



JUSTICE WILLIAM PATERSON
1793-1806

JUSTICE WILLIAM PATERSON—FOUNDER

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I. INTRODUCTION

Appointed by George Washington in 1793 as a Justice of the Supreme Court of the United States,¹ William Paterson was in the unique position given to a Founding Father. At the Constitutional Convention of 1787, he had helped to frame the Constitution under which he exercised judicial office.² In the first Senate, he had been one of the principal authors of the Judiciary Act of 1789, which constructed the Federal judicial system. Indeed, the first nine sections of the Act, which included the composition of the Supreme Court and the establishment of the district and circuit courts, were in Paterson's handwriting.³ Thus, Paterson was a Founding Father both of the Nation and of the Federal judiciary.

Consequently, this study of Paterson's work as a Justice of the Supreme Court has an unusual aspect. Paterson's influence on the Court through his work in the Convention and his structuring of the Federal judiciary were more important to the Nation and to the Supreme Court itself than even his substantial contributions as a Justice. This essay, accordingly, has two parts: the Convention and the Judiciary Act, and Paterson's work on the Court.

First, however, a brief look at his roots in New Jersey helps to explain much about William Paterson. He was born in Antrim, Ireland in 1745. In 1747, his Scotch-Irish parents came to America. His father opened a general store in Princeton, across from Nassau Hall of the College of New Jersey. Paterson was fourteen when he entered the college in 1759. He studied the classics and moral philosophy, read Pope and Dryden, was

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¹ J. O'CONNOR, *WILLIAM PATERSON: LAWYER AND STATESMAN 1745-1806*, at 224 (1979).

² See M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 84-86, 200 (1913); C. ROSSITER, *1787: THE GRAND CONVENTION 175-76* (1966); C. WARREN, *THE MAKING OF THE CONSTITUTION* 220-32 (1937).

³ I. J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 457-508 (1971).

strongly religious, and saw no conflict between religion and the rationalism of John Locke and Thomas Hobbes. He was anxious to advance himself and to become a gentleman.⁴

Paterson was rather short, slight, not handsome, and he waited fourteen years after college to marry. He was a leader, however, and he helped found the Cliosophic Society, a social and debating club, at Princeton.⁵ After graduation, he read law in Princeton under Richard Stockton.⁶ He finally left Princeton, with misgivings, for a country practice in Raritan. There, besides being a surrogate, he seems to have spent a great deal of time handling his father's financial problems.⁷

Paterson thought that both private and public life rested on moral virtue, and virtue in turn rested on discipline. The enemy of virtue was luxury, and Paterson saw luxury in the British monarchy. As a good Calvinist, Paterson saw the people as also prone to luxury.⁸ He thought, however, that morals and republican government together would help to keep the citizens virtuous. Even so, to Paterson, government depended upon a natural aristocracy of virtuous leaders who would seek the public interest.⁹

Paterson was a blend of the moralistic and the practical, an ambitious and perhaps a somewhat insecure person in his early years. These personal paradoxes were evident during the Constitutional Convention. A consistent nationalist, Paterson introduced the New Jersey or Paterson plan for amending the Articles of Confederation; he opposed Madison's Virginia plan, which became the eventual basis of the Constitution.¹⁰ After achieving equality for the small states, Paterson left the Convention on July 23rd, when half of the work was still to be done.¹¹ These contradictions seem to fit William Pierce's description of Paterson at the Convention:

[O]ne of those Men whose powers break in upon you, and create astonishment. He is a Man of great modesty, with looks that bespeak talents of no great extent,—but he is a Classic, a Lawyer, and an Orator;—and of a disposition so favorable to

⁴ See J. O'CONNOR, *supra* note 1, at 7-19; C. ROSSITER, *supra* note 2, at 99.

⁵ J. O'CONNOR, *supra* note 1, at 28.

⁶ *Id.* at 32.

⁷ *Id.* at 33-34.

