Chapter 9

The Verdict on Samuel Chase and His “Apologist”

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Was the appointment of Samuel Chase to the United States Supreme Court “one of the most regrettable nominations in the Court’s history,”¹ or did his jurisprudence make an important and positive contribution to the development of the young republic? Until recently, virtually every historian of the early Court dismissed Chase as the “bad boy” of the Ellsworth Court²—a rabid partisan, a bully, an American Jeffreys, or worse. He was, of course, the only United States Supreme Court justice ever to be impeached, and though the impeachment did not result in his removal from office by the Senate because the required two-thirds majority could not be cobbled together, a majority of senators did vote to convict him on some of the charges. At least one prominent reviewer of Chase’s record, Raoul Berger, has flatly declared that the Senate should have thrown him off the bench.³

One can often make a lot of money in the stock market by doing what everyone else is not, and, similarly, young academics seek often to make splashes by writing revisionist works. So it has been with me and Samuel Chase. No one, I figured, when I was young, and when I began writing the legal history of the Third Circuit,⁴ for which Chase served one important term as circuit justice, could have been as bad as Chase was then made out to be. Moreover, there had been times in our history when he appeared to be highly regarded,⁵ and I thought that this made him a ripe candidate for a revisionist work. I finally published the book-length work in 1991, The Original Misunder-
standing: The English, The Americans, and the Dialectic of Federalist Jurisprudence, and, as befits a revisionist effort, it garnered a variety of interesting responses.

I thought I would use this forum, then, not only to describe the work of Chase but to examine and reply to the critics of my book in the hope that such an effort might further contribute to the ongoing assessment of the early republic’s Supreme Court and its most controversial judicial figure. In what follows I will begin by setting forth Samuel Chase’s relevant biographical facts, and I will go on to present the assertions I made evaluating his career, reviewers’ responses to those assertions, and what all of this suggests with regard to conclusions to be drawn about constitutional jurisprudence on the pre-Marshall Court, about the character and value of Samuel Chase, about the perils of working the intersection of law and history, and about future avenues that scholars might profitably pursue.

The Facts

Samuel Chase of Maryland (b.1741–d.1811; associate justice of the United States Supreme Court, 1796–1811) signed the Declaration of Independence, served in the Revolutionary War Congress, and served as a judge on the Maryland bench as well as the federal judiciary. His political and judicial career was constantly the subject of criticism and controversy, flowing from two undeniable facts. First, he had a personally rough manner, he denounced in no uncertain terms those who disagreed with him, he was not given gladly to suffering fools, and his hair-trigger temper could be easily ignited by those who sought to discredit or embarrass him. Second, there was admittedly much with which his critics had to work. There was at least the appearance (if not the reality) of impropriety in his financial dealings, at least early in his career. He appears to have profited from his state legislative service through his participation in the issuance of paper money in Maryland, and from his congressional service by speculating in the flour futures market at a time when he may have known that Congress was going to make significant wartime orders for bread. His political associations, say his critics, turned more on personal advantage than philosophical conviction, with the best evidence being perhaps that he was a strong and vocal opponent of the federal Constitution, but, once the
document had been approved, he quickly sought appointment to the new federal government.

It was not uncommon for the leading men of late-eighteenth-century America to profit from their public service, to, as it were, do well by doing good—even John Marshall was not above engaging in this art—but Chase appears to have gone a bit beyond the norm. Nevertheless, if we are about the business of judging his jurisprudential contribution and not simply of seeking to single him out for censure because of his business dealings, it is what he did as a Supreme Court justice that will determine in what regard we ought ultimately to hold him. There is much in his judicial record that shows proof of at least his brilliance, if not his true eminence.

For example, in his maiden Supreme Court opinion in Ware v. Hylton (1796), the longest of the four seriatim opinions delivered by the justices in the case, Chase engaged in an exhaustive study of civilian treatises on the law of nations to solve an exceptionally politically sensitive constitutional problem. A Virginia statute passed in 1777 had directed that debts due to British creditors could be obliterated by paying them into the loan office in Virginia (in grossly depreciated Virginia currency), but this conflicted with a provision in the Treaty of Paris. That pact, which ended the Revolutionary War, and which was signed in 1783, provided that no legal impediments would be permitted to defeat the claims of British creditors against American debtors, and that those debts were payable in sterling. In Ware a British creditor, relying on the treaty and the supremacy clause of the United States Constitution, sought to collect a debt allegedly discharged by the Virginia statute of 1777. The Virginia debtor’s position, that the Virginia statute was a valid exercise in state sovereignty that the federal treaty could not override, was argued before the Supreme Court by none other than John Marshall. Marshall’s argument was rejected by Chase and his fellows, however.

In his Ware opinion, which reflected not only exhaustive study of the relevant treatises but also the theory of popular sovereignty, Chase held that the plain meaning of the treaty and the supremacy clause governed, and that even though Virginia possessed the power to nullify the debt in 1777, the treaty in 1783 had reinstated it. Chase noted that the effect of his decision was to make the debtor liable to paying twice (since he had already paid into the Virginia loan office and was now liable to pay a second time, to the British creditor), but that the
debtor had a claim for just compensation under the Constitution. Chase’s opinion was a “tour de force” that not only rested on the law of nations, the construction of treaties, and the nature of popular sovereignty but also drew heavily on the concept of “justice” itself. His opinion also has been taken by commentators to have performed the valuable service of settling the question of whether the supremacy clause would be construed by the courts as meaning what it said, or whether exceptions would be carved out to meet the political demands of powerful states.

In his most widely quoted Supreme Court opinion, that in *Calder v. Bull* (1798), Chase explored what might be regarded as the natural-law basis for the federal Constitution. In that case he explained that there were some supraconstitutional principles that circumscribed any legislature, whether or not such principles had been explicitly spelled out in the written fundamental law. Chase gave only two examples in his opinion—making a person judge and party in his or her own case, and taking A’s property and giving it to B without any compensation to A—but his work has been taken to have established the doctrine now referred to as “substantive due process,” the reading into the Fifth or Fourteenth Amendment’s “due process” clause guarantees of particular rights or liberties not expressly found elsewhere in the Constitution, rights or liberties generally drawn from some sort of conception of natural-law theory.

This sort of approach to constitutional law, recently favored by many advocates of “liberal” constitutional theory, has always been opposed in our history by judicial conservatives, who have maintained that “strict construction” or “original intent” is more of a certain guide to appropriate constitutional interpretation. Curiously, however, Chase is also one of the founders of the “strict constructionist” approach. While Chase may have been revealing a belief in natural law in *Calder v. Bull*, he apparently thought that the natural-law basis for constitutional jurisprudence was a very limited one. Many, if not all of his Federalist fellows believed that the natural-law basis of the federal government was broad enough to include the jurisdiction to punish crimes that had not yet been prohibited by federal statute, but in one of his most notable opinions while riding circuit, that in *United States v. Worrall* (1798), Chase became the only late-eighteenth-century federal judge to reject this theory of the “federal common law of crimes.” The argument of the champions of the fed-
eral common law of crimes was that any government had a sort of natural right to self-defense, and thus the federal government could punish crimes such as bribery or seditious libel even before Congress prohibited such particular conduct by means of a specific statute. Chase apparently believed that these matters of the criminal law were more policy choices than they were immutable principles and, consequently, that for the federal courts to punish crimes without statutes would create too much uncertainty and injustice in the law. His view on this point was eventually upheld by the Supreme Court, in the early nineteenth century.

