**Vanderbilt Law Review**

Volume 62 | Issue 2 Article 2

3-2009

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## INTRODUCTION

Samuel Chase is not exactly unknown. Indeed, as the only U.S. Supreme Court Justice to be impeached, he achieved a sort of instant fame, or instant infamy. He is, I think, fairly characterized as a "neglected Justice," however, because, in our exclusive focus on his impeachment, we tend to forget that he did possess considerable intelligence, virtue, legal ability, and energy that make him worth our study. His life is also something of an object lesson in how a judge's self-destructive tendencies can harm his reputation. As Richard Peters, his colleague on the Pennsylvania Circuit Court remarked, Chase had a singular instinct for tumult and appeared to have sought controversy whenever he could. "I never sat with him without pain," Peters remembered, "as he was forever getting into some intemperate and unnecessary squabble."[1] Chase is remembered as a rabid Federalist partisan and a vehemently anti-Jeffersonian judge.[2]

I am not aware of any other Supreme Court Justice who apparently deprived his Court of a full complement of required

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1. Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), *quoted in* STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 11 (1991) [hereinafter PRESSER, ORIGINAL MISUNDERSTANDING].

2. *See, e.g.*, PETER CHARLES HOFFER & N.E.H. HULL, IMPEACHMENT IN AMERICA 1635–1805, at 288 (1984) (describing Chase as "virulently partisan, arrogant, and imposing").

personnel because he went out on the political hustings to give speeches in support of a presidential candidate he favored (John Adams)[3] and against one he feared (Thomas Jefferson).[4] During the 1800 election campaign, Chase made himself an easy target for Jeffersonian newspapers when he appeared to sympathize zealously with the prosecution of Jeffersonian editors and writers. Indeed, more than one historian has suggested that in the trial of one of these writers, the notorious John Thompson Callender, Chase actively sought to prevent "all creatures called democrats" from serving on the jury. This assertion, however, is dubious.[5]

To the victors belong the spoils of writing history, however, and the Jeffersonians and their sympathizers have monopolized the judgment of Chase. Even as recently as Bruce Ackerman's 2005 book on the founding period, Chase continues to be painted as a hyper-partisan, and my own feeble efforts to correct this view are rather cavalierly dismissed.[6] Raoul Berger, the late prolific legal historian, took special pains to condemn Chase, probably because of Chase's anti-Jeffersonian views.[7] It is likely, then, that it will be a long time, if ever, that Chase ceases to be remembered as the "American Jeffreys."[8]

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3. In Chase's manuscript grand jury charge book, from which manuscript Chase appears to have taken his grand jury charges beginning in 1799, there is a reference to John Adams as "our illustrious and patriotic beloved President, the determined foe of vice, the uniform friend of Religion and piety, morality and Virtue. . . . [T]hat wise and vigilant Statesman." Samuel Chase, Grand Jury Charge Book 21 (on file with the Maryland Historical Society).

4. PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 4–5.

5. For that charge leveled against Chase, see, e.g., HOFFER & HULL, *supra* note 2, at 241. *See generally* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 132–33 (suggesting that the testimony offered at Chase's impeachment trial that he sought to pack the jury in the Callender case was specious, given that it was hearsay evidence and the federal marshal who picked the jury denied that any such jury-packing was proposed by Justice Chase).

6. Bruce Ackerman's book, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005), is a thoughtful, carefully researched meditation on the nature of the world of the Framers. I think Ackerman's conclusion that "the charges against Chase were well within the realm of constitutional plausibility," when placed within the appropriate context is arguable, if not incorrect, but Ackerman believes that my treatment of Chase in *The Original Misunderstanding* amounts to "sympathetic indulgence." ACKERMAN, *supra*, at 355 n.37.

7. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 242–51 (1973) [hereinafter BERGER, IMPEACHMENT]; Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873; Raoul Berger, *The Transformation of Samuel Chase: A Rebuttal*, 1992 BYU L. REV. 559. I let Raoul Berger have the last word on this (after all, he did give me my chair), but for the nature of my disagreement with him see Stephen B. Presser, *Et Tu Raoul, or The Original Misunderstanding Misunderstood*, 1991 BYU L. REV. 1475.

8. For this appellation applied to Chase, see, e.g., RICHARD ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 79 (1971) (citing Republican newspapers characterizing Chase's actions as "those of a 'hanging judge,' an American Jeffreys"). The original

It seems likely that Chase will continue to be regarded as a man who, as was charged against Chief Justice Taney, "degraded his age."[9] In what follows, I will explore some of the controversial trials over which Chase presided, some of which led to his impeachment. His conduct on these occasions has been almost universally condemned, but I will argue here that this universal condemnation is too glib.

## I. THE TRIAL OF THOMAS COOPER

Those who accuse Chase of being anti-Jeffersonian are correct, but there were, after all, some reasons for opposing the man from Monticello and his champions. Take, for example, the Jeffersonian scribblers who wrote against Adams. One was Thomas Cooper, an English radical immigrant, who, like several others in his position, was either financed or strongly supported by Jefferson himself.[10] Chase presided over Cooper's trial for seditious libel in 1800. Cooper had accused Adams, in print, of maintaining a permanent army and navy, of borrowing money at too high a rate during peacetime, and of improperly interfering in the affair of Jonathan Robbins.[11] The Constitution provides that appropriations for the Army must be renewed at two-year intervals.[12] This theoretically makes a standing army impossible (which was the reason for the constitutional provision). When Cooper wrote, there was an army in the field mopping up the recent rebellion against federal taxes in eastern Pennsylvania. It was also true that naval vessels had recently been commissioned and were engaged in hostilities during the undeclared

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Jeffreys was George Jeffreys, 1st Baron Jeffreys of Wem, PC (1645–89), infamous for his harsh conduct in presiding over the 1685 "bloody assizes": trials of rebels against James II.

9. For this charge against Taney, see STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 509 (6th ed. 2005) (quoting Sen. Charles Sumner that "the name of Taney is to be hooted down the page of history. Judgment is beginning now; and an emancipated country will fasten upon him the stigma which he deserves . . . . He administered justice at least wickedly, and degraded the age." CONG. GLOBE, 38th Cong., 2d Sess. 1012 (1865)).