⁸ *Id.* at 59-61.

⁹ *Id.* at 18-19, 48-55.

¹⁰ M. FARRAND, *supra* note 2, at 84-85.

¹¹ See C. WARREN, *supra* note 2, at 719.

his advancement that everyone seemed ready to exalt him with their praises.¹²

In spite of these paradoxes, Paterson had a set of consistent principles and great opportunities. Property and political stability were sacred to him.¹³ As a lawyer, Paterson sued debtors, and as attorney general during the Revolution, he pursued Tories and fought for political and financial stability in New Jersey.¹⁴ Paterson joined his friends and mentors from Princeton in a rebellion against a monarchy that he saw as luxury-ridden and contemptuous of republican principles.¹⁵

Paterson represented the middle-class, Presbyterian New Jersey of the colonial era. He served as secretary to both New Jersey's Provincial Congress and its constitutional convention before being named attorney general.¹⁶ In 1787, he was chosen as one of New Jersey's delegates to the Federal Constitutional Convention in Philadelphia.¹⁷ The Convention, in the words of his biographer John E. O'Connor, was his finest hour.¹⁸

II. THE CONVENTION

It was as a politician, lawyer, and strategist that William Paterson distinguished himself at the Constitutional Convention. Madison of Virginia and Wilson of Pennsylvania were to be the principal architects of the new Government, not only because of ability and political principle, but because the interests of their states coincided with the creation of a strong National Government and with proportionate representation by population in both branches of the Legislature. Madison, Wilson, and Gouverneur Morris were determined to institute a national or consolidated Government that would give the states a distinctly subordinate role, the opposite of government under the Articles of Confederation.¹⁹

William Paterson, representing New Jersey, led the coalition of small states that stopped the large state juggernaut and

¹² J. O'CONNOR, *supra* note 1, at 134.

¹³ *Id.* at 47-49.

¹⁴ *Id.* at 50, 100.

¹⁵ *Id.* at 45-55.

¹⁶ *Id.* at 71, 77, 84.

¹⁷ *Id.* at 133-34.

¹⁸ *Id.* at 131. See generally J. POMFRET, *COLONIAL NEW JERSEY* 218-46 (1973) (explaining social and political atmosphere in New Jersey prior to the Revolution).

¹⁹ See generally C. ROSSITER, *supra* note 2, at 159-81; C. WARREN, *supra* note 2, at 134-200.

brought about the Great Compromise.²⁰ The Compromise provided for proportional representation in the House of Representatives, but equal representation in the Senate.²¹ It ensured also that the new Government would be a federal one having a significant role for the states. Indeed, Paterson was later to describe the Federal system as "sovereignties moving within a sovereignty."²² To political thinkers like Paterson, the Great Compromise was necessary to prevent the demise of small states' rights and autonomy in the new Government.

Nowhere was this portentous scenario more evident than in Paterson's home state. New Jersey, having no major ports, had to import and export through New York and Philadelphia, both of which laid duties on New Jersey's commerce. Paterson's home state was, in Madison's words, "likened to a cask tapped at both ends."²³ New Jersey, like Connecticut, Maryland, and Delaware, was a relatively small state. Along with those states and New York, it had no claims to Western territory. If the new Government were to be based on representation according to population, Paterson and others believed, New Jersey could anticipate that the large states such as Virginia, Pennsylvania, Massachusetts, and others would subordinate New Jersey's interests to theirs and would perhaps even destroy the smaller states.²⁴ By contrast, for the large states with significant populations or the prospect of new Western lands, proportional representation in the National Government posed little apparent threat to their interests.²⁵ In addition, Madison, Wilson, and some of the others from the large states had backgrounds of national and even international experience, while Paterson had served New Jersey during the Revolution as its attorney general.²⁶

We must analyze Paterson's role in the course of the Convention in order to understand and appraise it. In the first two weeks, from May 30th to June 13th, the delegates met as a Committee of the Whole while Randolph, Madison, Wilson, and

²⁰ See C. ROSSITER, *supra* note 2, at 175-79; C. WARREN, *supra* note 2, at 199, 220-31.