Riding on circuit, Chase also relied in his opinions on the principle of judicial review to declare unconstitutional acts of Congress void, the principle later famously brought to national attention in Marshall’s opinion in *Marbury v. Madison* (1803). The most important such instance was in the *Callender* trial of 1800, discussed below, a federal prosecution for seditious libel when the defendants’ lawyers sought to get the jury to reject the Federalist statute as unconstitutional. Chase carefully borrowed arguments from Hamilton’s *Federalist* 78 to demonstrate that only the judges—and not the jury—could declare a law void because it went beyond constitutional limits. Marshall was reported to have been in the audience during Chase’s pronouncement on judicial review in *Callender*, and to have adopted some of Chase’s language for use in *Marbury*.

Once he joined the Federalist bench, Chase made pronouncements that clearly indicated that he had become a political as well as a judicial conservative. He found himself impeached by the Jeffersonians as a result of his presiding over several criminal trials and proceedings in which he sought to implement the Adams administration’s attempts to silence what it believed to be destructive and dangerous attacks on the government by rebels and mendacious critics. These trials occurred in Pennsylvania and Virginia when Chase rode circuit in 1800. Most important, perhaps, in Pennsylvania he presided over the second trial of John Fries, a leader in the “Fries Rebellion” or “Hot Water War,” an uprising over federal taxes in eastern Pennsylvania. Before the trial began, Chase distributed a written opinion to counsel and jury in which he stated that he would not permit citation or discussion of English constructive treason cases. Chase’s objective was to forestall the defense from using English abuses to discredit the federal prose-
The two other most notable 1800 circuit cases involved alleged violations of the Federalists’ seditious libel statute passed in 1798. In the Pennsylvania Circuit trial of Thomas Cooper, Chase, when the defendant raised truth as a defense, applied English civil libel rules and required the defendant to prove truth “beyond a marrow.” Since Cooper’s assertions—that the United States had a standing army, that President Adams paid too high a rate of interest during peacetime, and that President Adams improperly interfered in a judicial proceeding involving a murder suspect—could have been construed as matters of opinion that might have gone either way, putting a severe burden of proving truth on Cooper probably ensured his conviction. On the other hand, at least some of Cooper’s charges were demonstrably false, and, under the terms of the statute at least, his conviction was probably not a miscarriage of justice. For this reason, although Cooper’s case has provided fodder for Chase’s critics, it was not made a part of the impeachment proceedings against him.

This was not the case for the other notable seditious libel prosecution over which Chase presided, the 1800 trial of James Thomson Callender in Virginia. Callender, who was perhaps charitably described as a “little reptile,” and who was once ejected from the Virginia legislature for being covered with lice and filth, had written an over-the-top book critical of President Adams, the mildest comment of which was probably that Adams was “a hoary-headed incendiary.” According to most accounts, Chase was handed Callender’s book by his friend Luther Martin (who was to be his principal defense lawyer at the impeachment) when he began the trek by stage to Virginia, he was enraged by what he read, and when he got to Virginia he manipulated the grand jury to secure Callender’s indictment. This story is probably apocryphal, at least insofar as it suggests Chase demanded that no Jeffersonian sympathizers be allowed on the grand
jury, but it was Chase’s conduct at the trial itself, of which we have a clear record, that was to provide some of the most serious impeachment charges against him.

Callender had been indicted on nineteen counts of violation of the seditious libel statute. His lawyers, three aggressive Jeffersonians, after having failed to convince Chase to postpone the trial for a year to allow them to gather more evidence (Chase said that they had failed to demonstrate a need for delay, although he apparently offered a postponement of one month, which they declined) chose to defend Callender by arguing the truth of only one of the charges, and, as indicated above, by trying to get the jury to throw out the federal statute as unconstitutional. In hindsight, it seems clear that they were far more interested in scoring political points off Chase than they were in defending their hapless client. Most probably sensing what was going on, Chase was condescending in his treatment of the three, whom he referred to as “young gentlemen,” refused their only offer of evidence on the probably correct ground that it was of dubious relevance and prejudicial, and, as also indicated earlier, refused to allow them to make the constitutionality argument to the jury, on the grounds that constitutionality, as a matter of law, was for the judge, not the jury. Callender’s lawyers, as had Fries’s lawyers before them (one wonders whether they were imitating the latter’s tactics) stormed off the case. Callender, as Fries had been, was convicted.

At Chase’s trial on the impeachment charges, John Randolph, the fiery manager for the prosecution, sought to portray Chase’s conduct in the Callender trial as that of a zealous partisan hell-bent on Callender’s conviction. Although John Marshall waffled somewhat when he was a witness in defense of Chase’s trial conduct, Chase and his lawyers did a fair job of demonstrating that his rulings were in accordance with an orthodox understanding of the law of evidence and the Constitution, and that while he was guilty of being irritated by counsel and what he believed to be their inappropriate arguments, he had violated no law, and thus committed no impeachable offense.

In other moves that undoubtedly sparked the interest of those who sought to remove him from the bench, Chase had unsuccessfully sought to convince Marshall that the Jeffersonians’ elimination of the position of circuit judges (the famous “midnight judges,” appointed pursuant to the 1801 Judiciary Act passed in the waning hours of the Adams administration) should be ruled unconstitutional and re-
versed. The final event that triggered his impeachment, however, hap-
pended during the early years of Jefferson’s administration, when, hav-
ing failed to get Marshall and his other colleagues to act, Chase de-
ivered a charge to a Baltimore grand jury blasting the Jeffersonians at
the federal and state levels for undermining judicial independence.
Chase warned that such conduct would destroy the basis of the rule
of law on which constitutional government rested, and violated as
well basic political principles that insisted that law be undergirded
with morality, and morality with religion. Chase’s grand jury charge
borrowed heavily from the philosophy of Edmund Burke, with whom
Chase had spent a fortnight on a trip to England in 1784, and warned
that unthinkingly democratic Jeffersonian advocates of the “rights of
man” were plunging the country in the direction of mobocracy.

