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SOME ALARMING ASPECTS OF THE LEGACIES OF JUDICIAL REVIEW AND OF JOHN MARSHALL

STEPHEN B. PRESSER*

My assigned tasks at this Symposium were to speak about the legacy of judicial review in general, and the legacy of Chief Justice John Marshall in particular. As originally delivered, my remarks were divided into two ten-minute discussions on these topics, and I have combined, revised, and annotated them for this written version. I begin with the legacy of judicial review, and follow that with some consideration of John Marshall. *Caveat Lector*.¹ I want to dissent from the conventional wisdom of the legal academy on these matters.

JUDICIAL REVIEW: ORIGINALLY REPUBLICAN, NOT DEMOCRATIC

I have to confess that I am more than a little at a loss to know what to say about the legacy of judicial review. Let us start with a definition. For our purposes, "judicial review" is the practice of the courts reviewing and, if necessary, declaring unlawful, the conduct of the executive and legislative branches of the federal government, and all three branches of the state governments. This practice seems to be the U.S. Constitution's ultimate device for securing federalism and the separation of powers. For me, then, a law professor with just short of three decades experience teaching and writing about American law, to ruminate on the legacy of judicial review is a bit like being asked to comment on the legacy of our being air-breathers. In the American judicial system, devoted as we claim to be to the rule of law and the notion that ours is a

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1. By which I mean, of course, "Let the reader beware."

government of laws, not men, I cannot imagine an alternative to judicial review. Then again, there have been plenty of cultures that have done without it. Until recently, for example, the civil law tradition managed just fine without judicial review, thank you very much,² but if you have followed events in Europe recently, you know that the European Court of Justice has gotten very much into it, so judicial review may be becoming a universal phenomenon.³

This may not be all to the good, however, because the modern conception of judicial review seems to differ from what Alexander Hamilton had in mind in *The Federalist No. 78*,⁴ to say nothing of what Marshall intended in *McCulloch*,⁵ but probably not in *Marbury*.⁶ Indeed, some of the literature on human rights and some of the decisions of international judicial bodies that I recently have looked at read human rights protocols⁷ expansively to remove governing power from legislatures and sovereign nations.⁸ These

2. On the civil law tradition see generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969).

3. For a discussion of the emergence of judicial review as a means of preserving the rule of law in the European Union, and its correspondence with the American model as developed under Chief Justice Marshall, see generally Herbert A. Johnson, *Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice*, 33 J. MARSHALL L. REV. 1063 (2000).

4. *THE FEDERALIST NO. 78* (Alexander Hamilton).

5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Marshall was making an orthodox, indeed a conservative, statement of judicial review's use in implementing the popular will as expressed in the Constitution, but in *McCulloch*, Marshall was using judicial review as a way of expansively stretching the meaning of the Constitution, probably beyond what its Framers intended. For an extended discussion of this argument, see Stephen B. Presser, *Marbury, McCulloch, Gore and Bush: A Comment on Sylvia Snowiss*, 33 J. MARSHALL L. REV. 1157 (2000); see also, Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973 (2000) (examining differences in the application of text and principle in the two cases).

7. A fine introduction to the problematic nature of the concept of "human rights" as used in the late twentieth century and a comprehensive review of the literature on human rights is Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

8. For the theory that national sovereignty ought to give way before international law norms see, for example, Ronald A. Brand, *The Role of International Law in the Twenty-First Century: External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685 (1995) and sources there cited. For further discussion of this theory, see, for example, Philippe Sands, *Lecture: Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527 (2001).

decisions remind me of the Warren Court, the Burger Court, or the Rehnquist Court when they were in the business of manufacturing new constitutional rights, and taking power away from states and localities.⁹

But if *The Federalist No. 78* makes any sense, I think, it is because it expresses a single clear, objective, and limited notion of judicial review.¹⁰ Hamilton's argument, ostensibly adopted by Marshall in *Marbury*, was that judicial review was a conservative doctrine, the purpose of which was to limit the legislature, the states, and the executive to the exercise of the clearly defined and originally limited powers granted to them by the sovereign people.¹¹ Judicial review was not to be a license for judicial lawmaking as it has become in our time and as it has been celebrated by most of us in the academy. I am out of the academic mainstream here, because I like the original conservative conception of judicial review, and am horrified by what the Supreme Court has done, at least since the New Deal, to aggrandize the federal government, to limit the power of states and localities, and to create utter uncertainty as to the meaning of constitutional provisions.¹²

I am a simple person, a simple Midwestern provincial law professor, and I subscribe to the simple notion that the only thing that should guide our understanding of the Constitution is the meaning that it had in 1789 when originally drafted, or the meaning of amendments as they were understood when they were passed. Raoul Berger gave my chair to Northwestern, and I share his originalist views.¹³ I think the Supreme Court's opinions that incorporate the Bill of Rights into the Fourteenth Amendment are judicial usurpations,¹⁴ and I disagree with everything from the

9. See generally STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED (1994) [hereinafter PRESSER, RECAPTURING THE CONSTITUTION]. For a comparison of what is happening at the international level to what happened in American courts, see generally Stephen B. Presser, "Liberty Under Law" *Under Siege*, 45 ORBIS: A JOURNAL OF WORLD AFFAIRS 357 (2001).