²¹ C. ROSSITER, *supra* note 2, at 186. See generally C. WARREN, *supra* note 2, at 267-312.

²² Talbot v. Janson, 3 U.S. (3 Dall.) 133, 154 (1795) (opinion of Paterson, J.)

²³ I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 65 (1950).

²⁴ See J. O'CONNOR, *supra* note 1, at 135-36; see also I. BRANT, *supra* note 23, at 65 (noting problem of trade for New Jersey and Connecticut).

²⁵ I. BRANT, *supra* note 23, at 61.

²⁶ See C. ROSSITER, *supra* note 2, at 99, 101-09, 117-26.

others formulated the Virginia plan. The plan, largely drafted by Madison, presented the idea of a national government consisting of three branches with broad national powers. Of these branches, the lawmaking body was a two-house legislature to be chosen according to proportional representation. The plan envisioned a new form of government rather than an amendment to the Articles of Confederation.²⁷

While the different resolutions of the Virginia plan were being adopted, Paterson remained silent.²⁸ On June 9th, however, Paterson rose to object to the proposal for proportional representation. In his carefully prepared speech, Paterson argued that the body was moving beyond its mandate from the states, which was to amend the Articles.²⁹ More importantly, Paterson stated that the small states could never agree to the dominance by the large states embodied in the Virginia plan.³⁰ Madison's notes recorded the speech and the peroration:

He alluded to the hint thrown out heretofore by Mr. Wilson of the necessity to which the large States might be reduced of confederating among themselves, by a refusal of the others to concur. Let them unite if they please, but let them remember that they have no authority to compel the others to unite. N. Jersey will never confederate on the plan before the Committee. She would be swallowed up. He had rather submit to a monarch, to a despot, than to such a fate. He would not only oppose the plan here but on his return home do everything in his power to defeat it there.³¹

Wilson replied that the large states could not agree to representation not based upon population, in which a minority could rule the majority.³² The Committee of the Whole voted on June 11th to accept the principle of representation in both houses according to population, but the Convention resolved to take the matter up again.³³

On June 13th, a Wednesday, the Committee of the Whole de-

²⁷ C. WARREN, *supra* note 2, at 146-219; see C. ROSSITER, *supra* note 2, at 171-73.

²⁸ J. O'CONNOR, *supra* note 1, at 138.

²⁹ *Id.*

³⁰ C. WARREN, *supra* note 2, at 199-200.

³¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 179-80 (M. Farrand ed. 1911) [hereinafter cited as 1 RECORDS] (Madison's notes); see also *id.* at 185-91 (Paterson's notes of his speech).

³² *Id.* at 183; C. WARREN, *supra* note 2, at 200.

³³ 1 RECORDS, *supra* note 31, at 192-94. See generally C. WARREN, *supra* note 2, at 207-12.

cided to report the Virginia plan to the Convention.³⁴ Paterson's intervention on June 9th, however, had initiated a great debate between the large states and the small. The next move by Paterson was the introduction of an alternative to the Virginia plan—the New Jersey or Paterson plan.³⁵ After obtaining a recess to complete its preparation, and with backing by New Jersey, Connecticut, Delaware, and Luther Martin of Maryland, Paterson presented the plan on June 15th.³⁶ Essentially, Paterson's plan expanded the powers of the Confederation.³⁷ After several days of debate on the two plans, capped by a speech from Madison, the Virginia plan was approved on June 19th by the Committee of the Whole by a vote of seven to three.³⁸ Madison, Wilson, and others had eloquently presented the Virginia plan, while the New Jersey plan had been thrown together hastily.³⁹ The small state delegates were united only in their demand for equality.⁴⁰