This was too much for Jefferson and his Republican colleagues in
Congress, who had assumed control of the national legislature fol-
lowing the defeat of Adams and the Federalists in 1800. Following on
the heels of John Marshall’s reminder in *Marbury* that the legislature
would be subject to judicial review, the Baltimore grand jury charge
apparently convinced Jefferson that Chase (and some of his Federal-
ist allies) were set on using the judiciary to frustrate the efforts of the
new Jeffersonian majorities in Congress and the states. Jefferson ap-
parently gave his consent to the attempted removal of Chase, and
urged his congressional lieutenants to act. Within a few months, and
following the removal by impeachment of the mentally incompetent
United States District Court judge John Pickering, impeachment arti-
cles were filed in the House against Chase. The best lawyers among
the Adams Federalists immediately enlisted in Chase’s defense, agree-
ing to work for no fees because of their belief that Jefferson and the
congressional Republicans were attempting to destroy the indepen-
dence of the judiciary. At Chase’s trial before the Senate in 1805, he
and his defenders argued that the impeachment charges were little
more than politically motivated calumny. The strategy was successful,
as some of the more moderate Republicans joined the remaining Fed-
eralists in preventing a two-thirds majority necessary to remove
Chase. At Chase’s trial before the Senate, John Marshall played a
rather disappointing role, refusing to do much in Chase’s defense and
even suggesting, contrary to his reputation as a great defender of ju-
dicial review, that perhaps Congress ought to be the only arbiter of the
constitutionality of its own acts.26
The failure of the Senate to remove Chase is usually pointed to by historians as a victory for judicial independence, and as having established the precedent that a judge could not be removed merely for stating political views from the bench. More correctly, however, the proceeding ought to be seen as establishing the principle that it was dangerous for a judge, such as Chase, to articulate political philosophy, particularly one at odds with the prevailing democratic ethos of the Jeffersonians.

There were some apparent inconsistencies in Chase’s jurisprudence and politics, but they were more apparent than real. He opposed the federal Constitution before its ratification, but he became the staunchest of Federalist defenders of the Adams administration against its critics. He was the only Federalist justice to reject the federal common law of crimes, but, as indicated earlier, he believed that there were certain supraconstitutional principles that restrained any and all governments. On at least one occasion he expressed reservations about the power of the Supreme Court to reject legislative acts on the grounds that they conflicted with the federal Constitution, but on other occasions, most notably Callender’s trial before a hostile Virginia audience, he made clear that the Court was the only body that could declare that a law was unconstitutional. He had originally been a professed champion of the people, particularly against the aristocratic proprietary interest in Maryland, but he ended his career opposed to the party of Madison and Jefferson, and as a judge who carefully circumscribed the operation of the petit jury, arguably the most important popular institution in the legal system.

Many of these inconsistencies evaporate when Chase’s actions are put in context. He appears to have believed that the moment for active popular sovereignty was the time of the American Revolution, but that once the American people had established a federal Constitution, their duties were to obey the rules of the government they had established, to refrain from resisting its laws, and to take directions from their constitutionally selected judges. Throughout his life Chase was a firm supporter of the notion that judges had limited discretion, circumscribed by the written word of statute or constitution. Nevertheless, he believed that there were certain things no government could do and still call itself “Republican.” For example, even if the Constitution was silent on the point, Chase indicated in *Calder*, no government could make an act criminal and then proceed to punish those
who committed the act before the legislation was passed. Similarly, as he again stated in *Calder*, no government could transfer the property of one citizen to another, whether or not any written constitutional directives prohibited such a transfer. Chase apparently believed that it was the duty of the judge to enforce such unwritten rules when necessary.

Still, because his study of law had convinced him that the common-law rules embraced by the thirteen new states were different in each state, and because the federal government had never explicitly adopted any state’s common law, Chase rejected the notion of a federal common law of crimes. For a judge to declare a particular act a federal common-law crime, to Chase, looked like a legislative act that prohibited something lawful when done. Thus, for the same reason he rejected ex post facto criminal legislation in *Calder*—inherent uncertainty—Chase rejected the federal common law of crimes.

This notion of the certainty and predictability of the law is also what led him to try to restrict the discretion of his juries. It was an American legal maxim that the jury was to be the “judge of law and fact,” and while Chase appeared to accept this notion, he gave it limited application. Many of the Federalists’ foes in Virginia and Pennsylvania believed that the jury’s ability to render a general verdict (a verdict of “guilty” or “not guilty” without explaining the basis of the finding) meant that they could decide for themselves whether the law they were asked to apply was just. To them, this meant that the jury could refuse to enforce a law—for example the Federalists’ seditious libel legislation of 1798—because they believed it to be unconstitutional. Chase would have none of that. He informed his juries that they were duty-bound to follow the law as he saw it, he issued instructions on the law (in one case even before the evidence was heard) that his jurors were not to sway from, and he made clear that the only body capable of passing on the constitutionality of legislation was the court, not the jury. For Chase, then, the traditional American (and English radical) ability of the jury to find “law” meant only the ability to apply the law the judge gave them to the facts of the case. They could find the “law of the case,” in other words, but not reject the legal rules dictated to them by the judge. To do anything more, Chase believed, would be for the individual jurors to substitute their will for the will of the American people expressed in legislation or constitution. That, for Chase, would be to betray nothing less than the Amer-
ican ideal of popular sovereignty itself. Because Chase feared the possibility of arbitrary and prejudicial behavior on the part of the jury above all, he was also zealous in restricting arguments of counsel to the clearly relevant, and was probably the most sophisticated expositor of the rules of evidence on the early federal bench. For this he earned the enmity even of politically friendly lawyers in some of his circuit sittings.

All of the early federal judges could have been described as “Republican schoolmasters” because of the manner in which they used their grand jury charges to instruct in the finer points of the new federal government, but Chase pushed this practice to the limits, and beyond, triggering his impeachment by the Jeffersonians after he blasted some of their actions in his famous Baltimore grand jury charge of 1803. In that charge Chase laid out the fundamental maxims of his politics and jurisprudence as they had finally matured, including the notions that property would be insecure in a regime where the unpropertied could vote (a view he shared with most of the Federalists) and that the legislature had no power to abolish courts once they were established. To elaborate on the latter point, Chase believed that the courts were supposed to be the guardians of the security of person and property and that any trifling with them could well lead to “mobocracy”—the worst of all governments. Finally, Chase made clear in his grand jury charges that he subscribed to the fundamental Federalist set of beliefs that while popular sovereignty might be the American creed, that sovereignty itself was subject to the rules of the Almighty. Thus, Chase believed (as did George Washington, for example) that there could be no law without morality and no morality without religion. It was accordingly the job of the people and their government to promote morality and religion, and to live and legislate pursuant to the directives of these twin pillars of good government.

Themes from The Original Misunderstanding

In The Original Misunderstanding I tried to limn Chase’s judicial philosophy, one that I thought corresponded roughly with the “Court” philosophy of seventeenth- and eighteenth-century English Tories, and contrast it with a Jeffersonian “Country” variant, which owed much to the thought of British theorists Harrington, Sidney, Tren-
chard and Gordon, and others. I tried to draw a parallel between the battles in late-eighteenth-century England (involving what might be described as a rerun of “Court” and “Country” philosophies, played out in English courts over the issues of jury prerogatives, especially in seditious libel cases) and what happened in America during the so-called Federalist “reign of terror” when Jeffersonian editors were prosecuted under the Federalist Alien and Sedition Law of 1798. Essentially, I suggested that judicial events in both England and America could best be understood as a reaction to the challenge posed by radical ideas, especially those flowing from the contemporary French Revolution. I tried to build on the work of many American historians who had dealt with concepts of “republicanism” and “liberalism” in the early republic, to mix in the reaction to the French Revolution, and then to present Chase as an apostle of conservative “Republican” theory who confronted what appeared to be a Francophilic Jeffersonian “liberalism,” which he sought to crush in his courtroom.

