous, they were not, roughly speaking, unlawful. But when they all run one way, against the defendant, when they are "arbitrary," "highly unusual," and "extraordinary," 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]." Violation of that oath subverted the rule of law. Rehnquist notes Chase's "thoroughly partisan attitude during parts of the proceedings against John Callender," his breach of the "obligation . . . to refrain from ridiculing . . . the lawyers," 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."

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

Article II alleged that in trying Callender, Chase was "prompted by a similar spirit of persecution and injustice." "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.
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." 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." Lastly, Rehnquist observes that no law required a "federal judge to disqualify himself on account of bias." That, however, did not absolve Chase from conducting the Callender trial in impartial fashion. The Supreme Court declared that "a fair trial in a fair tribunal is a basic requirement of due process." Judicial impartiality, Thomas Hobbes observed, is "a law of nature." Hamilton put it simply: "Who 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." English judges, Justice Story declared, had been impeached "for acting grossly contrary to the duties of their office." For me, as for Blackstone, "tyrannical partiality of judges" is a "crime of deep malignity."

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. "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.
163. HOBBS, supra note 52, at 80.
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.”\(^\text{168}\) 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.”\(^\text{169}\) 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.”\(^\text{170}\)

Where Chase maintained that his acts, though “improper” were not defined as a crime, Presser urges that they “violated no law.”\(^\text{171}\) 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.\(^\text{172}\) 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.”\(^\text{173}\) “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,\(^\text{174}\) 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).
stitutes impeachable conduct.\textsuperscript{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.\textsuperscript{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.'"\textsuperscript{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."\textsuperscript{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?\textsuperscript{179}

Presser blandly replies, "there is nothing untoward about appointing judges whenever the President has a vacancy to fill."\textsuperscript{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

\textsuperscript{175} 1 STORY, supra note 140, § 798.
\textsuperscript{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).
\textsuperscript{177} Presser, supra note 4, at 1484.
\textsuperscript{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.
\textsuperscript{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.  

“Needed reforms” was merely a facade for the “stacked deck.”

Understandably, Jefferson moved to repeal the Judiciary Act which created the judgeships. Presser labels the repeal as blatantly “unconstitutional.” The power of one legislature to repeal an Act of its predecessors is rooted in the common law. Furthermore, Article III of the Constitution gives Congress power to establish inferior courts; 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. 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, 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.


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

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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)).


193. 2 HOLMES-LASKI LETTERS 1463 (Mark D. Howe ed., 1983). 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," and dismisses my refutation because the "legal academy" awards the palm to Powell, of which more later.

Although Powell recognizes that the English common lawyers' references to "intention" often "sounded remarkably like contemporary intentionalists," he maintains that they looked for the intent exclusively in the words themselves—a confessedly "curious usage"—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 exposicion of statutes."[199]

(2) Lord Chancellor Hatton wrote circa 1587 that "wheneuer 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
that of Lord Nottingham [1678]."  

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."  

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, which merits attention if only because it betrays the sorry state of activist historical endeavors. Baade unearthed an English copyright case from 1769, 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," 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 that Millar was known to the Framers. Certainly the Wheaton court did not assume that Millar was part of the "corpus of the common law of the United States." 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."

Baade is not the first to attack my views. Richard Saphire wrote in 1983 that refuting Berger "has become somewhat of a cottage industry," and the stream of "refutations" flows un-
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 Education215—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,
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.  

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.

A. Calder v. Bull

Apparently, Presser attaches considerable importance to Chase's statement made in one of four seriatim opinions in Calder v. Bull.  

"[A] strong statement that there were certain unwritten 'vital' or 'fundamental' principles which circumscribed the activities of both state and federal legislature."

These "supraconstitutional principles" sounded like "natural law" jurisprudence. 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."