Nevertheless, the New Jersey plan and Paterson's earlier intervention of June 9th had dramatically highlighted the cause of the small states for equality. From June 21st to June 26th, the Convention took up each detail of the Virginia plan as submitted by the Committee of the Whole.⁴¹ On June 27th, the debate over representation was renewed by Luther Martin of Maryland in a long, rambling speech.⁴² On June 28th, Dayton of New Jersey and Lansing of New York moved for equality among the states in the lower branch.⁴³ Their motion was lost, with Connecticut, New York, New Jersey, and Delaware on the losing side and Maryland divided.⁴⁴ Representation in the Senate was considered next, with Ellsworth of Connecticut moving for equality and expressing doubt that any state north of Pennsylvania, except Massachusetts, would consent to anything other than equal representation.⁴⁵ A tie vote ensued on July 2nd, and a special committee was elected to report a compromise.⁴⁶

Paterson, who had remained silent during this debate, was

³⁴ 1 RECORDS, *supra* note 31, at 238-39.

³⁵ M. FARRAND, *supra* note 2, at 84-85.

³⁶ *Id.*

³⁷ See 1 RECORDS, *supra* note 31, at 242-45.

³⁸ C. WARREN, *supra* note 2, at 231-32.

³⁹ See generally 1 RECORDS, *supra* note 31, at 248-322.

⁴⁰ C. ROSSITER, *supra* note 2, at 176.

⁴¹ *Id.* at 182-84; C. WARREN, *supra* note 2, at 236-45. See generally 1 RECORDS, *supra* note 31, at 334-435.

⁴² C. WARREN, *supra* note 2, at 245-47.

⁴³ *Id.* at 249.

⁴⁴ 1 RECORDS, *supra* note 31, at 468.

⁴⁵ C. WARREN, *supra* note 2, at 255; see 1 RECORDS, *supra* note 31, at 468-69.

⁴⁶ M. FARRAND, *supra* note 2, at 96-98.

elected to the Committee.⁴⁷ The composition of the Committee meant that the Convention favored a compromise with the smaller states. Madison and Wilson were not elected; large state delegates who were willing to compromise were chosen instead.⁴⁸ The result, reported on July 5th, was the Great Compromise: representation by population in the House and equal representation in the Senate.⁴⁹

After a long debate on other parts of the Compromise—the number of representatives in the House, the counting of slaves, and the power over money bills⁵⁰—the Convention adopted the full Compromise on July 16th.⁵¹ Connecticut, New Jersey, Delaware, Maryland, and North Carolina voted yes (New York was absent); Pennsylvania, Virginia, South Carolina, and Georgia voted no; Massachusetts was divided.⁵² Randolph of Virginia then asked for an adjournment to enable the large states to evaluate their position, and he suggested that the small states might also consider a method of conciliation.⁵³ At this point, Paterson, not one to let the victory slip away, intervened. He would be happy to second Randolph's motion for an adjournment for the purpose of consulting with his constituents, he said, because the small states would never yield their demand for equality in the Senate.⁵⁴ Randolph replied that he had never intended more than a day's adjournment.⁵⁵ The next day, July 17th, after inconclusive discussion among large state delegates, the Compromise was left intact, much to Madison's distress.⁵⁶

On this same day, Paterson wrote to his wife, "I expect to be with you on or about the first of next month and hope that I shall not be under the necessity of returning."⁵⁷ Paterson seems to have had pressing business at home, he was uncomfortable in Philadelphia and avoided the social life the Convention called for,⁵⁸ and he had, as always, one foot in New Jersey. Perhaps he decided to leave only a few days later on July 23rd because he realized that the work

⁴⁷ J. O'CONNOR, *supra* note 1, at 153.

⁴⁸ 1 RECORDS, *supra* note 31, at 516; C. ROSSITER, *supra* note 2, at 187; C. WARREN, *supra* note 2, at 264.

⁴⁹ M. FARRAND, *supra* note 2, at 99; 1 RECORDS, *supra* note 31, at 526.