I tried to present Chase’s conservatism as something that had grown over time, that had led him to reject the democratic excesses of his youth and to move from the camp that opposed the federal Constitution as too tightly constricting the sovereignty of the states (because of their belief in democratic prerogatives) to join the forces of Federalism in the Washington and Adams administrations. I tried to show that Chase changed his mind about what the nation needed, partly as a result of a visit to England in 1783–1784 and partly as a result of developments in the young republic, particularly the Whiskey Rebellion and the Fries Rebellion—which seemed to Chase and other Federalists to come too close to what was happening in France to be tolerated. I also tried to show, however, that there were some consistent strains in Chase’s judicial philosophy over the years, principally his regard for the rule of law itself, and what I took to be a firm Christian basis for his jurisprudence. I suggested that his foes, principally Thomas Jefferson, evinced much less of a regard for the rule of law and for the notion that religion and morality undergirded the law.

At about the same time that I began the series of articles that were incorporated in *The Original Misunderstanding*, two biographies of Chase appeared. I thought that the time might be ripe for rescuing Chase from the opprobrium he had been under for most of the twentieth century, an opprobrium that I thought had something to do with the current American academy’s preference for liberal democratic pol-
itics (which regards Jefferson as its avatar)\textsuperscript{28} and its antipathy to Jefferson’s critics, such as Hamilton and the High Federalists. I thought that Chase was also something less of a trimmer than was John Marshall, particularly on the issues of judicial review and the independence of the federal judiciary, and I thought that it was time that Chase received some credit for the courage he demonstrated in sticking to his principles.

By the late eighties, when I was trying to put the manuscript into book form, events in Europe and America suggested that the turn to the left in national and European politics was coming to something of an end, and I thought that closer scrutiny of an old conservative approach might have resonance for today. This seems to have been realized by at least one prominent formerly left-leaning American historian,\textsuperscript{29} and it is true as well that, at long last, the Supreme Court might be poised to reexamine some of what has usually been characterized as the “liberal” decisions of the Warren and Burger Courts, particularly those regarding race and religion. Can the study of Chase’s trials and tribulations help in the working out of a jurisprudence for the twenty-first century?

Or is this question even appropriate? This sort of teleological approach flies in the face of much that some (perhaps most) current American historians hold dear. Conceivably practicing history for its own sake, they look with jaundiced mien on those whose study of history follows the directive of Santayana. For example, David Thomas Konig, a distinguished colonial legal historian, writing a few pungent paragraphs in a key professional journal for American historians, the *American Historical Review*, stated that *The Original Misunderstanding* “must be read with great caution and an awareness of its intended ‘relevance for the present.’”\textsuperscript{30}

Konig, all but dismissing the book as “idiosyncratic,” suggested that I drew “broadly, indiscriminately and reductionistically on numerous elements of eighteenth century thought.”\textsuperscript{31} I suppose I was a reductionist, as must be anyone who tries to capture the unmanageable sprawl of reality in the pages of a book, although I thought I worked with more discrimination than Konig apparently was willing to allow. Indeed, Konig’s review is a rather dangerous exercise in reductionism itself. Konig found “dubious” what he called my assertion that “Americans understood no distinction between the law of nations and . . . a federal common law,” while all I was doing was stat-
ing what is increasingly becoming the orthodox understanding that for early Americans (at least those of whom were Federalist judges) there was a federal common law that incorporated the law of nations.32 Perhaps this is a sign that some of the more orthodox historians have found it difficult to keep track of what the lawyers have been doing with the jurisprudence of the early republic.

We are now beginning to understand that in the early republic most members of the legal profession were natural lawyers,33 but positivism continues to reign supreme at elite law schools and the upper reaches of our profession. Even among people who would otherwise describe themselves as conservatives, it is troubling, perhaps even horrifying, to suggest that law ought to be coupled with morality. Knud Haakonssen, an intellectual historian writing in the William and Mary Quarterly, appeared sympathetic to the notion that my aim in writing on Chase was “to deliver a moral lesson from history,” or, as he put it, that “America has to rekindle the right telos for the republic, a civic humanistic communitarianism for which the judiciary can be the guardian.”34

Still, while Haakonssen conceded that a review of Chase’s work might add to the ongoing philosophical and political debate over whether there is something to be learned from our constitutional history, and, in particular, whether there was “a historically given essence of the American Constitution that a historicist method of unraveling the dialectics of history can discern,” he thought I hadn’t captured it, nor did he think that my presentation had provided a “sustained argument for the moral, legal, and political values” I wanted to further. Moreover, Haakonssen, protested my “uncritical acceptance” of the dichotomy drawn by J. G. A. Pocock between republicanism and liberalism, because “the debate between Lockean liberalism vs. Neo-republicanism is . . . a false alarm.”35

Haakonssen, reflecting his own notable research in the natural-law roots of American jurisprudence,36 argued that what American constitutional historians ought to address was not the battle between liberals and republicans but the manner in which republicanism was intertwined with natural-law arguments drawn not only from Locke but also from the civilians.

Haakonssen’s point about the importance of natural-law theories is well taken. The domination of legal positivism in this country may be facing an uncertain future, examination of the past is vital in finding
a substitute, and our natural-law tradition is clearly a good framework within which to search. I thought I understood and communicated this, but perhaps the temptation to dabble in the then-trendy “republicanism” rhetoric obscured the contribution I sought to make.

I have had only limited success in getting my fellow legal and constitutional historians enthused about the value of studying Chase. Neil Duxbury, a prolific younger legal historian who teaches at the University of Manchester, writing in the legal history fraternity’s senior professional journal, the *American Journal of Legal History*, provided some great advertising copy blurbs: “well researched,” “highly engaging,” “wonderful job of putting Chase’s ideas and attitudes in their historical context,” a “delightfully ambitious book,” “impressive and provocative.” But even Duxbury thought that the book was a “too flattering portrait of Chase,” and “too much of an apology.” Alas, it is difficult to concoct precisely the right amount of flattery or apology.

The dean of practicing American judicial biographers, R. Kent Newmyer, in his review of *The Original Misunderstanding* for the *Review of American History*, declared that “by establishing the doctrinal compatibility of Chase and [United States District Court judge Richard] Peters, who was recognized as a judge of fairness and probity, Presser makes a good case for Chase’s being within the mainstream of Federalist jurisprudence—indeed being a courageous and uncompromising guardian of that conservative legal tradition.” Upon reading this, I rejoiced, since that’s all I had set out to do in the book. Nevertheless, Newmyer wondered why there wasn’t more in the book about the Supreme Court as a whole, and stated that, in particular, I probably erred by failing to see the Callender trial and other developments as more about a contest between the federal courts and “entrenched legal localism” than about competing distinct legal ideologies.