10. THE FEDERALIST NO. 78 (Alexander Hamilton).

11. For this reading of *The Federalist No. 78*, see, for example, PRESSER, RECAPTURING THE CONSTITUTION, *supra* note 9, at 77-82.

12. See generally *id.*

13. For Berger's originalist views see, for example, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).

14. See PRESSER, RECAPTURING THE CONSTITUTION, *supra* note 9, at 160-63; see also

school prayer decisions¹⁵ to *Planned Parenthood v. Casey*.¹⁶ While I think *Brown v. Board of Education*¹⁷ was correct to outlaw racially segregated schools, it is because I believe that the Fourteenth Amendment can legitimately be read as intending to create a color-blind Constitution: all governmentally sponsored racial classifications, even for affirmative action or diversity purposes, are unconstitutional.¹⁸ My views, in other words, differ so drastically from those of any other contributor to this Symposium that I wonder what limited use my comments have for any of you.

Still, maybe it does not hurt to speak from the perspective of a convinced conservative originalist, because that is still the view that the courts virtually always claim to be applying, and it is also the view that Congress claimed to be following in the recent Clinton impeachment fiasco. So, *at some level*, probably around our legal genomes, so to speak, we are programmed to be originalists, and we understand that there is something a bit illegitimate about any other perspective. This is not to say that those who claim we cannot reproduce the historical understanding are wholly without merit, but I think we can do a pretty good job, or I would not be in the business I am in, occupying the chair that I do.¹⁹ All the same, however, how can I take the positions I do, if virtually no other practicing historian in the legal academy does?

It is because I think that originalism and the original conception of judicial review still have a lot to teach us. I have never been a big fan of diversity,²⁰ for example, because I think we have yet to get *uniformity* right. So what *was* the original understanding of judicial

BERGER, *supra* note 13, at 157-86 (explaining the lack of historical evidence for the "incorporation" theory).

15. *E.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962).

16. 505 U.S. 833 (1992).

17. 347 U.S. 483 (1954).

18. See generally PRESSER, RECAPTURING THE CONSTITUTION, *supra* note 9, at 179-92, 203-14, 219-25.

19. For a comprehensive refutation of the critics who contend that recovery of the original understanding cannot be accomplished, and constructive reasons why it can, see generally KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 47-109, 161-212 (1999).

20. Essentially, I share the reservations expressed in Paul D. Carrington, *Diversity!*, 4 UTAH L. REV. 1105 (1992) (arguing that quotas and other forms of mandated diversity conflict with the goals of the civil rights movement and have a negative impact on the law and law schools).

review all about? What was this simple, clear, uniform conception that I have posited supposed to be, and how could a smart fellow like Hamilton and, even in 1789, Jefferson, be enamored of the idea? You will remember that Jefferson turned around on this issue, but, in 1789, his correspondence indicates that he was all for it.²¹

What were the Federalists thinking in 1789? What justified judicial review? Again, if we look at *The Federalist No. 78*, and consider it on its own terms, it was popular sovereignty.²² Supposedly, when the justices kept state and federal lawmakers and officials within bounds it was to be within the bounds set by the people when they, by the act of their sovereign will, adopted the Constitution. Under this view, the justices were merely the agents of the people. Popular sovereignty was the only acceptable theory for American government in 1789, as it had been since we made the break with Great Britain in 1776, so this justification for judicial review is not surprising.²³ But what passed for popular sovereignty back then is not the same as what passes for *democracy* now, and perhaps that is the legacy we should be exploring. We start with the proposition that the "people" who endorsed the Federal Constitution included no women, no blacks, and very few of everybody else, since the franchise was, at that time, virtually universally limited to property holders. This has led many of us to conclude that in our modern era we ought to forget about the Framers altogether, since we live in more democratic and less elitist times.