10. *See, e.g.*, DUMAS MALONE, PUBLIC LIFE OF THOMAS COOPER 1783–1839 (1926) (describing Jefferson's strong support of Cooper, who was his lifelong friend); PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 131–32 (describing Jefferson's financial support of Callender). John Adams concluded that Jefferson's "patronage of Callender and a host of Republican libelers was not only a blot on his moral character but proof he was a captive of party." MERRILL D. PETERSON, ADAMS AND JEFFERSON: A REVOLUTIONARY DIALOGUE 100 (1976).

11. United States v. Thomas Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865). An edited version of the case appears in PRESSER & ZAINALDIN, *supra* note 9, at 230.

12. U.S. CONST. art. I, § 8, cl. 12 (granting Congress the power to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years").

naval war with France, so Cooper was not totally wrong when he wrote that Adams was maintaining an army and a navy.

Because there had been no formal congressional declaration of war, Cooper was correct that we were borrowing money at a high rate during peacetime. But, as Chase himself pointed out at the trial, there was no doubt that America was engaged in hostilities with France, so, declared or not, was at war.[13] Finally, while the Jeffersonians made much of the "Jonathan Robbins" matter—they claimed Robbins was an American citizen wrongly put into the hands of the British by the order of Adams—recent research has demonstrated that Robbins was actually not an American. Rather, he was an Englishman named Nash suspected of murder aboard an English ship, who was, pursuant to America's treaty with Great Britain, properly turned over to British authorities.[14] Chase's exasperation with Cooper is understandable. Nevertheless, instead of requiring that the government prove the falsity of Cooper's claims beyond a reasonable doubt (the standard employed in at least some contemporary seditious libel trials), Chase insisted that the defendant prove the truth of his accusations "to the marrow,"[15] the standard for the defense in English civil libel actions rather than criminal ones.[16] There may have been some confusion about whether there was any difference between private and criminal libel procedures, and perhaps Chase was not actually in error here. With the burden he imposed on Cooper, however, it is difficult to understand how Cooper's charges, essentially matters of opinion, could ever be proved "to the marrow." Curiously, however, even if Cooper's trial was an instance of Chase's anti-Jeffersonian bias, it was never made an element of Chase's approach to impeachment.

## II. THE TRIAL OF FRIES

There were two criminal trials over which Chase presided on circuit that did become matters that the House found impeachable offenses. The first was the trial of John Fries for treason.[17] Fries was one of the rebels from eastern Pennsylvania who took part in the uprising of 1799 against a federal tax on houses. The uprising is

13. PRESSER & ZAINALDIN, *supra* note 9, at 232.

14. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 230–38 (1990).

15. PRESSER & ZAINALDIN, *supra* note 9, at 235.

16. *See generally* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 122–23 (describing the development of the different standards).

17. Case of Fries, 9 F. Cas. 826 (C.C.D. Pa. 1800) (No. 5126). An edited version appears in PRESSER & ZAINALDIN, *supra* note 9, at 191.

usually called "Fries's rebellion," as Fries was the most notable of those eventually convicted.[18] The federal tax on houses was thought necessary to meet the expenses of the military action taken to quell the Whiskey Rebellion of 1794 in western Pennsylvania. Fries's specific offense in the 1799 fracas was participating in the freeing of several prisoners from federal custody, but the Federalist prosecutors construed this as armed opposition to a federal statute, and thus within the constitutional definition of "levying war against the United States." This definition had been adopted earlier by the circuit courts who tried the 1794 Whiskey rebels. Those western Pennsylvania rebels were resisting a federal excise tax on whiskey, and, for a time, had successfully bullied excise tax collectors into giving up their offices.[19] Those who brought criminal proceedings against the Fries rebels wished simply to invoke this precedent.

When Fries was first brought to trial in 1799, Justice Iredell (probably the most anti-Federalist of the Federalist Justices), sitting with Judge Peters, had permitted Fries's counsel, the Jeffersonian Alexander James Dallas, and his associate William Lewis, to argue to the jury that the Whiskey rebels precedent should be ignored as too harsh for a republic, and that while Fries and his fellows may have committed the common law crime of rescue, they were not guilty of the capital crime of treason.[20] This effort took nine or ten days, during which Lewis and Dallas cited many examples of abuses of the English constructive treason doctrine. In particular, they pointed to English prosecutions for acts encompassing the death of the king in order to argue that under the monarchy, an expansive treason doctrine stifled liberties in ways that, though done at the time of the Whiskey Rebellion, should not be tolerated in our republic. The jury in the first Fries trial nevertheless followed the Whiskey rebels precedent and convicted Fries. Yet Justice Iredell, convinced of the prejudice of one of the jurors in this first Fries trial, persuaded his colleague Peters to go

18. *See generally* PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION (2004) (tracing the history of Fries's Rebellion).

19. For the Whiskey rebels' trials see, e.g., the abridged reports in PRESSER & ZAINALDIN, *supra* note 9, at 175–84. For a recent popular account of the Whiskey Rebellion, see WILLIAM HOGELAND, THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY (2006) (chronicling the events of the Whiskey Rebellion from 1791 to 1795); *see also* THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986) (discussing the Whiskey Rebellion and its social, ideological, political and personal concerns).

20. *See generally* PRESSER & ZAINALDIN, *supra* note 9, at 184–87 (summarizing the first Fries trial). For Justice Iredell and his interesting jurisprudence, see, e.g., WILLIS P. WHICHARD, JUSTICE JAMES IREDELL (2000); William R. Casto, *There Were Great Men Before Agamemnon*, 62 VAND. L. REV. 371 (2009).

along with him and grant Fries's motion for a new trial the next term.[21]

During that next term, Samuel Chase presided with Richard Peters. Chase told Peters that the first Fries trial had gone on for far too long, and that what took nine or ten days should really only have taken two or three.[22] Chase was concerned that there was a large backlog of civil cases as a result of the Fries criminal trial, and he believed it his duty to get those cases tried. In addition, he felt it was wrong of Peters and Iredell to have allowed Lewis and Dallas to cite old "reprobated" English treason cases and to use them to condemn the American treason law laid down in the Whiskey rebels' trials.[23] During the new trial, Lewis and Dallas again relied on the theory that just as English judges had abused the treason doctrines, so did the judges who presided over the Whiskey rebels' trials.