⁵⁰ See generally C. WARREN, *supra* note 2, at 274-308.

⁵¹ *Id.*

⁵² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (M. Farrand ed. 1911) [hereinafter cited as 2 RECORDS].

⁵³ *Id.* at 17-18.

⁵⁴ J. O'CONNOR, *supra* note 1, at 156-58.

⁵⁵ *Id.* at 158; C. ROSSITER, *supra* note 2, at 194-95.

⁵⁶ See C. ROSSITER, *supra* note 2, at 192-94; C. WARREN, *supra* note 2, at 313.

⁵⁷ 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 70 (M. Farrand rev. ed. 1937) [hereinafter cited as 4 RECORDS]; see J. O'CONNOR, *supra* note 1, at 160.

⁵⁸ See J. O'CONNOR, *supra* note 1, at 160-61.

of the Convention would take some weeks more. Nevertheless, he returned on September 17th to sign the proposed Constitution.⁵⁹

Despite persistent impressions to the contrary, which are attributable in part to Madison's notes of July 7th, it seems clear that Paterson supported the Great Compromise.⁶⁰ Above all, he was satisfied with the work of the Convention. In the letter of July 17th to his wife, Paterson also wrote, "The business is difficult and unavoidably takes up much time, but I think we shall eventually agree upon and adopt a system that will give strength and harmony to the Union and render us a great and happy people."⁶¹ For Paterson at that time, the principles had been settled upon to his satisfaction, and only the detail remained. In an August 23rd letter to Oliver Ellsworth, he stated:

What are the Convention about? When will they rise? will [sic] they agree upon a System energetick [sic] and effectual, or will they break up without doing any Thing to the Purpose? . . . I hope you will not have as much Altercation upon the Detail, as there was in getting the Principles of the System. . . . I wish you much Speed, and that you may be full of good Works, the first mainly for my own Sake, for I dread going down again to Philad[elphia]. . . .⁶²

Paterson's departure once the small states were protected symbolized his role at the Convention.⁶³ The success of the Convention depended upon an accommodation with the small states, which Madison, Wilson, and Morris were unwilling to make. That the debate was held, that it was conducted on legal and political principles

⁵⁹ C. WARREN, *supra* note 2, at 719. Once the small states like New Jersey had won equality, they were strong supporters of national power. See C. ROSSITER, *supra* note 2, at 196; see also C. WARREN, *supra* note 2, at 310 n.1 (quoting Letter from James Madison to Martin Van Buren (May 13, 1828)).

⁶⁰ Madison's notes have Paterson as saying, in debate with Madison and Gouverneur Morris on July 7th, "For himself he should vote [against] the Report, because it yielded too much." 1 RECORDS, *supra* note 31, at 551. King's notes also report Paterson as saying, "I think I shall vote [against] the Report." *Id.* at 554. In any event, Paterson's words appear in the context to be a debating tactic.

Paterson's July 16th tactics on adjournment are cited by Warren and seem to have influenced Rossiter, who quotes the entire exchange. See C. ROSSITER, *supra* note 2, at 194-95; C. WARREN, *supra* note 2, at 311-12; see also *supra* notes 53-55 and accompanying text. O'Connor, however, correctly reads this as maneuvers by Randolph to upset the Compromise and by Paterson to protect it. See J. O'CONNOR, *supra* note 1, at 156-58.

⁶¹ J. O'CONNOR, *supra* note 1, at 160; 4 RECORDS, *supra* note 57, at 70.

⁶² 4 RECORDS, *supra* note 57, at 73; see J. O'CONNOR, *supra* note 1, at 161.

⁶³ Clinton Rossiter, appraising each of the Framers, calls Paterson "the stubborn and successful advocate of state equality, whose departure in late July may have robbed him of a much higher ranking." C. ROSSITER, *supra* note 2, at 250. Paterson, Rossiter says, "set some sort of record for stubborn courage." *Id.* at 205.