21. Compare, e.g., Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in *THE PORTABLE THOMAS JEFFERSON* 438, 438 (Merrill D. Peterson ed., 1975) ("In the arguments in favor of a declaration of rights [in the new federal constitution], you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.") with Letter from Thomas Jefferson to Thomas Richie (Dec. 25, 1820), in *12 THE WORKS OF THOMAS JEFFERSON* 175, 177 (Paul Leicester Ford ed., 1905) ("The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone.").

22. *THE FEDERALIST NO. 78* (Alexander Hamilton).

23. On the political and ideological movements that made popular sovereignty the only acceptable basis for American government, see generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 344-89 (1969).

I am not so sure, though. I think it is still useful to remember how popular sovereignty differs from democracy, at least in the conception held by our Framers. I am not prepared, in this day and age, to mount a campaign for the narrowing of the franchise, but I think it is useful, occasionally, to remember how the Framers could simultaneously seriously believe in both popular sovereignty and a limited franchise. The clue, I think, is in what we called, in history departments fifteen years ago, "Republicanism": the set of principles that elucidated Republican government and was concerned with fostering civic virtue in the American people. The legal academy never really understood "Republicanism,"²⁴ and as explicated by people like Cass Sunstein²⁵ and Frank Michelman²⁶ it sounded suspiciously like Franklin Roosevelt's New Deal rather than ideas held by Hamilton, Madison, Jay, and Marshall.²⁷ Even historians have now figured out that the late eighteenth century in the newly formed United States was as much about Lockean liberalism and Protestant Christianity²⁸ as it was about the "Republican" ideals of Harrington and Sidney, Trenchard and Gordon.²⁹ All the same, the U.S. Constitution, in its "republican"

24. Here I am making an argument essentially similar to that which can be found in G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 791-807 (2000) (claiming that the Marshall Court's conception of republicanism included ideas about the difference between the will of the judge and the law, the nature of history, and the ability of men to control it—ideas very different from current conceptions of republicanism).

25. See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) (arguing that classical Republicanism was committed to, among other things, political equality and guaranteed rights of participation by all citizens).

26. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (stating as one of the central tenets of Republicanism the view that citizenship, meaning participation as an equal in government, is of primary interest).

27. For the general failure of legally trained writers on the American Constitution to understand American constitutional history in general and Republicanism in particular see, for example, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

28. The seminal piece in this regard is James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987).

29. For the development of the understanding among American historians of "Republicanism," an understanding which included consideration of the English thinkers mentioned in the text and one that predated and was always more sophisticated than that among most law professors, see generally Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (1982), and Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American*

structure, as the late twentieth-century Federalist Society has been trying to tell us, does have some lessons for us, *a legacy we should consider and perhaps even emulate*. As *The Federalist Papers*, published in the late eighteenth century, tell us, the idea behind the Federal Constitution was one of creating a republican structure in which government was removed from direct democracy.³⁰ The indirect election of the president and senators was calculated to produce persons of virtue who could make difficult decisions without bowing to popularity, and in a manner that would preserve the rights and interests of the community, rather than reflecting narrow personal or partisan concerns.³¹

I do not know how well this ever worked, but I do think that Marshall himself, at some level, was committed to republican rather than democratic ideals, and his opinion in the *Dartmouth College*³² case, his jeremiad against the New Hampshire legislature's attempt to democratize the college by subjecting it to popular legislative control, suggests as much.³³ If you read *The Federalist Papers* carefully, and—let us be honest—after more than 200 years, it is still recognized as the best guide to Constitutional interpretation we have, you see repeated praise of the Constitution for giving discretion to officials whose purported sense of virtue and honor will lead them to act appropriately, lest they suffer the disgrace and ignominy of impeachment.³⁴

Unfortunately, as those of us who tried to explain the matter to the House of Representatives and Senate a couple of years ago found out, even if honor and virtue were important to the Framers,

Historiography, 29 WM. & MARY Q. 49 (1972).

30. See, e.g., THE FEDERALIST NO. 10, at 126-27 (James Madison) (Penguin Books ed., 1987) (exploring the advantages of a republican form of government over direct democracy).

31. See *id.*; see also THE FEDERALIST NO. 76, at 430 (Alexander Hamilton) (Penguin Books ed., 1987) (discussing the president's appointment power, and indicating that the independence of senators, and the necessity of getting their concurrence for appointments, will operate as a check on the president, and will tend "to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity").

32. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

33. *Id.*

34. See, e.g., THE FEDERALIST NO. 64, at 380 (John Jay) (Penguin Books ed., 1987) (indicating that Senators voting on treaties will be likely to behave as men of talent and integrity because of their sense of "honor, oaths, reputations, conscience, the love of country, and family affections and attachments" and the threat of impeachment).

they were of little or no importance to current House Democrats and even current Senate Republicans, and a President sorely lacking in both was not removed, even though that is what impeachment is for.³⁵ The pardon power, as Hamilton tells us in *The Federalist No. 74*, was given to the President because he was supposed to be a person of "prudence and good sense,"³⁶ which I take to be a person concerned with honor and possessing virtue. Those of us who argued for the impeachment of Clinton recently got a good chance to say if not "we told you so," then "we told you *why*" when the recent batch of unpardonable pardons and clemencies came down.³⁷

The point here is that judicial review, and the Constitution itself, I think, were premised on a notion of government that required some insulation from democracy. A nation now obsessed with direct democracy, and that insists on popularity as the only valid basis for choosing presidents and senators, is probably not going to be playing the governmental game exactly the way Marshall and the Framers intended. The Warren Court, and its followers on the Burger and Rehnquist courts, were intoxicated by direct democracy, and all but forgot the essentially aristocratic premises, the notions of virtue and honor, that were part of our original republicanism.³⁸ It was hardly their fault, since the so-called

35. See generally, Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 676-81 (1999) (arguing that if the facts as alleged by Kenneth Starr were true, then the Framers would have wanted Bill Clinton removed from office); Stephen B. Presser, *The Ordinary, The Exceptional, The Corrupt And The Moral: What Did The Impeachment Of Bill Clinton Mean For America and Americans?*, 17 CONST. COMMENT 149 (2000) (reviewing RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* (1999)) (arguing that Posner got it wrong, and Clinton should have been removed).

36. THE FEDERALIST NO. 74, at 423 (Alexander Hamilton) (Penguin Books ed., 1987).

37. For the suggestion that the pardons of people like Marc Rich, and other assorted cronies and miscreants were not the sort of conduct the Framers had in mind, see, for example, Stephen B. Presser, *Cultural Revolution*, 25 CHRONICLES: A MAGAZINE OF AMERICAN CULTURE 8 (Apr., 2000). For criticism of Clinton's actions in pardoning Rich and others, see Lisa Anderson, *Clinton Has a Knack for Taking Lows to New Heights; He's Just 5 Weeks out of Office, but Alleged Sins Keep Multiplying*, CHI. TRIB., Feb. 26, 2001, at C1; *Clinton's Unpardonable Action*, L.A. TIMES, Feb. 11, 2001, at M4; *Clinton's Unpardonable Pardons*, FORT LAUDERDALE SUN-SENTINEL, Jan. 26, 2001, at A24; William Safire, *Isn't it Rich?*, N.Y. TIMES, Feb. 1, 2001, at A23; David Tell, *Unpardonable*, WKLY. STANDARD, Feb. 26, 2001, at 9.

38. See PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 9, at 170-99.

"Progressive Amendments" that brought us a redistributive income tax,³⁹ direct election of senators,⁴⁰ and prohibition,⁴¹ among other evils, may well have transformed this country, at a constitutional level, into something Marshall and the Framers would have abhorred.⁴²

To be consistent I ought to advocate the repeal of all the post-Reconstruction Amendments, but I am not prepared to go that far, and, after all, I have been one of the most vocal supporters of the Flag Protection Amendment, which I still expect to pass sooner or later.⁴³ Still, the legacy of judicial review ought to be to remind us that it was originally a tool in the service of a *republican* and not a *democratic* Constitution, devoted to the protection of property and contract rights, and devoted to preventing state legislatures from suspending debts and issuing paper money.⁴⁴ Holmes was, of course, quite wrong when he dissented in *Lochner*⁴⁵ on the grounds that a constitution embraces no particular economic or political theory. Ours did, and the *Lochner* majority basically got it right, as we are now beginning to understand.⁴⁶ That is judicial review for you. So as we ruminate on judicial review, and the legacy of *Marbury*,⁴⁷ we ought to consider that, at least as originally understood, it was anything but a progressive doctrine, and that the legacy of the progressives might well yield Bill Clinton and Marc Rich, and not a future John Marshall.

39. U.S. CONST. amend. XVI.

40. U.S. CONST. amend. XVII.

41. U.S. CONST. amend. XVIII. (repealed 1933).

42. Lest the implication that Marshall would have had some problems with the Eighteenth Amendment be doubted, see Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1109 (2000) (noting Marshall's "unquenchable thirst for Madeira").

43. On the flag amendment, and the wisdom of current amendment efforts, see generally Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209 (2000).

44. For more on these purposes of the Federal Constitution see generally WOOD, *supra* note 23, at 503-16.

45. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *overruled in part* by *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), and *overruled in part* by *Ferguson v. Skrupa*, 372 U.S. 726 (1993).

46. On the coherent and historically accurate theory of *Lochner*, and how Holmes got it wrong, see, for example, PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 9, at 139-43.