Lewis, Dallas (by implication), Peters, and Iredell all appeared to assume that it was for the jury to determine just what American treason law was, but Chase disagreed. His position was that treason law was settled, that the judges presiding in the Whiskey rebels' trials had gotten it right, and so did Peters and Iredell when they charged the jury in the first Fries trial. For Chase, then, there was no doubt that armed opposition to a statute and armed resistance to the tax laws constituted the capital crime of treason, and that armed rescue of federal prisoners accused of interfering with the collection of taxes came within the definition. In other words, the jury's task was to accept the law formulated by the judges and not to reformulate it on its own.

Accordingly, Chase prepared an opinion making these points and informed Peters that he intended to deliver it before the trial so that the prosecutors, defense counsel, and the jury would all know precisely what the law was, and the limits of its tasks. At the start of the trial, Peters appears to have had no problem with the idea of delivering an opinion. He even remarked that Chase's arguments formulated a better opinion than Peters himself had given in the first Fries trial.[24] Still, Peters warned Chase that he needed to take care in his manner of delivery. Peters was worried that if Lewis and Dallas felt the law was against them, they might, as Peters put it, "take the

21. PRESSER & ZAINALDIN, *supra* note 9, at 187.

22. Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), *quoted in* PRESSER & ZAINALDIN, *supra* note 9, at 188–89.

23. *Id.*

24. *Id.*

studs" and walk off the case.[25] Peters had apparently discerned that Fries's counsel, hoping to make a martyr of their client and (presumably with the aid of some negative publicity about Chase from the Jeffersonian press) position Fries for a presidential pardon. Chase failed to follow Peters's advice and simply distributed his opinion in a perfunctory manner. Just as Peters had predicted, once Lewis and Dallas read Chase's opinion and discerned that Chase was not going to permit them to cite irrelevant English cases and was not inclined to let them argue law to the jury, they walked off the case. They advised their client to spurn the Court's offer to appoint other counsel for him.[26]

This created a bit of a stir, and Chase retired from the courtroom along with Peters and the federal prosecutor, William Rawle.[27] After this somewhat unorthodox maneuver, Chase was begrudgingly persuaded to withdraw his opinion and to allow Lewis and Dallas to make whatever arguments they wished. Chase, wrote Peters later, administered no "emollients [sic]," but did tell Fries's counsel that they were free to proceed in any manner they chose, although, he reminded them, "it would be at the hazard of [their] reputation."[28] Dallas later testified at Chase's impeachment trial that this had the effect of confirming him in his opinion that the correct thing to do was withdraw from the case.[29] Lewis and Dallas then left the court and Fries was on his own, declining Chase's offer to appoint new counsel. Chase then declared, following English practice, that he would act as Fries's counsel and would see that Fries's rights were protected.[30]

Chase's motives may have been pure, but he went so far as to inform the second Fries jury that the first Fries jury had seen fit to convict Fries.[31] When the prosecutor offered to forgo summing up the evidence because Fries had no independent counsel to do it for his side, Chase more or less ordered the prosecutor to proceed, because fairness to the government required it.[32] Fries was convicted a second time. The impeachment charges later brought against Chase accused

25. *Id.* at 190.

26. *Id.*

27. *Id.*

28. *Id.* at 190–91.

29. PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 111 (citing Case of Fries, 9 F. Cas. 924, 941 (C.C.D. Pa. 1800) (No. 5127)).

30. PRESSER & ZAINALDIN, *supra* note 9, at 191, 193.

31. *Id.* at 197.

32. *Id.* at 194.

him of unfairly depriving Fries of counsel and of wrongly issuing an opinion on the law before trial.[33]

When one reads Fries's trial transcript today, it certainly appears that Chase favored the prosecution, and perhaps even that he had concluded before trial that Fries was guilty and deserved death. Still, Chase did make several attempts to protect Fries's rights and offered him opportunities to give his views on the facts.[34] Indeed, there is one account that after being pardoned by President Adams, Fries actually journeyed to Baltimore to thank Chase for conducting such a fair trial.[35] This has always struck me as bizarre, given that Chase had, in no uncertain terms, made clear to Fries that he deserved to die for wrongly imposing his will on his countrymen, and for imposing on them the costs made necessary to crush this second tax rebellion in five years.[36]

Nevertheless, there may have been some basis for Fries to feel that Chase had his best interests at heart. Once the guilty verdict was rendered, Chase, the son of a Maryland minister, said to Fries, "I presume you are a Christian," and proceeded to inform him that the lenient government of the United States would provide him a minister of the gospel. This government-supplied man of God, in the short time remaining to Fries, could assist Fries in sincerely repenting for his illegal and immoral conduct.[37] Chase made it clear to Fries that without such repentance, on the judgment day that would soon be upon him, Fries could be expected to find himself eternally condemned. If he did sincerely repent, however, he could still, God being merciful, expect eternal salvation.[38] Perhaps, then, Chase's concern for Fries's eternal soul forged a bond between the two men.

## III. THE TRIAL OF CALLENDER

Shortly after Fries's trial, Chase journeyed to Richmond to preside over the trial of James Thompson Callender, the author of *The*

33. *See, e.g.*, *id.* at 257 (citing 1 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, IMPEACHED BY THE HOUSE OF REPRESENTATIVES, FOR HIGH CRIMES AND MISDEMEANORS, BEFORE THE SENATE OF THE UNITED STATES 5–8 (1805)).

34. *E.g.*, *id.* at 196 ("John Fries, you are at liberty to say anything you please to the jury.").

35. 9 J. SANDERSON, BIOGRAPHY OF THE SIGNERS OF THE DECLARATION OF INDEPENDENCE 230 (1827), *quoted in* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 14.

36. *See, e.g.*, PRESSER & ZAINALDIN, *supra* note 9, at 198–201 (reproducing Chase's comments to Fries at sentencing).

37. *Id.* at 201.

38. *Id.* ("If you will sincerely repent and believe, God has pronounced his forgiveness; and there is no crime too great for his mercy and pardon.").

*Prospect Before Us*, a diatribe against John Adams. According to Callender, John Adams was a "hoary headed incendiary"[39] bent on malicious destruction of anything good that remained in life and "was a professed aristocrat; he proved faithful and serviceable to the British interest."[40] There were criticisms of many more figures in Callender's book. In fact, there were twenty different items in the indictment brought against him for seditious libel. Yet Callender (or his lawyers) chose to offer a truth defense on only one of the charges: Adams, as a professed aristocrat, had proved serviceable to the British interest.[41]

The later impeachment charges against Chase that had to do with the Callender trial resulted in the most votes for conviction. Raoul Berger believed that Chase should have been removed from office based on his conduct at that trial alone.[42] Callender was another paid hireling of Jefferson,[43] although one who eventually turned on Jefferson, earning a footnote in history as the man who first propagated the notion that Jefferson sired children by his slave Sally Hemings.[44] Historian Richard E. Ellis labeled Callender "perhaps the most scurrilous newspaperman America has ever known."[45] Callender believed that Jefferson had promised him the position of Postmaster at Richmond. When Jefferson reneged, Callender's poison pen turned against his former benefactor.[46] But that was in the future. Back in 1800, when Chase presided over Callender's Richmond trial, the defendant was still very much in Jefferson's camp.