(whatever the issues of property and power concerning the Western lands), and that it was able to continue instead of leading to the dissolution of the Convention can be attributed in large part to Paterson, who was able to stand up to the ablest men of the Convention, such as Madison, Wilson, and Gouverneur Morris.⁶⁴

The focus of Paterson's efforts, in turn, is directly traceable to New Jersey's place in the nascent attempts to establish the bases of American political philosophy. As a small state, New Jersey needed a strong National Government to protect its interests. Paterson's intimacy with New Jersey as a student, lawyer, and public official made him acutely aware of this need. This intimacy ensured that New Jersey and other small states would have a cogent and formidable voice speaking for them at the Convention.

Well-educated and thoughtful as he was, however, Paterson was more the skilled common law and chancery practitioner than the scholar or political philosopher. Yet in his own political and moral philosophy, he was a strong advocate of stability and authority, with these convictions often directed to securing the rights of property. Paterson also stressed the people's compact, a principle apparently derived from John Locke, and a theory of sovereignty that bore echoes of Thomas Hobbes and may have owed much to William Blackstone.⁶⁵ In his later arguments supporting the Constitution and in his work on the Supreme Court, Paterson was an outspoken Federalist or nationalist. No fundamental change in Paterson's views seems to have been necessary, only the kind of development shared by most of the Founders. He was, from his experience, a true Federalist, seeking national, sovereign power while retaining an important role for the states, which would remain "sovereign" in the exercise of their own non-national powers.

One also senses about Paterson a certain underlying modesty and rectitude about his duties. On July 17th, when he saw that the Compromise would hold, his contribution to the Convention was sufficient; it was time to return home to his family and his law practice in New Jersey. What Paterson had done was to furnish the strong but moderate opposition that the great plan of Madison required. If the Constitution were to be proposed and adopted, it was not only essential that the small states be protected; it was also criti-

⁶⁴ Rossiter notes that the Constitution and its federal structure were at stake in the battle between "prideful Virginia and tenacious New Jersey." *Id.*

⁶⁵ See L. ROSENBERG, *THE POLITICAL THOUGHT OF WILLIAM PATERSON* 43-50, 180 (1967). Rosenberg emphasizes the influence of Locke. *Id.*; see also 12 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 712 (1938) (noting Blackstone's influence in the American Colonies).

cal that the Convention itself be a means for argument, debate, and compromise. Paterson's first argument on June 9th raised the question of representation. Then the New Jersey plan created the vehicle for the great debate. It is significant that Paterson was elected to the Committee of Compromise, while Madison, Wilson, and Gouverneur Morris were not. One can only speculate about what might have happened to the Convention if the small states had not been represented by a skillful, determined, and courageous advocate who was, at base, in agreement with Madison, Washington, and the other nationalists.

III. THE JUDICIARY ACT OF 1789

New Jersey was the third state to ratify the Constitution.⁶⁶ By August 1788, the required nine states had done so.⁶⁷ On November 25, 1788, William Paterson was chosen by a joint session of the legislature to be one of New Jersey's two Senators.⁶⁸ He took his seat in the Senate on March 19, 1789 in New York City. On April 7th, the Senate appointed a committee "to 'bring in a bill for organizing the judiciary of the United States.'" ⁶⁹ Paterson was appointed to this committee, which produced the Judiciary Act of 1789.⁷⁰

The first nine sections of the Judiciary Act of 1789 were in William Paterson's handwriting.⁷¹ Almost identical to the printed version, the handwritten draft discovered by Charles Warren⁷² led to a reappraisal of Paterson's contribution to this "great law."⁷³ Oliver Ellsworth chaired the committee and is considered to have been the leading draftsman, but Paterson played a considerable role.⁷⁴

⁶⁶ C. WARREN, *supra* note 2, at 768.

⁶⁷ J. O'CONNOR, *supra* note 1, at 167-68.

⁶⁸ *Id.* at 168.