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

JOHN MARSHALL: WHICH ONE? BETTER OR WORSE THAN CHASE?

That brings me to my second set of alarming observations, those concerning the legacy of John Marshall himself. What, then, is the legacy of John Marshall, assuming that it is not judicial review, on which I have already touched? To be honest, the legacy of John Marshall could not be judicial review, because it is clear to anybody who consults the historical record that Marshall, in *Marbury*, was simply invoking the doctrines of judicial review set out by Hamilton in *The Federalist No. 78*, and many others before and after.⁴⁸ But if we search for the legacy of John Marshall the man, the first problem that we encounter is that there are probably lots of John Marshalls, which introduces the possibility of multiple legacies. There is the John Marshall who allegedly wanted to keep the Court out of politics⁴⁹ (somehow I think he did not leave much of a legacy);

48. See, e.g., JOSEPH H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1965) (making the case that these colonial appeals were the precursors of American judicial review); Presser, *supra* note 6, at 1158 (supplementing Snowiss's listing with Thomas Hutchinson's 1768 criticism of American ideas about having judges refuse to enforce immoral laws or laws contrary to the purposes of government); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997) (exploring the sources of judicial review before *Marbury v. Madison*); Snowiss, *supra* note 6, at 979 (providing examples of the articulation of the theory and practice of judicial review by James Iredell, James Wilson, Spencer Roane, Saint George Tucker, and William Paterson, all before *Marbury*). For a comprehensive study of the relationship between *Marbury* and judicial review, see ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 117-25 (1989).

49. The principal work supporting this contention is probably 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815* (1981). For skepticism about whether this account squares with reality see, for example, Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340 (1982) (book review). In any event, in the late twentieth and early twenty-first century, it is impossible to argue that the dominant perception is anything but the clear infusion of politics into law and judging, illustrated by the lamentable effort now underway to subject judicial appointees to ideological litmus tests. See, e.g., Richard Bond, *The Senate's Hidden Power: Ideology Taints Judicial Appointments*, WASH. TIMES, June 5, 2001, at A19; Editorial, *Stop Pretending Judges' Ideologies Don't Matter*, NEWSDAY, June 28, 2001, at A40; Edward Walsh, *Panel Debates Senate Role on Court Choices; Clash on Ideology's Place Reflects Battles to Come*, WASH. POST, June 27, 2001, at A23. Along with a couple of other brave stalwarts I tried to make the case in Washington, before Senator Schumer's committee (he is the point man on the effort to take ideology into consideration for judicial appointments) that rather than ideology, the only relevant thing about a nominee is his or her adherence to the notion that judges should not legislate, but should instead implement the rule of law. See generally *Ideology and Judicial Nominations: Hearing on*

there is the John Marshall who broadly expounded, or perhaps *expanded* the Constitution in *McCulloch*, who went on to become the patron saint of the "switch in time that saved nine," the "judicial revolution of 1937,"⁵⁰ as well as of the Warren Court;⁵¹ and then there is the John Marshall of *Fletcher v. Peck*⁵² and *Dartmouth College*,⁵³ who believed in property and contract rights,⁵⁴ and who might well have inspired the "Four Horsemen" in their resistance to Franklin Roosevelt.

I do not know much about any of those Marshalls, however. The real reason I was invited to participate in this Symposium is because I once spent some time studying the pre-Marshall Court in general and Samuel Chase in particular.⁵⁵ Perhaps the most important legacy of John Marshall is that he was, by definition, something different from the pre-Marshall Court. While we glory in Marshall's anniversary, however, I thought it might be worthwhile to remember what it was he moved away from, or perhaps what he obscured. The point here is that there was a lot in the pre-Marshall

"Should Ideology Matter?: Judicial Nominations 2001" Before the S. Comm. on the Judiciary Subcomm. on Admin. Oversight and the Cts., 107th Cong. (2001) (testimony of Stephen B. Presser, Raoul Berger Prof. of Legal Hist., Northwestern Univ. Sch. of Law), available at <http://judiciary.senate.gov/record/oldsite/te062601Pre.htm>. Senator Schumer appeared unconvinced. See, e.g., Joyce Purnick, *Ideology? Well, Who's to Judge?*, N.Y. TIMES, July 2, 2001, at B1 (indicating that Presser's view was different from Schumer's).

50. James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1024 (2000) ("In a particularly unhistorical twist, some supporters of the New Deal even presented Marshall as a kind of forerunner of modern liberalism.").