Callender's lawyers, William Wirt, George Hay, and Philip Norborne Nicholas, do not appear to have been overly solicitous with their client's welfare. More likely, they wanted to use the Callender trial to embarrass the dominant Federalist establishment.[47] Alternatively, but not inconsistently, Callender's counsel may have seen the trial as a means of establishing some core principles of

39. *Id.* at 238.

40. *Id.* at 239 (quoting the indictment in Callender's case).

41. United States v. Callender, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709). An edited version of the trial is in PRESSER & ZAINALDIN, *supra* note 9, at 237–47. For a highly romanticized view of Callender, see WILLIAM SAFIRE, SCANDALMONGER: A NOVEL (2000).

42. *See generally* BERGER, IMPEACHMENT, *supra* note 7, at 234–61 (critiquing Chase's conduct at the Callender trial).

43. PETERSON, *supra* note 10, at 98.

44. The Jefferson Monticello, *Thomas Jefferson and Sally Hemings: A Brief Account*, http://www.monticello.org/plantation/hemingscontro/hemings-jefferson_contro.html (last visited Mar. 6, 2009).

45. ELLIS, *supra* note 8, at 78.

46. PETERSON, *supra* note 10, at 98.

47. *See, e.g.*, PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 134–35 (suggesting that Callender's lawyers cared little for their client, but much more for the Jeffersonian cause).

Virginia jurisprudence. As indicated above, they chose to present a substantive defense to only one of the charges brought against Callender.[48] The federal seditious libel statute under which Callender had been prosecuted provided that truth was a defense, and that the jury was to be the judge "of law and fact, as in other causes."[49] Wirt, Hay, and Nicholas offered only one witness to prove the truth of this charge: one Colonel Taylor, a notable Jeffersonian partisan and constitutional theorist.[50]

Chase must have understood that Colonel Taylor was there to score political points against Adams in favor of Jefferson. Accordingly, he required that Colonel Taylor's proposed testimony be reduced to writing so that he could determine whether it was appropriate. Reluctantly, Callender's counsel complied, and it appeared that Colonel Taylor was going to testify that from his reading of Adams's constitutional scholarship, he drew the conclusion that Adams believed that the British constitution, which combined aristocracy, monarchy, and democracy, was the best yet formed.[51] From this, Callender charged, one could presumably conclude that Adams was a "professed aristocrat." Colonel Taylor was also prepared to testify, from his own knowledge, that as president of the Senate, Adams had cast a tie-breaking vote against a measure that would have sequestered British property in the United States. From this, Wirt, Hay, and Nicholas urged, one could properly conclude that Adams "proved faithful and serviceable to the British interest."[52]

Still, Chase rejected Colonel Taylor's proffered testimony. This move has been harshly criticized; Raoul Berger in particular takes it as evidence that Chase was a prejudiced jurist who deserved to be impeached.

As far as I know, no other scholar has defended Chase's conduct in this regard, but I do think a defense is possible: the same defense Chase gave at his impeachment trial before the Senate. Chase pointed out that he would have been perfectly willing to admit Colonel Taylor's testimony, but that the prosecutor objected to the evidence as

48. For the report that Callender's counsel chose only to defend him on this one charge, see, e.g., PRESSER & ZAINALDIN, *supra* note 9, at 264 (reproducing Chase's statement at his impeachment trial).

49. Act for the Punishment of Certain Crimes § 3, 1 Stat. 596 (1798), *reproduced in* PRESSER & ZAINALDIN, *supra* note 9, at 227.

50. *See* ACKERMAN, *supra* note 6, at 206–08 (discussing Col. Taylor as a Jeffersonian partisan).

51. *See generally* PRESSER & ZAINALDIN, *supra* note 9, at 238–40 (reproducing the report of the Callender trial).

52. *Id.*

inappropriate and prejudicial, which required Chase to rule whether it was admissible. This also required Chase to determine what sort of evidence would actually support the truth of the charge that "Adams was a professed aristocrat; he proved faithful and serviceable to the British interest."

Chase carefully examined the two phrases separated by the semicolon and concluded that it certainly could not be libel to accuse anyone of being a "professed aristocrat" because there was nothing wrong with simply professing aristocracy. Similarly, it could not be libel to accuse someone of proving "faithful and serviceable to the British interest"; there was nothing wrong with paying homage to another country so long as one did not betray the interests of one's own country. To take the two phrases together, however, was surely to imply Callender's view that Adams's professed aristocracy led him to be an enemy to the democracy of his own country and to favor British interests over American ones. In other words, to combine the two phrases was to imply that Adams had a traitorous motive in casting his vote against the sequestration act. The statement amounted to criminal libel because it suggested that the then-Vice President was a traitor. Being a traitor was of course criminal, and the accusation of criminality was libel.[53]

Neither Colonel Taylor nor anyone else had been brought forward to testify to Adams's motive in voting against the sequestration act, and, according to Chase, this was a fundamental flaw in the attempt to prove the truth of Callender's statement. Only with some proof of improper motive could the defense of truth be attained. Without evidence on motive, it made no sense to admit Colonel Taylor's testimony because it would not form an adequate defense of the truth of the statement. It would even be prejudicial to admit Colonel Taylor's testimony because the jury might be misled into believing that evidence of truth had been offered when a crucial element (motive) was missing. According to the rules of evidence, which forbid the admission of prejudicial or irrelevant evidence, Chase believed he had no choice but to bar Colonel Taylor's testimony.[54]

The matter of Colonel Taylor's testimony was an exceptionally technical one, but there was another aspect—a bit easier to

53. *See* PRESSER & ZAINALDIN, *supra* note 9, at 238–41 (reproducing Chase's comments at the trial of Callender); *id.* at 264–65 (reproducing Chase's comments at his impeachment trial).