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, a written Constitution was designed to define and limit the delegated powers. That signifies,


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.
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, "All 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 & Goodwin\textsuperscript{238} 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.”\textsuperscript{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.”\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{243} This unrestricted grant was changed so that Congress could “declare the Law and Punishment . . . of Offences against the Law of Nations.”\textsuperscript{244} Madison observed that “no foreign law should be a standard farther than is expressly adopted.”\textsuperscript{245} Ultimately, Congress was empowered to “define” such offenses.\textsuperscript{246} Gouverneur Morris explained that this was necessary because “the law of [nations] [was] often too vague and deficient to be a rule.”\textsuperscript{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

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\bibitem{238} 11 U.S. (7 Cranch) 32 (1812).
\bibitem{239}  \textit{Id.} at 33.
\bibitem{240}  PRESSER, \textit{supra} note 3, at 166.
\bibitem{241}  \textit{Id.} at 71.
\bibitem{242}  U.S. CONST. art. I, § 8, cl. 10 (emphasis added).
\bibitem{243}  2 RECORDS, \textit{supra} note 36, at 136.
\bibitem{244}  \textit{Id.} at 168.
\bibitem{245}  \textit{Id.} at 316.
\bibitem{246}  \textit{Id.} at 570, 614.
\bibitem{247}  \textit{Id.} at 615.
\end{thebibliography}
legislative, judicial and constitutional restraints. 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.” 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, including belief in “a structured society, the inevitability of different social classes, and the subordination of the lower orders to the upper.” 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.” 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.” He animadverted upon the “late[r] reformers’” doctrine that all men “are entitled to enjoy equal liberty and equal rights” as a “mighty mischief,” never mind the affirmation in the Declaration of Independence that “all men are created equal.”

Presser cites Wilson’s alleged belief in a
"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.
262. Berger, supra note 2, at 874.
263. Presser, supra note 4, at 1490 n.76 (quoting THE AMERICAN HERITAGE
cilled or factious popular orator." Since oratory is the medium of demagogy, and since Jefferson was no orator and delivered no orations, Presser is driven to argue that the "impassioned appeals" were made by proxy, by "partisan scribblers." All credit to Presser for suggesting demagogy by proxy. Federalist "scribblers" waged a massive campaign of vilification, so by Presser's test, the Federalists were a party of demagogues.

Whatever Adams' reaction in the heat of political strife, his mature judgment expressed in his old age to Jefferson was, "your administration will be quoted by philoso-
phers as a model of profound wisdom." That is not the earmark of demagogy. 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," a far remove from demagogy. It is needless to recapitulate the documented particulars of my defense of Jefferson against Presser's charges. 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," whereas Chase "put the rule of law at the center of his politics," this of the "American Jeffreys." Presser's comparison of Jefferson's "departure from the law," e.g. the Louisiana Purchase, which Congress all but forced on him, with Richard Nixon's coverup of the Watergate break-in, speaks for itself. 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).
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.
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";\textsuperscript{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."\textsuperscript{281} Presser notes Jefferson's "faith in public opinion and in democracy generally," being "poles apart from Chase."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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,"\textsuperscript{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."\textsuperscript{286}

\section*{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."\textsuperscript{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 \textit{beau ideal}. Presser's "project of making a noble stand for the rule of law . . . through reliance

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\bibitem{280} Presser, \textit{supra} note 3, at 161.
\bibitem{282} Presser, \textit{supra} note 3, at 154.
\bibitem{283} Presser, \textit{supra} note 4, at 1491-92.
\bibitem{284} 12 \textit{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, \textit{supra} note 38, at 368.
\bibitem{285} 12 \textit{Encyclopedia Britannica} 989 (14th ed. 1929).
\bibitem{286} Presser, \textit{supra} note 4, at 1490.
\bibitem{287} \textit{Id.} at 1477.
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On Samuel Chase, the ‘American Jeffreys,’ 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,” 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.” 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.” 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. 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.” That is the meth-

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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.
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, *Constructive Contempt: A Post Mortem,* 9 U. CHI. L. REV. 602 (1942).
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.