Newmyer’s magisterial work on Joseph Story did have a lot about the Supreme Court, and if his comprehensiveness is the measure of a successful effort at book writing in legal history, my effort clearly falls short. On the other hand, so do the books of most of the rest of us. The localism versus central authority point is tougher to deal with. That’s been a staple of writing about the Federalists and Antifederalists for years, but does it make sense when applied to the judiciary? The question still becomes, localism or centralism to accomplish...
what? Why is local control better? What values are thereby promoted or discouraged? I thought that by focusing on questions involving judge, jury, and the nature of law, I might better address the important ideological questions that lay behind the centralism and localism questions.

Newmyer, to my surprise, suggested that what I had done fit nicely with Yale law professor Bruce Ackerman’s ongoing review of constitutional law as a “community of discourse.” One couldn’t ask for more than to be linked with one of the law school faculties’ leading luminaries. Moreover, it appeared that Newmyer accepted what he called my “main point,” that “in the unfragmented intellectual universe of the 1790’s, politics, morality and law were interconnected if not indistinguishable.”

While Newmyer rejected parts of my characterization of John Marshall as presenting a new synthesis of the views of the Adams Federalists and the Jeffersonians, he apparently agreed enough to end his review with the observation that “the secular pragmatic, instrumental American jurisprudence Marshall helped create for the new nation finally left Chase and his friends in the historical dust.” Since my task was explicitly to rescue Chase from the “dustbin” of history, I was a little miffed by Newmyer’s choice of metaphor, and, further, I’m coming to believe that Chase’s brand of jurisprudence never vanished after all (and was even employed by Newmyer’s man Story). Still, Newmyer had gotten enough of what I had to say, he was more than fair in calling the book “short, densely argued [and] provocative,” and, basking in the kind comments of one of my role models, I was somewhat fortified for the stinging rebukes that were still to come.

The most painful was from Seriatim’s own Sandra F. VanBurkleo, who teaches history at Wayne State University, writing in the Law and History Review, which is now the official journal of the American Society for Legal History. She declared that The Original Misunderstanding was “a maddening book.” VanBurkleo’s principal point seems to have been that, as a monograph, the book should have contained more elaboration than was included in the previous articles on which it was based. “[T]he book disappoints,” she declared, suggesting it was “mystifying” that the argument wasn’t “carried to fresh ground.” I did think that I had said a few things I hadn’t in the previous articles, but whence cometh the rule that once you move to hard covers (where you can reach an audience greater than you can with
law reviews or specialized historical journals), you must plow “fresh ground”?

While VanBurkleo adopted the familiar pose of the reviewer who wants very much to have something nice to say, who has great respect for the author, and who wants to be helpful (“To avoid misunderstanding, let me say that I would greatly prefer to applaud this project, and not just because we all work hard on our books and hope for better than I’ve been able to give”), we seem to have again the problem that my book is not how she would have done it. She was gracious enough to pinpoint exactly what I could do to conform with her Platonic form of a work in legal history: “One [presumably, she] hopes that he will write another, less idiosyncratic account of the motivations and fate of Chase the Antifederalist-cum-Federalist jurist, situate himself firmly within relevant literatures, and, as they say in Reno, let the chips (read ‘policy implications’) fall where they may.”

One [I] suspects that it is this “policy implications” problem that really disturbs VanBurkleo, and I think she could speak for many members of her generation of legal historians. Still, her other points need some rebuttal before we reach this question. VanBurkleo be-moaned its “idiosyncratic approach”—neither a comprehensive history of the courts at the time nor a full judicial biography, nor a treatise on all aspects of early constitutional law. The writing of history, or any other form of scholarship, it seems to me, benefits from divergent approaches (isn’t that the theoretical justification of “diversity” as an academic goal, after all?), and if we seek to remove idiosyncrasy we’ll be the poorer for it. Who wants a bunch of conformists re-spouting each generation’s conventional wisdom? Isn’t the power of some of the greatest recent works in American legal history the strong individual voices of their respective authors? (One thinks here of Morton Horwitz’s Bancroft Prize–winning Transformation of American Law, 1776–1860 [1977].)

But I digress. VanBurkleo’s objection to my idiosyncrasy is firmly grounded in two other problems. First, she argued that in my work on Chase, I had failed to situate myself “firmly within the relevant literatures.” Apparently unaware that others, such as Kent Newmyer, had concluded exactly the opposite on this point, VanBurkleo declared that the dichotomous approach I had employed was wrong, and that I would have done better to use the same Kent Newmyer’s approach of a “matrix or set of ideological choices.” Instead of trying to situate
Chase within a bipolar construct of liberals and republicans, I should have examined him as a proponent of “liberal republicanism.” I should have done more with the earlier studies, she suggests, that led to the recent monographs by Isaac Kramnick, Joyce Appleby, and Gordon Wood. These, she asserts, do a much better job of fleshing out the nuances of philosophy and ideology in the early republic.

In sum, VanBurkleo declares, it would have been better to “fully exploit the crisis of the 1790’s to explain Chase’s seeming conversion to Federalism as well as ongoing resistance to federal judicial overreach on the criminal law question.” Since this was precisely what I thought I had done, should I have been satisfied with the implication that I had at least “partially exploited?” Isn’t that enough for one work?

It must be said, however, that VanBurkleo does draw some real blood with her point that recent scholarship on the Antifederalists and the Jeffersonians does suggest that the former were more religious than the Federalists, and that the latter could be as much free-marketeers as the Federalists. Thus, my claim that Chase’s religiosity could be regarded as typical of the Federalists, and my suggestion that John Marshall moved beyond the Jeffersonians to embrace the free market needed further amplification. Nevertheless, and again invoking Newmyer, he appeared to have found enough to suggest that Chase was a representative (if extreme) spokesman for the Federalist position, and while VanBurkleo doubts that Chase has “utility as a window into juridical federalism,” isn’t it significant, as Newmyer thought, that Chase’s views do seem to correspond with those of other Federalists, particularly Richard Peters (who, after all, acknowledged that in Fries’s case Chase had stated his views on the law better than Peters could have done himself)?

VanBurkleo asks, unconvinced by the arguments that moved Newmyer, “What if Chase was indeed a loon (as critics kept insisting) and a pseudo-Federalist bully to boot?” But it was a common tactic in the late eighteenth century to label your opponents as lunatics, and a loon could not have written Calder v. Bull, Ware v. Hylton, the opinions in the Fries, Cooper, and Callender cases or the Baltimore grand jury charge, all of which are sophisticated treatments of constitutional law and theory. Perhaps VanBurkleo is correct that Chase was “a loose cannon,” but I think she too quickly reaches the conclusion that he was “(occasionally) no friend of liberty.”
What Chase and his Federalist fellows understood, if they understood anything, was that for liberty to flourish there must be security for person and property, and that with American rights had to come American responsibilities. From the hindsight provided by two hundred years, it looks to us as if the Federalists were excessive in trying to implement these policies, but that doesn’t mean they were not the correct ones for their time (or, even, with some modifications, for ours). It is the necessary linkage between rights and responsibilities, for example, that fuels the surprising (to members of the chattering classes) effort to pass the Flag Protection Amendment, which has so far garnered the support of forty-nine state legislatures, more than two-thirds of the United States House of Representatives, and sixty-three votes in the United States Senate, as well as (by some polls) 80 percent of the American people. The Flag Amendment, like the views of the Federalists, strikes most American academics as insufficiently protective of American freedoms (the Flag Amendment is habitually denounced by those who ought to know better as the first attempt in two hundred years to amend the Bill of Rights), when it is really a simple statement of the need for a baseline of civility, decency, and reciprocal responsibility so that liberty may flourish.