54. Chase rejected Col. Taylor's testimony because it failed to prove the entirety of the charge that Adams was a professed aristocrat who proved serviceable to the British interest. Despite the suggestions by Hoffer and Hull to the contrary, this was not because "as far as [Chase] could determine, the testimony would go to only one of the counts against Callender." HOFFER & HULL, *supra* note 2, at 230.

understand—of Chase's alleged misconduct at the Callender trial that became an important element of the impeachment charges brought against him. This was the brouhaha surrounding the famous "Virginia Syllogism" offered by Wirt, Hay, and Nicholas at the trial.[55] The three attorneys offered no substantive defense to nineteen of the twenty charges brought against Callender. This meant, of course, that Callender could have been convicted on any of the other charges, which certainly would have been sufficient to imprison him. Still, what Wirt, Hay, and Nicholas actually seemed to have wanted, for political purposes or even for the ultimate defense of their client, was to convince the jury to reject a guilty verdict on the grounds that the federal sedition law was unconstitutional.

It was the Jeffersonian position at this time that the First Amendment included a prohibition on any federal seditious libel statute at all, because such a statute arguably restrained speech.[56] This was a relatively dubious proposition; in England at least, freedom of speech had never been conceived as giving one the right to libel others with accusations of criminal conduct.[57] The Jeffersonians also believed that there was no such thing as a federal common law of crimes.[58] Thus, seditious libel, as a common law crime, could only be the subject of a federal statute if the Constitution granted the power to legislate regarding crimes at common law. Given the Jeffersonian belief that the powers of the federal government should be narrowly construed and limited to those enumerated in the Constitution, one ought not to imply this broad common law of crimes power. Therefore, a fortiori, given the First Amendment, which prohibited any

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55. *See* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 136–40 (discussing the "Virginia Syllogism" and its significance).

56. *See generally* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (rev. ed. 1985) [hereinafter LEVY, EMERGENCE OF A FREE PRESS] (discussing the history of seditious libel doctrine in the United States, and, in particular, the emergence of Jefferson's and Madison's opposition to seditious libel, particularly at the federal level); LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963) (discussing the convoluted views of Jefferson regarding civil liberties).

57. *See generally* LEVY, EMERGENCE OF A FREE PRESS, *supra* note 56.

58. According to Jefferson, in a 1799 letter he wrote to Edmund Randolph:

> all that the Federalist "monocrats," "aristocrats," and "monarchists" had done to harass the people–the creation of the bank of the United States, Jay's Treaty, the imposition of a standing army and navy, and the passage of the Sedition Act–were "solitary, inconsequential timid things in comparison with the audacious, barefaced and sweeping pretension to a system of law for the U.S. without the adoption of their legislature, and so infinitely beyond their power to adopt."

9 WORKS OF THOMAS JEFFERSON 73 (P. Ford ed., 1904), *quoted in* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 67–68.

congressional restrictions on the freedom of speech, a federal law regarding seditious libel was impermissible. This was the argument that Wirt, Hay, and Nicholas wished to make to Callender's jury. They hoped to convince the jury that the federal seditious libel statute exceeded congressional powers, thus it ought to be regarded as unconstitutional, and, accordingly, Callender should be found not guilty.[59]

It was a bold argument, and Chase would have none of it. When it became clear that Callender's counsel wished to argue the constitutionality of the seditious libel statute, Chase demanded that they prove that the jury could judge constitutionality.[60] This led to the statement of the "Virginia Syllogism," which ran roughly as follows:

1. In Virginia the jury is the judge of law and fact.

2. The constitutionality of a statute is a question of law.

3. Therefore, in Virginia, the jury is the judge of the constitutionality of a statute.[61]

Upon hearing the syllogism, Chase advised Callender's counsel that it was "[a] *non sequitur*, sir,"[62] and he refused to allow them to argue the unconstitutionality of the statute to the jury. Chase explained that because Article III vested the judicial power in the courts, and because the question of constitutionality was undeniably part of the judicial power, it was for the court rather than the jury to address constitutional questions.[63] This anchoring of the power of judicial review in the judiciary tracked the arguments of Federalist 78. Significantly, John Marshall was in the audience for the Callender trial[64] and later used similar language in his defense of judicial review in *Marbury v. Madison*.[65]

After one of Callender's lawyers failed to convince Chase of the validity of the Virginia Syllogism, the two others rose seriatim to try again. Chase rebuffed them as well, having earlier disparaged the three as "young gentlemen"[66] who appeared not to understand the proper functions of judge and jury. Chase's "rude and contemptuous"

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59. For an excerpted report of Callender's counsel's arguments on this point, see PRESSER & ZAINALDIN, *supra* note 9, at 241–43.

60. *Id.* at 241.

61. See *id.* at 241–43 for statements of the Virginia Syllogism by Wirt, Hay, and Nicholas.

62. *Id.* at 241.

63. *Id.* at 243–47.

64. PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 242 n.42 (citing 3 ALBERT BEVERIDGE, THE LIFE OF JOHN MARSHALL 39, 40 n.1 (1919)).

65. 5 U.S. (1 Cranch) 137, 177 (1803) (laying down the foundation of judicial review and stating "[i]t is emphatically the province of the judicial department to say what the law is").

66. PRESSER & ZAINALDIN, *supra* note 9, at 240.

expressions to Callender's counsel were later made part of the impeachment charges brought against him,[67] but it is easy to understand how the irritable Chase could believe he was being toyed with by the Virginians. William Wirt's biographer wrote that Wirt, Hay, and Nicholas "deliberately baited the easily irascible Chase; anticipated his explosive response; and planned from the outset to walk out of the courtroom and leave Callender to his fate."[68]

Still, the logic of the Virginia Syllogism seems indisputable, if the jury was really to be both the judge of law and fact. And, indeed, there is no denying that the Virginia practice at the time gave the jury wide discretion, even if that meant that the jury would essentially make up the law as it went along. This was the position that Randolph, who led the eventual impeachment proceedings against Chase in the House, maintained at Chase's Senate trial.[69] Yet for Chase, either because of his experience in England[70] or his experience as a lawyer and judge in Maryland (where the jury was kept on a tighter leash), the role of the jury was supposed to be much narrower.[71] For some Americans, including many Virginians, the jury needed wide discretion to safeguard against an abusive government. As in the Zenger trial and the Seven Bishops trial before it, it was necessary for the jury to have the power to nullify a statute thought excessively arbitrary or inappropriate. For Chase, though, the jury's possession of this power allowed it to nullify the rule of law itself, something that to him seemed wrong.[72]

The truism that the jury was to be the judge of law and fact, then, meant something different to Chase than what it meant to the Virginians. Perhaps the best way to explain the truism and reconcile it with Chase's belief that it was the jury's task to take the law from the judge is to suggest that for Chase, the jury was to render what we might describe as "the law of the case": the manner in which the jury

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67. *Id.* at 258.

68. PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 134 (quoting 1 JOHN P. KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT 81–84 (1849)).

69. For Randolph's suggestions that the jury in a criminal case must be free to decide for itself what the law was, and should be free to ignore precedent, see the edited version of his argument at the trial of Chase, reproduced in PRESSER & ZAINALDIN, *supra* note 9, at 270–72.

70. Chase spent almost a year in England from September 1783 to August 1784. *See generally* PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 46–47.

71. For the manner in which Chase's views—influenced by English and Maryland practice—differed from those of the lawyers in Pennsylvania who defended Fries, see *id.* at 111–12. For the narrow nature of the role of the jury in English law, see, e.g., *id.* at 137–38.

72. For Chase's comments at his impeachment trial that the jury did not possess a "dispensing power" over the law and that it was their duty to take the law from the court, see PRESSER & ZAINALDIN, *supra* note 9, at 261.

applies the law as given by the judge to the facts of the particular case. For Chase, this was all that was meant by the phrase the jury was to be the judge "of law and fact." The jury had no right to reject the law pronounced by the judge, and thus had no right to declare that the law enunciated by the judge amounted to an unconstitutional mandate. Such activity would have been an impermissible usurpation of the judicial role.[73]

## IV. THE BALTIMORE GRAND JURY CHARGE

Chase's fear that the Jeffersonians were trifling with the rule of law was also evident in his infamous charge given to a Baltimore Grand Jury in 1803, the act that seems to have put in motion his impeachment proceedings.[74] With Jefferson's victory in 1800, Chase feared for the rule of law in general and the independence of the judiciary in particular. Three developments most concerned him: (1) the 1802 Judiciary Act, in which the Jeffersonians abolished the federal circuit courts created in the last days of the Adams Administration; (2) the abolition of two courts in Maryland—also an effort to consolidate Jeffersonian power over the judiciary, this time at the state level; and (3) the institution of universal male suffrage in Maryland.[75]

To take the last development first, Chase believed that universal suffrage was dangerous because it would result in the franchise being exercised by men who did not have "property in, a

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73. For further thought on Chase's narrow conception of the role of the jury, prompted by his desire to preserve the rule of law, see generally PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 136–38. Demonstrating his belief that only judges were competent to pass on the constitutionality of a statute, Chase wrote:

> The Judicial power of the United States is *coexistent, co-extensive,* and *coordinate* with and *altogether independent of* the *Legislature,* & the *Executive,* and the Judges of the Supreme and District courts are bound by their *Oath of Office* to regulate their Decisions *agreeably to the Constitution.* The Judicial power, therefore, are the only proper and *competent* authority to decide whether any Law made by Congress or any of the State Legislatures is contrary to or in Violation of the *Federal* Constitution.

Chase, *supra* note 3, at 12. Similar language appears *id.* at 28–29.

74. For an edited version of the Baltimore grand jury charge, see PRESSER & ZAINALDIN, *supra* note 9, at 252–54. For the original manuscript of the Baltimore grand jury charge, see Chase, *supra* note 3, at 38–44. For the assertion that the Baltimore grand jury charge triggered Chase's impeachment, see, e.g., ELLIS, *supra* note 8, at 79–82. As was the practice at the time, Chase was not seeking to get the grand jury to return any particular indictment but was generally instructing them on their responsibilities.

75. For a discussion of what prompted the Baltimore grand jury charge, and the philosophy there expressed, see PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 143–46.

common interest with, and an attachment to, the community."[76] The risk of allowing such men to vote was that their votes could be bought by demagogues or those who wished to corrupt the government to serve selfish financial ends. To allow universal suffrage, Chase told his grand jurors, "will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments."[77] The "abolition of the office of the sixteen circuit judges," coupled with universal suffrage, Chase warned, "will, in my judgment, take away all security for property and personal liberty," because the "independence of the national judiciary is already shaken to its foundation, and the virtue of the people alone can restore it."[78]

While Chase didn't explain exactly how it happened, he told the Baltimore grand jurors that these Jeffersonian reforms had come about because of

> visionary and theoretical writers [Paine and Jefferson, influenced perhaps by Locke], asserting that men in a state of society are entitled to exercise rights which they possessed in a state of nature; and the modern doctrines by our late reformers, that all men in a state of society, are entitled to enjoy equal liberty and equal rights . . . .[79]

For Chase, who was presumably influenced by Hobbes:

> [T]here could be no rights of man in a state of nature, previous to the institution of society . . . the great object for which men establish any form of government is to obtain security to their persons and property from violence; destroy the security to either and you tear up society by the roots.[80]

Chase told the grand jury that he "cheerfully subscribed" to the "doctrine of equal liberty and equal rights," but for him this meant only that "every citizen, without respect to property or station, should enjoy an equal share of civil liberty; an equal protection from the laws, and an equal security for his person and property."[81] It seemed to Chase that the Jeffersonians had put equal protection from the laws and equal security for person and property in danger. Chase asked: "Will justice be impartially administered by judges dependent on the legislature for their continuance in office, and also for their support?"[82] He ended his charge with the query: "Will liberty or property be protected or secured, by laws made by representatives chosen by

76. PRESSER & ZAINALDIN, *supra* note 9, at 252, 254.
77. *Id.* at 253.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 254.
82. *Id.*

electors, who have no property in, a common interest with, or attachment to the community?"[83]

The blatant criticism of the Jeffersonians in Congress and in Maryland was enough to trigger impeachment proceedings that had long been contemplated against Chase, from the time that he moved against the first Jeffersonian scribbler. Furthermore, getting rid of Chase would open the door to replacing him with a more pliant Jeffersonian jurist from Maryland already picked out by the Jeffersonians.[84] President Jefferson gave the go-ahead, although seeking a more-or-less Nixonian plausible denial by trying to keep his involvement in the effort to remove Chase unknown.[85]

In the meantime, Chase sought John Marshall's assistance in declaring the 1802 Judiciary Act unconstitutional, since it removed judges by a means other than the constitutionally specified impeachment procedure.[86] This strikes me as a plausible argument, and although Marshall may have been initially inclined to oppose what both he and Chase perceived as the unconstitutional actions of the Jeffersonian-controlled legislature, eventually Marshall backed off, probably seeking to avoid an out-and-out clash with the Jefferson Administration that he might lose. Avoiding such a clash seems to have been what Marshall did in *Marbury v. Madison*,[87] in which he ruled that the judiciary had no power to compel Jefferson's Secretary of State to grant commissions, even though the withholding was clearly contrary to law. In the end, the Marshall Court eventually upheld the 1802 Judiciary Act in *Stuart v. Laird*.[88]

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83. *Id.*

84. *See* ELLIS, *supra* note 8, at 80 (suggesting that Chase's successor would have been Joseph Hooper Nicholson, a Republican Congressman from Maryland).