51. STEPHEN B. PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* 172 (1991) [hereinafter PRESSER, *THE ORIGINAL MISUNDERSTANDING*] (commenting on the habit of scholars "to use John Marshall's supposed greatness to legitimize United States Supreme Court actions since the 'Constitutional Revolution' of 1937," including not only those of the New Deal Court, but also those of the Warren Court).

52. 10 U.S. 87 (1810).

53. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518 (1819).

54. For thoughts on this John Marshall, see, for example, ROBERT KENNETH FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 20-33 (1968) (analyzing Marshall's understanding of the foundational role of private property for economic growth), and Ely, *supra* note 50 (reassessing, articulating, and praising Marshall's commitment to property and contract rights as essential features of his constitutionalism).

55. The principal result was PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51. My views on Chase are further set forth in Stephen B. Presser, *Et tu, Raoul? Or The Original Misunderstanding Misunderstood*, 1991 BYU L. REV. 1475, and in Stephen B. Presser, *The Verdict on Samuel Chase and his "Apologist,"* in *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL* 260 (Scott Douglas Gerber ed., 1998).

Court that also forms part of our constitutional legacy, and that, while we celebrate Marshall, we should still remember the continuing influence of the Supreme Court before him.⁵⁶

So I thought I would take a few pages to do that, and, in particular, to say something about Samuel Chase, whom Marshall *clearly* was not. Like everybody else who had to deal with Chase, I suppose Marshall was politely exasperated with him during the eleven years that they were together on the Court. Everybody, then and now, seems to have loathed Chase in one form or another.⁵⁷ Chase, you will remember, is the only United States Supreme Court Justice ever to have been impeached, and is usually regarded as the "American Jeffreys,"⁵⁸ a partisan bully, or worse.⁵⁹ Chase was the most famous enforcer of the Alien and Sedition Acts, and it is said he loved nothing better than to send a Jeffersonian scribbler to federal prison, which a contemporary newspaper, the *Philadelphia Aurora*, called Chase's "repository of Republicans."⁶⁰ For the last fifty years almost no one has had a kind word to say about Chase, which was enough for me to find him irresistible.

As it turns out, if you look into the record you do find that Chase was not without human failings. Alexander Hamilton, no less, in what may have been his first use of the pseudonym *Publius*, denounced Chase for cornering the flour futures market during the Revolutionary War, when our troops needed bread, and when

56. For introductions to the work of the pre-Marshall justices, see generally, WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (1995); 1 JULIUS GOEBEL, JR., *A HISTORY OF THE UNITED STATES SUPREME COURT: ANTECEDENTS AND BEGINNINGS TO 1801* (1971); *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL* (Scott Douglas Gerber ed., 1998).

57. My favorite comment in this regard is that of Richard Peters, the United States District Judge for Pennsylvania who sat with Chase in some of his most notorious court cases: "Of all others, . . . I like the least to be coupled with him [Chase]. I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble." PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 11 (quoting 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 281 (rev. ed. 1926) (quoting Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804))).

58. *Id.* at 13 (quoting RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC*, 79 (1971)).

59. For a summary of and citations to the litany of criticism of Chase, see *id.* at 4-5.

60. *Id.* at 5. Here the term "Republican" means an adherent to the tenets of the emerging Jeffersonian "Democratic/Republicans" as distinguished from the Adams' "Federalists," and not the generic use of "republican" as meaning something distinguished from "democratic," as employed in the first part of this Essay. No one said this was not going to be confusing.

Chase, as a Congressman, had advance confidential word that there was going to be a massive Army purchase of flour.⁶¹ And it is true that while he was a sitting Supreme Court Justice Chase actively campaigned for John Adams.⁶² To my mind, however, Chase was more consistent than Marshall at upholding what was to become a set of American judicial ideals.

It was Chase's exposition of *The Federalist No. 78* in the 1800 *Callender*⁶³ case (with Marshall in the audience) that was reproduced, almost word for word, in *Marbury*.⁶⁴ During Chase's impeachment trial, Marshall, whom Chase had counted on to support him with regard to his conduct at the *Callender* trial, was rather wishy-washy on the stand. In addition, at almost the same time, Marshall, who gets all the credit for judicial review, actually put pen to paper to confess that maybe Congress should have the last word on judging unconstitutionality.⁶⁵ Almost no one ever remembers these incidents, but under pressure at the time of the Chase impeachment, when strong men should have been standing firm in defense of the rule of law, Marshall waffled. When the Jeffersonians passed their 1802 Judiciary Act, which repealed the Federalists' Midnight Judges Act and removed all the new federal circuit judges from their benches, Chase wrote Marshall and the other Supreme Court justices that this was an unconstitutional removal of judges without the benefit of impeachment,⁶⁶ and that the Court had to take a stand against it, but Marshall meekly let it pass. Mull that over for a while, by the way, to see if Chase did not get it right. The Jeffersonians said, "Oh, no, we're not removing judges, we're just removing judicial positions," but is that really consistent with the structure of the Constitution? If the Jeffersonians were right, of course, then Franklin Roosevelt did not really need his court-packing plan at all—he should have just

61. *Id.* at 25.