VanBurkleo believes that Chase “bullied jurymen into ferreting out libels so that he might prosecute them,” and that he “repeatedly trashed political and legal processes.” But if I am an apologist for Chase, surely this is an uncritical acceptance of the calumny of the Jeffersonians. The historical record (even that which I reviewed) simply does not support such blanket assertions. Granted there are those who would disagree (such as Raoul Berger), but a study of the impeachment defense that Chase mounted makes clear that he had persuasive legal arguments to support each of the actions he took, as well as the concurrence of respected judges such as Peters of Pennsylvania and Griffin of Virginia. Further, at least some of the impeachment evidence adduced against him comes from sources whose credibility is doubtful, and much of the information to support the charge that Chase zealously ferreted out potential defendants in seditious libel cases appears to be based on press accounts published by Jeffersonian republican editors, hardly an objective source.

Is it too much to suggest that, in the final analysis, VanBurkleo’s own policy preferences may have colored her evaluation of what I had to say about Chase (and the Federalists generally)? Dismissing Chase,
and a fellow Federalist who held similar views, Associate Justice William Paterson, who cautioned grand jurors that occasionally the people might do better to “mind [their] own business” and defer to their elected representatives, VanBurkleo asks why we should “give pride of place to a party harboring the likes” of the two of them. VanBurkleo then quotes Linda Kerber to indicate that Americans need “Locke, not Machiavelli,” and goes on to ask whether it isn’t true that “every variety of revolutionary republicanism and civic humanism, by virtue of the privileging either of property rights or patriarchy and the establishment of a single subjectively constructed but functionally ‘objective’ and universalized political truth, perpetuated racism, sexism, anti-Semitism, and so on, and would do so again if revived wholesale. . . .”

The implication appears to be that unless a historian is willing to accept the current ideology of politically correct feminism, and probably willing to “trash” two thousand years of Western civilization and the attempt to fashion an objective “rule of law” besides, the policy “chips” will not be falling in the place from which VanBurkleo would like to gather them. Alas, I’m afraid I’m doomed to continue to madden and disappoint her.

The most ambitious of the reviewers of my book, and the last I’ll consider here, was Stewart Jay, a law professor at the University of Washington, best known in legal history circles for two fine pieces on the federal common law. Jay did me and Chase the honor of actually writing a thirty-page law review essay on the book. While Jay had some nice words to say about the part of The Original Misunderstanding that dealt with the federal common law of crimes (chapter 6, in which Chase plays only a cameo role), noting in particular that he and I agreed on most issues relating to that limited topic, Jay dissented vigorously from my interpretation of Chase. Unlike VanBurkleo, who to her credit took the ideology of the late eighteenth century seriously, Jay argued that the best way to understand late-eighteenth-century Federalists and Chase in particular was as men concerned with furthering their own careers and seeking their own financial advantages.

Essentially Jay made what is best characterized as a neo-Beardian argument that the “aim of Federalist Constitutionalism was the stabilizing of credit through enforcement of major debts”; that the proponents of the Constitution were hypocritical in their claims that the
Constitution was based on popular sovereignty;\textsuperscript{72} that there was “a lack of an original understanding about the nature of the Constitution”; and that the pre-Marshall justices can best be viewed as “adherents of commercial prosperity and [believers] that the national government should play a significant part in its accomplishment.”\textsuperscript{73} For Jay, Chase and his fellows were crass commercialists bent on feathering their own nests, and thus he rejected my view of them as sincerely seeking to articulate a civic republican philosophy based on popular sovereignty. Instead of their being altruistic civic republicans, Jay, as may be true of VanBurkleo as well, finds the Federalists to have been simply authoritarian and intolerant.\textsuperscript{74}

Jay marshaled an impressive amount of data to support his claims, and demonstrated a thorough familiarity with the biographical literature on Chase and many of the other late-eighteenth-century Federalists. A point-by-point response or refutation to the arguments made by Jay, which by rights he deserves, is, alas, not possible here, in an essay ostensibly devoted to fleshing out an understanding of Chase, particularly for those encountering him for the first time. Still, some issues can be raised and suggested for resolution by others’ efforts.

What then of Jay’s suggestion that Chase (and his fellow Federalists) were motivated only by “pursuit of lucre,” selfish financial concerns, or a desire for power? In particular, is it correct, as Jay states, that Alexander Hamilton, who blasted Chase’s dabbling in flour futures,\textsuperscript{75} had a better grasp on the essential Chase than I did?\textsuperscript{76} What did Hamilton think of Chase, and particularly of Chase’s efforts to battle the Jeffersonians? Perhaps Hamilton altered his enmity to Chase because Hamilton was solicited, along with other leading Federalists, to serve on Chase’s defense team at the impeachment trial, although Burr apparently killed him before he could reply.

If Chase was motivated solely by his own personal interest, as Jay suggests, is it likely that he would have put his personal political fortunes frequently in jeopardy by being as outspoken as he was? Indeed, Jay, because of his thoroughness, unearths some behavior of Chase’s—for example, seeking to clamp down on pro-French demonstrators in Maryland, and thus losing one of his Maryland judiciary positions, when some Francophilic Maryland legislators sought to punish him—that does suggest that principle rather than advantage motivated Chase.\textsuperscript{77}
I suppose that Jay could conclude that Chase’s Baltimore grand jury charge (in which he criticized the Jeffersonian legislature of Maryland and the Jeffersonians in Congress) was simply an attempt to stir the citizenry to turn out the Jeffersonians and return Chase’s Federalist fellows back to power, but since Chase had little personally to gain (he was already ensconced on the Supreme Court at the time), it is far more likely that he was again acting from principle not personal advantage. Isn’t it even possible that Chase knew that the Baltimore grand jury charge and his machinations with Marshall to get his fellow justices to condemn the Jeffersonian Judiciary Act of 1802 were activities that might risk impeachment, and he welcomed the opportunity to fight for what he believed in rather than simply acted only for short-term advantage? Jay is gracious enough to suggest that “Samuel Chase may have been braver than his Chief Justice [Marshall] in combating enemies, but Marshall derives his fame from picking the fights he could win.”78 But is “winning” what historians, or those evaluating historical actors, ought most to admire? Is it better to defend principle at great personal cost, or is it better to lay low and strike when you know you’re not in danger?