85. *See id.* ("[T]here can be no doubt that the President was giving his consent to having Chase removed. It appears that Jefferson expected the impeachment of Chase to be hazardous politically, for he added, significantly, 'for myself, it is better that I should not interfere.' ").

86. Chase's plea to Marshall is contained in Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *in* GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801–1815, at 172, 172–77 n.182 (1981). A copy of the letter is available at the New York Historical Society, and the letter can also be found in 6 THE PAPERS OF JOHN MARSHALL 109, 109–16 (Charles F. Hobson et al. eds., 1990). The 1802 Judiciary Act abolished the circuit courts (which had been staffed by Federalist judges) created by the Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 which was passed in the waning days of the Adams administration and, as indicated earlier, called thereafter the "Midnight Judges" Act.

87. 5 U.S. (1 Cranch) 137 (1803).

88. 5 U.S. (1 Cranch) 299 (1803). For a perceptive review of the response of Marshall and the other Justices to the Jeffersonians' conduct, and a careful comparison of *Marbury* and *Stuart*, see ACKERMAN, *supra* note 6, at 163–98.

## V. PRINCIPLES OF CHASE'S JURISPRUDENCE AND HIS QUALITIES AS A JUDGE

Chase, unlike Marshall, was never one to avoid a fight. Perhaps this was because Marshall was a more adept judicial politician who chose only the battles he knew he could win. Still, Chase seemingly never waivered in his principles, while Marshall, at the time of Chase's impeachment, openly acknowledged that review of the constitutionality of statutes should not be exercised by the judiciary, but by Congress alone,[89] an episode rarely acknowledged by those who ritually praise Marshall as the father of American judicial review.

While the Jeffersonians sought to remove Chase, it is intriguing to note that some aspects of Chase's jurisprudence tracked those of at least some Jeffersonians. In 1798, in *United States v. Worrall*,[90] Chase made clear his belief that there was no federal common law of crimes, and that the federal government could not indict and prosecute miscreants without a federal statute defining the crime and affixing a punishment. His opinion created quite a stir with his fellow Federalist judges, who may have better understood the likelihood of measures being soon taken to bring Jeffersonian editors and publishers to trial on seditious libel charges based on the common law.[91]

In *Worrall*, the defendant had unsuccessfully sought to bribe the federal Commissioner of Revenue, and the jury convicted the defendant. Immediately thereafter, the defendant's counsel moved to have the verdict set aside on the grounds that no statute made the attempt to bribe the Commissioner of Revenue a crime, even though other federal statutes prohibited bribery of other federal officials. Judge Peters, sitting with Chase, had no problem with the indictment in *Worrall*, as he believed that every government, state or federal, could punish such crimes as a matter of self-defense.[92] Chase differed with his colleague, explaining that there was no statute that adopted the common law at the federal level, and because the common law of

89. The story is told by Marshall's great biographer, Albert Beveridge, in 3 THE LIFE OF JOHN MARSHALL 176–79 (1919).

90. 2 U.S. (2 Dall.) 384 (1798), *reprinted in* PRESSER & ZAINALDIN, *supra* note 9, at 214–20.

91. For a discussion of the controversy over the federal common law (the existence of which was affirmed by all of the Federalist judges, save Chase), see generally PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 67–99.

92. PRESSER & ZAINALDIN, *supra* note 9, at 220.

the states differed, there was no sure body of jurisprudence from which to draw a federal common law of crimes.[93]

When it became clear that Peters and Chase disagreed on the matter, the judges suggested that the defense appeal the question of the legitimacy of a federal common law of crimes to the Supreme Court for resolution. By this time, however, all of the members of the Supreme Court, save Chase, had indicated acquiescence in the idea of federal common law crimes. Presumably understanding this, Worrall's counsel declined to appeal and insisted that Peters and Chase come to some agreement.[94] Peters and Chase then retired. Wharton, the editor of the early federal cases, speculated that they consulted the other Supreme Court Justices, who made clear their belief that an indictment at common law in the federal courts was perfectly permissible.[95] Chase then acquiesced in Peters's view, and Worrall was sentenced.[96] If Chase performed a *volte-face* on the issue of common law crimes, it suggests some malleability in his jurisprudence, if not a rather stark submission to political expediency. At least one distinguished scholar, the late Kathryn Preyer, believed that Chase still maintained that there was no federal common law of crimes.[97] His behavior in the *Worrall* case, however, suggests otherwise. Legal historian Morton Horwitz argues that *Worrall* represents a difference of opinion between Peters and Chase over the nature of law itself, with Chase believing that even the common law represented positive acts of a sovereign state, while Peters believed that the common law partook of the law of nature and had an eternal quality.[98] There might be something to Horwitz's argument, although in what was arguably Chase's most famous (or most notorious) decision, *Calder v. Bull*,[99] Chase revealed himself a believer in what I

93. *Id.* at 218–20.

94. *Id.* at 220.

95. FRANCIS WHARTON, *Trial of Robert Worrall*, *in* STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 190, 199 n.* (1849).

96. PRESSER & ZAINALDIN, *supra* note 9, at 220.

97. Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 234–36 (1986).

98. For information on Justice Chase and *Worrall*, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 11–12 (1977). For information on the belief of an "instrumental conception of law" held by early judges, see *id.* at 16–30.