62. *Id.* at 4-5.

63. *United States v. Callender*, 25 F. Cas. 239 (C.C.D. Va. 1800) (No. 14,709).

64. PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 242 n.42.

65. 3 ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 176-79 (1919).

66. PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 163 (citing Letter from Samuel Chase to John Marshall (Apr. 24, 1802) (on file with the New York Historical Society)).

gotten Congress to reduce the number of Supreme Court justices, and booted out the Four Horsemen,⁶⁷ but I digress.

Chase was the only United States Supreme Court Justice until well into Madison's term who boldly rejected the federal common law of crimes, an issue on which Marshall was strangely silent.⁶⁸ And, interestingly enough, Chase, in *Calder v. Bull*,⁶⁹ equally boldly advocated a jurisprudence based on transcendent principles of republicanism, a jurisprudence which claimed that no matter what was in a written constitution, no government that called itself republican could tolerate ex post facto laws, the expropriation of private property, or parties being allowed to act as judges in their own cases. Here, though it was couched in terms of what a republic required, Chase was simply reflecting the overarching maxims of the common law championed by no less an authority than Sir Edward Coke himself.⁷⁰ These were principles that restricted the national and state legislatures in the interests of protecting liberty and property, just as Chase's view on the common law of crimes was designed to protect citizens from an overweening government. The Marshall in *McCulloch*, at least, cleared the path for just the kind of powerful central government Chase feared.

Chase and his pre-Marshall fellows also seemed to believe, as Chase's Baltimore Grand Jury Charge (an element in his impeachment) indicated, that there could be no order without law, no law without morality, and no morality without religion, and that it was the job of the justices to remind the rest of America of these timeless truths.⁷¹ These pre-Marshall justices, as Robert Lerner wrote many years ago, believed they were "Republican

67. This argument is made in Presser, *Et tu, Raoul?*, *supra* note 55, at 1486.

68. On the controversy over the federal common law of crimes in general, and Chase's views in particular, see, for example, PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 76-98.

69. 3 U.S. (3 Dall.) 386 (1798). For an analysis of Chase's views in this case see, for example, PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51 at 41-43; Ely, *supra* note 50, at 1028-29; John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337 (1997).

70. Cf. *Dr. Bonham's Case*, 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610) (establishing principle that no one should be judge and party in his own case, and indicating the role of common law in adjudging acts of Parliament to be without force).

71. See, e.g., PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 141-49, PRESSER, *RECAPTURING THE CONSTITUTION*, *supra* note 9, at 84-97.

schoolmasters,"⁷² and thought it was part of their responsibility to lecture Americans on sensible political, economic, moral, and religious principles. In Chase's Baltimore Grand Jury charge he also railed against widening the franchise to include those without a serious stake in the community (as Maryland had recently done), and threw in attacks on Maryland's recent abolition of one of its courts, and the Jeffersonians' repeal of the Midnight Judges Act for good measure.⁷³ Marshall, it was said, was not "fond of butting [his head] against a wall in sport,"⁷⁴ and he seems, at least in the first part of the nineteenth century, to have avoided openly challenging Jeffersonian usurpations.

But I must give credit where credit is due. Marshall did the right thing in *Fletcher v. Peck*, in *Dartmouth College*, in *Gibbons v. Ogden*,⁷⁵ and maybe in lots of other cases of his that I do not even know. I am not quite ready to prostrate myself at the altar of Marshall worship, however, and I wonder if the kind of judicial deification of Marshall that we have perpetuated for the last sixty-five years or so is really healthy. For most of us, I daresay, Marshall stands in as a proxy for the notion that the courts are the best lawmakers, the Supreme Court in particular, and that the job of the courts is to fit the Constitution to the Age.

This is probably the dominant religion among most current legal academics, but Marshall worship obscures the continuing validity of a separate set of postulates—to wit, that if you want the Constitution to change you amend it, that it is the job of the courts to apply law, not to make it, and that it is for the legislatures to promulgate new legal rules. Marshall worship also obscures the fact that most of our legal and constitutional history was not made by United States Supreme Court Justices, but by state judges, by lower federal court judges, by state and federal legislatures, and by practicing lawyers, administrative agencies, and all the other

72. Robert Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

73. For the text of Chase's Baltimore Grand Jury Charge see STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 224-26 (4th ed. 2000).

74. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 205 (1985) (quoting Letter from John Marshall to Justice Story (Sept. 26, 1823) (on file with Massachusetts Historical Society, Boston)).

75. 22 U.S. 1 (9 Wheat.) (1824).

people and institutions that Willard Hurst urged us to study a generation or so ago.⁷⁶ I am not sure whether we have come here to praise Marshall, and I really have no wish to bury him, but he still makes me nervous. I am not as sure as I would like to be that he really cared all that much for the rule of law,⁷⁷ and while it is undeniable that he was brilliant, in his judicial opinions, at least, one usually searches in vain for the kind of scholarship or luminously articulated philosophy⁷⁸ that one finds in the opinions of Story⁷⁹ or even of Chase.⁸⁰

CONCLUSION: TWO STRANDS OF CONSTITUTIONAL JURISPRUDENCE

Let me close by putting it slightly differently. For me, John Marshall, or at least the Marshall of *McCulloch*, represents one strand in our constitutional history: an instrumentalist, positivist, centralizing, judicial supremacist strand, one less concerned with principle and precedent, and more concerned with expedience.⁸¹ For

76. For Hurst's titanic contribution to American legal history, and his philosophy of writing it, see, for example, Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 44-55 (1975).

77. For my difficulties with the question of whether Marshall believed as strongly in the rule of law as Chase did see PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51, at 162-69.

78. For a fascinating rumination on this problem, which concludes with the suggestion that Marshall's jurisprudence was deeply imbued with natural-law thinking, but in a manner that eludes current scholars, see Robert Lowry Clinton, *Classical Legal Naturalism and The Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 959-68 (2000).

79. For a discussion of Story's judicial philosophy see NEWMYER, *supra* note 74, at 205-11. See generally JAMES MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT* (1990).

80. See generally PRESSER, *THE ORIGINAL MISUNDERSTANDING*, *supra* note 51.

81. The qualifier in the text, "*at least the Marshall of McCulloch*," is an important one. One can make out a case that Marshall was a proponent of natural law, of the great principles of republican government, and a champion of property and contract rights that puts him quite close, on those issues, to the views of Chase, the pre-Marshall justices, and Joseph Story. See generally, Ely, *supra* note 50, at 1048-55 (exploring Marshall's commitment to supra-constitutional principles of a kind that Chase limned in *Calder v. Bull*). Still, there were differences between what Story believed in, and to what Marshall was prepared to commit. Professor Ely notes, for example, that it is likely that Marshall would have broken with Story over whether vested rights should have been sustained in the *Charles River Bridge* case. *Id.* at 1059.

me, Chase (and Story) represent another strand, one based in natural-law ideas running all the way back to Aristotle and Cicero, and forward through Aquinas and Burke.⁸² They saw law as a conservative force, and one embodying the moral principles and perhaps even the divine dictates of eternal forces. That is a view out of favor today, and perhaps that is why Marshall is now a great favorite. But we are now, and have been since our founding, involved in a sort of cultural war between these two views,⁸³ and the nation appears to prosper when both views are held in a sort of equilibrium. The Marshall/*McCulloch* view has been in ascendance for a long time now, and it, or something like it, has played a role in creating the essentially value-neutral views that now generally prevail in the legal academy and often in the courts. These views have led naturally to a law-school trained President—the one who just left office—who can quibble over what the meaning of “is” is, and who appeared to regard the prerogatives of his office as a license to do whatever he pleased, rather than what was in the best interests of the nation. Bill Clinton was not only not a modern Republican, he was not an Old Republican. I am sure John Marshall would not have been proud of him. Still, the Great Chief Justice, insofar as his legacy has come to be perceived as authority for an instrumental expedient brand of governing, may have helped spawn Clinton. I would not obliterate the legacy of John Marshall, but I would make a bit more room for the legacy of Chase, the pre-Marshall justices, and Joseph Story.

82. For this strand in Story, see particularly MCCLELLAN, *supra* note 79, at 69-73.

83. On the ongoing cultural war over these and related issues see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 241-50 (1990); GERTRUDE HIMMELFARB, *ONE NATION, TWO CULTURES* 137-41 (1999). There are those who see the development of American law as a movement from one set of values to another, a “transformation” as it were. See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977). See, to similar effect, White, *supra* note 24, at 812-18 and WOOD, *supra* note 23, at 91-93. I think the evidence indicates not so much a transformation from one view to another, but an oscillation from one perspective as the dominant one to the other. The “transformation” analysis seems to be a sort of Whiggish view of legal history that might be ripe for questioning. See, e.g., HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (reprint ed. 1931).