Curiously, Jay defends John Adams against my charge that Adams acted cynically and politically in pardoning Fries, after Fries’s second conviction, over which Chase presided,79 and thinks that Adams acted out of dispassionate concern with treason law because the Fries imbroglio cost Adams heavily with the Hamilton wing of his party—which defected and, in effect, made it all but certain that Jefferson would triumph in the election of 1800.80 I suspect that Adams simply made a bad political calculation, but, in any event, isn’t it significant and doesn’t it say something positive about Chase, that, unlike Hamilton, Chase remained loyal to Adams and even (admittedly raising other problems) actively campaigned for his reelection?81 Is it likely that Adams was the only person of principle among the Federalists, or is it more likely that the Federalists were like other human beings, sometimes principled, sometimes not?

Reading Jay, I did wonder whether Chase really was a sort of Rorschach blot that different legal historians could read as they chose, or whether we legal historians were really as much spinners of the facts as contemporary politicians. For example, knowing that Chase (no stranger to the knife and fork) did have personal habits that led him to suffer from the gout, Jay declares that Chase’s 1803 grand jury
charge (of which I make so much) “is the bitter lament of a man whose declining health promised a brief future of gout-ridden discomfort spent observing his enemies implement a form of government he despised, but for which he was in no small part responsible.”

But Chase lived on eight years more to 1811, and following a financial windfall after his impeachment, when his 1783–1784 efforts in recovering English monies due on Maryland debts came to fruition, Chase appears to have been quite happy with his lot in life. If contemporary accounts are reliable, he even was philosophical about his cherished and beautiful daughter’s marrying a Jeffersonian.

No doubt the world looked bleaker to Chase in 1803, but many other Federalists also were convinced that things had taken a dire turn for the worse in 1800, and, for my money, it was not personal idiosyncrasy (of a kind from which Chase and I both suffer) or bitterness or self-loathing that led Chase to make the statements in the Baltimore grand jury charge but, rather, sincere political beliefs. But even if Chase’s (and Adams’s, and even Hamilton’s) political beliefs were sincere, just what were those beliefs? Jay joins Kitty Preyer (and Kent Newmyer) in suggesting that, with regard to Chase’s confrontations with Virginians at the Callender trial, what was at stake were not questions about the nature of the Constitution, or the rule of law, or the abstract nature of the roles of judge and jury but, rather, the Virginians’ hostility to “a sustained defense of federalist centralizing.”

And yet, when one considers that Chase encountered similar issues in Pennsylvania, and that when Randolph, making the case for Chase’s removal from office at the impeachment trial in the Senate, criticized his conduct from a point of view about theories of the role of the judge and jury and the nature of the rule of law, it is very difficult to believe that only localism versus centralism was at stake. Indeed, even Jay, who is very hostile to interpretations based on ideological development or consistent ideology of actors, appears to concede that there was a “dominant Republican Constitutional theory” in Virginia under “Federalist assault.” Further research on the judiciary in the late eighteenth century, I think, ought to address whether the “dominant Republican Constitutional theories” were about localism versus centralism, “practical politics,” or, as I suspect, sincere differences over how American practice ought to emulate or differ from the British model. Other questions include whether hierarchy and aristocracy were inescapable components of any regime committed to
Conclusion

Perhaps Samuel Chase is, when all is said and done, just too strange to hang much grand theory on. On the other hand, if he didn’t exist, the Jeffersonians might have had to invent him, or find his attributes in somebody else—perhaps Paterson, or even Peters (who was, after all, initially a target of impeachment along with Chase). Personality is always of interest, but the issues transcend particular persons. Although in America the tendency is to try to undermine principle by demonizing the proponents of those principles with which you disagree, I think it obscures more than it clarifies to boil all disputes down to personal turf wars. I am convinced, at any rate, that the appointment of Chase (admittedly one that cost the Federalists dearly) was not a horrible mistake, as so many historians now believe. He articulated well the beliefs of his fellow Federalist jurists, and he boldly stood up for those beliefs. His jurisprudence, I hope we will one day understand, made a positive contribution then, and still has much to recommend it now. After all, John Marshall, someone who learned from others’ mishaps, appears to have read Chase’s struggles with the Jeffersonians as meaning that he should seek to have the judiciary portrayed as somehow different from and above “politics,” the better to maintain the notion that there are “objective” answers to constitutional questions. In our own time, when this view remains under sustained attack and, in particular, as conservatives search for a reasoned constitutional philosophy emphasizing responsibilities over rights, what I believe to be the honestly held Burkean beliefs of Chase and his fellows such as Peters, Ellsworth, Paterson, Wilson, and later Story, might be due for an impressive resurgence. In the flush of youthful enthusiasm I once thought that there was a chance that when future scholars began to view Chase as more than a rabid partisan, he might be placed in the judicial pan-
theon, very possibly at the level of Marshall himself. I now think that if it ever happens I won’t live to see it.

Still, as I reach the point where I’m happy to leave archival research and the refutation of factual hypotheses to younger scholars, I begin to wonder whether it makes any sense to try to reach ultimate judgments about the worth of historical characters. The generation of legal historians to which I belong was given to emulating the lawyers they studied. Lawyers try to win cases by piling on enough evidence to convict or acquit, and hoping to persuade a jury. A trial has a resolution, and, the way our court system works, there are definable winners and losers and an authoritative right and wrong answer to legal questions, at least with regard to particular litigants. But, if I’ve learned anything from my critics, the study of history may not actually resolve anything other than the folly of naively believing that there are simple, eternally valid reductionist explanations for historical events. Biographers in particular seem to strive to write the “definitive” work on a particular person, but perhaps the effort is misplaced.

I have no wish to step into the New Criticism’s trap of believing that every reader remakes the text, but I do think that we ought to regard all of what we do in legal history as leaving room for future enhancements of understanding. Jefferson Powell may have a point when he views our constitutional struggles as about the articulation of a “political grammar” to sustain debate, the same point Kent Newmyer appeared to be making (if I understood him correctly) by suggesting that Bruce Ackerman and I were engaged in an ongoing conversation about fashioning a morally based principled alternative to hereditary aristocracy and monarchy.93 In this endeavor, often the best (and perhaps the only) thing we’ll be able to do is raise questions that will need to be pursued by others.

I now believe that Samuel Chase was neither completely a saint nor completely a demon but the same uneasy combination of the two, as are most of the rest of us. In The Original Misunderstanding I had more kind things to say about Chase and fewer bouquets to toss in the direction of Jefferson and Marshall, who represented for me less worthy proponents of the ideals of constitutional government than I thought Chase did. On the other hand, as at least one of my reviewers, Duxbury, understood, I had no intention of obliterating these two titans of American history but merely sought to redress the balance by
rescuing Chase from utter obloquy.\textsuperscript{94} I wanted to save Chase from being perceived as only a loon; I wanted to transform him into a tool to be used in unpacking Federalist judicial theories, or as a window onto an interesting period in our history. There is some evidence that’s beginning to happen.\textsuperscript{95}

I didn’t expect to settle the issues regarding Chase or the Federalists, and since the battle between the ideals of the Federalists and Republicans are still motivating factors that divide Americans politically in the present, I don’t expect to see them resolved anytime soon. Indeed, perhaps it is the tension between divergent approaches to the good polity that provides the dynamic to American life, and if the tension is ever resolved, the genius of our politics will evaporate. Maybe Jefferson, in his inaugural address, was saying this when he proclaimed that “we are all Republicans, we are all Federalists.”\textsuperscript{96} If Jefferson was correct, then the task of future legal historians ought to be to help explain to us just what it meant (and still means) to be a Federalist or a Republican, or a Republican or a Democrat—or all at once. As VanBurkleo and Jay noticed, Samuel Chase, at one time or another, was all of the above, and studying Samuel Chase, I think, can only help in understanding who we are and who we might become.