⁶⁹ *Id.* at 169.

⁷⁰ *Id.*

⁷¹ *Id.* at 170.

⁷² See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50-51, 60 (1923); see also 1 J. GOEBEL, JR., *supra* note 3, at 463-65. Goebel believes that the manuscript discovered by Warren must be distinguished from an undiscovered "finished version" from which the bill was then printed. *Id.* at 465. Goebel's comparison of the actual draft and the printed bill does show a few small differences. See *id.* at 465-66 n.28. For a reproduction of the first page of Paterson's handwritten draft, see *id.* at 464.

⁷³ See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 4 (1927).

⁷⁴ 1 J. GOEBEL, JR., *supra* note 3, at 459; J. O'CONNOR, *supra* note 1, at 169-71; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 8-9 (1922).

While the House was considering the constitutional amendments that became the Bill of Rights, the Senate was undertaking to establish the Federal courts. The select committee numbered ten (half of the Senate), among whom Ellsworth, Paterson, and Caleb Strong were the leading lawyers.⁷⁵ In addition, Ellsworth and Paterson were the principal drafters.⁷⁶ Paterson, from his practice of law in New Jersey, had the most extensive experience in both the common law and the equity or chancery jurisdiction for which New Jersey was noted.⁷⁷

In the first nine sections, written by Paterson and enacted into law, the bill stated: "Be it enacted by the Senate and representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum. . . ." ⁷⁸ The next paragraph provided as follows: "And be it further enacted by the authority aforesaid, That the United States shall be, and they hereby are divided into eleven districts. . . ." ⁷⁹

The provision for United States district and circuit courts, in Paterson's hand, was of primary importance. The new Federal Government had fashioned "its own judicial machinery for enforcing its claims and safeguarding its agents against the obstructions and prejudices of local authorities."⁸⁰ Important matters such as financing the Government, commerce among the states, and foreign trade would be facilitated by the Federal courts.⁸¹

The division of the country into districts recognized the interests of the states. Each Federal district had a district court and was made coextensive with the geographic boundaries of a state, helping to ease the apprehension, as Goebel puts it, that the Federal courts would obliterate those of the states.⁸² Secondly, except for admiralty, the jurisdiction of the district courts was narrowly limited,⁸³ and the original jurisdiction of the circuit

⁷⁵ 1 J. GOEBEL, JR., *supra* note 3, at 458-59.

⁷⁶ Warren, *supra* note 72, at 50.

⁷⁷ 1 J. GOEBEL, JR., *supra* note 3, at 459.

⁷⁸ *Id.* at 469.

⁷⁹ *Id.*; see also *id.* at 464 (Paterson's handwritten manuscript).

⁸⁰ F. FRANKFURTER & J. LANDIS, *supra* note 73, at 10.

⁸¹ *Id.* at 7-11. For a summary and appraisal of the Act, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-36 (2d ed. 1973).

⁸² See 1 J. GOEBEL, JR., *supra* note 3, at 471.

⁸³ See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

courts, while broader, was carefully defined.⁸⁴

The famous section 25 provided for review by the Supreme Court, through writs of error, of the judgments of the highest courts of the states in law or equity when Federal questions were involved.⁸⁵ It was Paterson who had introduced the supremacy clause during the Convention as part of the New Jersey plan.⁸⁶ Section 25, "perhaps the boldest" section of the Judiciary Act, was an essential implementation of this clause.⁸⁷ As Laurence Tribe puts it, the Judiciary Act gave the Supreme Court the power "to review federal question decisions of state courts."⁸⁸ The Supreme Court later concluded that the Constitution gave it the power to accept such review.⁸⁹ In addition, section 34 of the Act provided that state laws would furnish the rules of decision in common law trials in the courts of the United States.⁹⁰

Paterson, with his unusual combination of nationalism and concern for the states, must have been a force on the committee for both national power and the integrity of the states. Because he was the most widely experienced lawyer on the panel, the more technical aspects of the bill must also have owed much to him. It is unnecessary to detract from Ellsworth's leadership in order to recognize this. Paterson's drafting of the first nine sections seems a good sign of the importance of his contribution to the Judiciary Act.