99. 3 U.S. (3 Dall.) 386 (1798).

have called "supra-constitutional principles,"[100] drawn from something that looks a whole lot like natural law itself.[101]

To be fair to Chase, he may not have understood that in his *Calder* opinion he was necessarily trafficking in natural law; rather, he was exploring the basic meaning of the rule of law. According to Chase (in words extraordinarily similar to those employed contemporaneously by the great Jeffersonian Virginia judge Spence Roane), there are certain great principles that circumscribe what any legislature can do. These include maxims such as no man can be judge and party in his own case, no act legal when performed can later be prosecuted as a criminal violation, and no legislature can simply take the property of A and give it to B.[102] Roane called such restrictions on legislatures "those great rights and principles, for the preservation of which all just governments are founded."[103] Chase described them in *Calder* as flowing "from the very nature of our free Republican governments."[104]

Chase's belief reflects a deep reverence for the protection of individual rights and private property, also reflected in his 1803 Grand Jury Charge. But it is also true that his notion of binding "supra-constitutional principles" was difficult to cabin and opened a wide swath for determining legislative acts unconstitutional without the benefit of express constitutional provisions. Accordingly, strict constructionists such as Robert Bork have condemned Chase's *Calder* opinion as the first "substantive due process" decision, leading eventually to such regrettable judicial behavior as that manifested in *Dred Scott* and *Roe v. Wade*.[105]

For Chase, an understanding of history was probably the guide to the principles that limited all legislatures, and thus for him his "supra-constitutional principles" were not a license for judicial discretion in the same manner as was a historically indeterminate federal common law of crimes. Thus, Iredell, who dissented from Chase's view in *Calder* on the grounds that Chase was advocating an

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100. *See* Stephen B. Presser, *The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer*, 4 LAW & HIST. REV. 325, 327 (1986) (arguing that early federal judges employed supra-constitutional theory in deciding cases).

101. On the natural law aspects of Chase's opinion in *Calder v. Bull*, see Stephen B. Presser, *Should a Supreme Court Justice Apply Natural Law?: Lessons from Earlier Federal Judges*, 5 BENCHMARK 103, 104–06 (1993) [hereinafter Presser, *Natural Law*].

102. *Calder*, 3 U.S. at 387–89.

103. Currie's Adm'rs v. Mut. Assurance Soc'y, 14 Va. (4 Hen. & M.) 315, 349 (1809), *reprinted in* PRESSER & ZAINALDIN, *supra* note 9, at 360–64.

104. 3 U.S. at 388.

105. For Bork's criticism of *Calder v. Bull* and substantive due process, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 19–20, 31–32 (1990).

unrestrained and uncertain view of natural law, probably missed the mark.[106] For the most part, Chase had a limited conception of the judicial role. Still, he was certainly capable of sweeping statements. For example, in *Ware v. Hylton*,[107] he declared (delivering a loss to John Marshall in the only case Marshall argued before the Supreme Court) that a Virginia law could not trump a federal treaty because Article VI's Supremacy Clause operated retrospectively to "prostrate" all state laws in conflict with lawful acts of the federal government.

Chase had originally opposed the Federal Constitution because he believed it too tightly constricted the sovereignty of the states.[108] His opposition to the federal common law of crimes, which he shared with the Jeffersonians, may have flowed from that early view. When it came to fundamental matters of national sovereignty, however, such as a treaty or enforcing the Alien and Sedition Acts, Chase was a reliable supporter of the Adams Administration. Indeed, in a letter seeking appointment to the federal bench, Chase promised President Washington that, if nominated, he would "exert [himself] to execute so honourable and important a station with integrity, fidelity, and diligence," and that the father of his country would "never have the occasion to regret the confidences bestowed in me."[109] This fierce loyalty to the Federalist administrations might even explain why Chase was willing to reverse himself on the issue of common law crimes in *Worrall,* to align himself with his Federalist judicial brethren and his broad construction of federal prerogatives in *Ware v. Hylton.*

## CONCLUSION

Although Marshall still tends to receive most of the credit for judicial review, we are increasingly appreciating that several of Marshall's predecessors assumed the existence of the doctrine. Hamilton wrote about it in Federalist 78, and Chase was willing to go further in its invocation (to nullify the 1802 Judiciary Act, for

106. On Iredell's dissent from Chase's views in *Calder v. Bull*, see Presser, *Natural Law*, *supra* note 100, at 106–08.

107. 3 U.S. (3 Dall.) 199, 237 (1796).

108. For Chase's early opposition to the proposed Federal Constitution, see, e.g., PRESSER, ORIGINAL MISUNDERSTANDING, *supra* note 1, at 22–24.

109. Letter from Samuel Chase to George Washington (Sept. 3, 1789) (on file with the Historical Society of Pennsylvania); *see also* Letter from Samuel Chase to Tench Coxe (Apr. 2, 1793) (on file with the Historical Society of Pennsylvania) (indicating Chase's desire to "quit the state service and to be employed by the General Government," where he promised to render the government "every support, that office and duty may require").

example) than Marshall himself proved willing to go.[110] Perhaps Marshall, a subtler politician than Chase, and a Chief Justice who molded his Court into a body which effectively championed the hegemony of the federal government over the states, deserves his fame as the greatest of the Justices.[111] At the very least, however, Chase deserves a place higher than his usual designation as an "American Jeffreys."

There is no doubt that Chase was a partisan, but in his era, after all, the idea of a legitimate political opposition was not generally accepted, and he believed his partisanship necessary to preserve the republic and the rule of law from Jeffersonian folly and mendacity. The Jeffersonians won, of course, becoming the victors with the spoils of writing history. Over time, however, Chase's views on the requirements of the rule of law, the allocation of power between judge and jury, judicial review, and the supremacy of the federal government became accepted wisdom and part of what Ted White called the "American Judicial Tradition."[112] If Chase's personal shortcomings (his political partisanship and quick temper) ought to deprive him of a place in the pantheon of truly great American Justices, perhaps he still deserves to be classified as an astute, learned, principled, and wise one.

110. Joseph Story agreed with Chase that the 1802 Judiciary Act was unconstitutional since it deprived judges of their position without impeachment. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 495 n.2 (1833), *reprinted in* ACKERMAN, *supra* note 6, at 180.

111. There is, however, some revisionist opinion on Marshall's greatness. *See, e.g.*, Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001) (arguing that the Marshall Court decisions were not as significant as commonly believed); Stephen B. Presser, *Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall*, 43 WM. & MARY L. REV. 1495 (2002) (arguing that Marshall deserves less historical attention and other early Supreme Court Justices, such as Chase and Story, deserve more).

112. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (3d ed. 2007).