\textbf{Notes}


5. Following the failure of the Senate to remove Chase from office, among biographers in the nineteenth and early twentieth centuries Chase appears to have


11. Casto, who still thinks that Chase’s appointment was a mistake, concedes his “obvious brilliance.” Casto, at 97.


Hylton, in Hall, at 910–911. Julius Goebel observed, “For what the Justices (Paterson, Wilson, and Cushing) who concurred in Chase’s conclusion had to offer, they might as well have let his opinion stand as that of the court.” Goebel, at 753.


20. The charge involving the alleged interference in the murder case appears to have been complete fabrication. See in addition to Wedgewood, Dumas Malone, The Public Life of Thomas Cooper, 1783–1839 121 (rev. ed., 1961) (“[T]he action of Adams [in the Jonathan Robbins matter] seems to have been entirely justifiable, and Cooper’s invective appears to have been a bit of sheer demagoguery, but his position was in full accord with that of the most distinguished Republicans”).


22. Chase’s witnesses for his defense at the impeachment trial “destroyed” the credibility of those claiming that Chase had sought to influence jury selection in the Callender case. See Stormy Patriot, at 231. Remarkably, this smear on Chase’s record has been accepted as true by virtually all modern historians.


27. See Stormy Patriot, and Jane Ellsmere, Justice Samuel Chase (1980).

28. Stephen B. Presser, Recapturing the Constitution: Race, Religion, and


31. Ibid.


35. Ibid., at 188.


41. Newmyer, Dusting Off, at 491.
42. For the extended elaboration of this assertion, see generally Presser, Re-capturing the Constitution.


44. Ibid., at 411.

45. Ibid., at 414.

46. Ibid.


48. Newmyer, Dusting Off, at 487 (Newmyer declared my use of the historiographical literature “excellent”).

49. VanBurkleo, at 411.

50. Ibid.

51. Ibid., at 412.

52. I still suspect it was, at least among the Supreme Court justices. See, e.g., Casto’s recent discussion of James Wilson’s views on American common law and constitutional law, and how they were both grounded in divine natural law. Casto, at 131–132, 194–195.

53. VanBurkleo, at 413.


55. VanBurkleo, at 413.

56. See, e.g., Casto, at 92, suggesting that charges about Chief Justice Rutledge’s alleged insanity were political cover for attacking him based on his opposition to the Jay Treaty. See also seditious libel trial defendant Representative Matthew Lyon’s publication of the suggestion that when the House and Senate heard John Adams quote Edmund Burke on the perfidy of the French, “We wondered that the answer of both Houses had not been an order to send him to a mad house.” Stephen Presser and Jamil Zainaldin, Cases and Materials on Law and Jurisprudence in American History 201–202 (3d ed. 1995) (hereafter, Presser and Zainaldin, Cases and Materials).

57. VanBurkleo, at 413. Compare the more admiring view of Chase’s commitment to liberty in Judson, and Stormy Patriot.

58. One of the best statements of this point of view is to be found in Samuel Chase’s manuscript jury charge book, discussed in Original Misunderstanding, at 141–149.

59. There is an increasing sensitivity among historians for approaching the late eighteenth century on its own terms, without being blinded by our preconceptions. Especially valuable here is Casto.

61. VanBurkleo, at 414.

62. See note 3.

63. See generally Chase’s Answer to the Articles of Impeachment, edited and reprinted in Presser and Zainaldin, Cases and Materials, at 232.

64. See note 22.

65. Their objectivity also can be gauged by their uniform distortion of the Jonathan Robbins matter. See notes 19–20.

66. VanBurkleo, at 414.

67. Ibid.

68. For further maddening and disappointing reading, VanBurkleo might consult my recent Recapturing the Constitution, an attempt to build on some of the work in Original Misunderstanding so as to articulate an objective constitutional jurisprudence for the present.


70. Jay, Rehabilitation.

71. Ibid., at 305. See generally Charles Beard, An Economic Interpretation of the Constitution of the United States (1913) (which argues that those at the Philadelphia convention were motivated by personal financial concerns). But see Forrest McDonald, We the People: The Economic Origins of the Constitution (1958) (a powerful refutation of the Beard thesis).

72. Jay, Rehabilitation, at 305.

73. Ibid., at 306.

74. Ibid., at 303.

75. See note 7.


77. Ibid., at 290–291.

78. Ibid., at 307.

79. Original Misunderstanding, at 112.


81. Stormy Patriot, at 207–208.

82. Jay, Rehabilitation, at 302.

83. Original Misunderstanding, at 158, 241 n.34.

84. Ibid., at 15–17, 34–36.


86. See, e.g., the excerpt from the impeachment proceedings reprinted in Presser and Zainaldin, Cases and Materials, at 243–244.

87. Basing his comments in part on Wythe Holt’s work suggesting that the
early judiciary’s conduct can be explained by the “practical politics” of the moment, Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, Jay remarks that “Criticizing a Jefferson or a Chase for ideological inconsistency or alternatively, finding a coherent evolution in their thinking is an all too easy and ultimately uninteresting endeavor.” Jay, Rehabilitation, at 304.


89. Jay, as was true of VanBurkleo, apparently has some trouble differentiating between the hierarchy to be found in any system committed to organic civil responsibility (on the inevitability of some aristocratic character in any organized society, see Russell Kirk, The Conservative Mind from Burke to Eliot 95–96 [7th ed. 1986]) and authoritarianism and intolerance. Jay, Rehabilitation, at 303.

90. Raoul Berger agrees with VanBurkleo and Jay that Chase is too weird to support any inferences about proper judicial philosophy. See generally our dialogue referred to in note 3.

91. Original Misunderstanding, at 12.

92. Jay accuses Chase of this, with some merit, Jay, Rehabilitation, at 299, but I think Chase’s critics were better at demonizing him than he was at demonizing them.


94. Duxbury, at 362.

95. Some of the evidence can be found in Powell, as well as H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation (1993). Casto’s fine book on the Jay and Ellsworth Courts supports this proposition as well. Even though he claims that Chase’s appointment was a mistake, he belies this claim by his fulsome discussion of Chase’s many accomplishments and his intellectual leadership on the Ellsworth Court. See, e.g., Casto, at 100–108, 121–123, 144–47, 167–172, 225–236, 244–245.