In short, the Judiciary Act of 1789 established the system of Federal courts, and Oliver Ellsworth and William Paterson were its principal authors. Of the Act itself, Frankfurter and Landis have written:

The Act has three claims to greatness. It devised a judicial organization which, with all its imperfections, served the country substantially unchanged for nearly a century. Through supervision over state courts conferred upon the Supreme Court by its famous Section Twenty-five, the Act created one of the

⁸⁴ See *id.* § 11, 1 Stat. at 78-79. See generally F. FRANKFURTER & J. LANDIS, *supra* note 73, at 12.

⁸⁵ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (current version at 28 U.S.C. § 1257 (1982)).

⁸⁶ M. FARRAND, *supra* note 2, at 85.

⁸⁷ 1 J. GOEBEL, JR., *supra* note 3, at 480-81; 1 C. WARREN, *supra* note 74, at 10-11.

⁸⁸ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-4, at 27 (1978); see G. GUNTHER, *CONSTITUTIONAL LAW* 29 (11th ed. 1985).

⁸⁹ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816).

⁹⁰ Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. Section 34 was not in the bill as drafted. It was, however, introduced in the Senate debate. Its original version was in Ellsworth's hand, as Charles Warren discovered. 1 J. GOEBEL, JR., *supra* note 3, at 502 & n.149.

most important nationalizing influences in the formative period of the Republic. But the transcendent achievement of the First Judiciary Act is the establishment for this country of the tradition of a system of inferior federal courts.⁹¹

IV. PATERSON'S WORK ON THE SUPREME COURT

In 1790, when Governor Livingston died, William Paterson was chosen by the legislature to be New Jersey's second governor.⁹² Then, in 1793, George Washington appointed Paterson to the Supreme Court of the United States.⁹³ Paterson was to serve on the Court until his death in 1806,⁹⁴ but there was also other evidence of his position and influence in the new Nation. In 1795, Washington, who had presided at the Constitutional Convention, offered Paterson the office of Secretary of State, but he declined.⁹⁵ Before Oliver Ellsworth was appointed Chief Justice in 1796, published reports indicated that the promotion of Justice Paterson was imminent.⁹⁶ In 1800, Paterson was the candidate of the Senate for the Chief Justiceship, but the Senators yielded to Adams's determination to appoint John Marshall.⁹⁷

In the early days of the Supreme Court, nearly every case established precedent. As in the Convention, therefore, the way to follow Paterson's work is chronologically, and Paterson's Supreme Court opinions will be discussed in the order in which they were written. Paterson also presided in the circuit courts, most notably at two trials for treason arising from the Whiskey Rebellion⁹⁸ and at two trials for violation of the alien and sedition laws.⁹⁹ It suffices to say that in the treason cases, Paterson carefully delineated the elements of proof of treason,¹⁰⁰ and in

⁹¹ F. FRANKFURTER & J. LANDIS, *supra* note 73, at 4.

⁹² J. O'CONNOR, *supra* note 1, at xii, 185.

⁹³ *Id.* at 223. As governor and chancellor of New Jersey, Paterson undertook a complete compilation and revision of New Jersey statutory law; he completed the work while on the Supreme Court. *See id.* at 202-22.

⁹⁴ *See id.* at 278.

⁹⁵ *Id.* at 238.

⁹⁶ I C. WARREN, *supra* note 74, at 140.

⁹⁷ J. O'CONNOR, *supra* note 1, at 260.

⁹⁸ *United States v. Vigol*, 2 U.S. (2 Dall.) 346 (Paterson, Circuit Justice 1795); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348 (Paterson, Circuit Justice 1795).

⁹⁹ I J. GOEBEL, JR., *supra* note 3, at 638-39; I C. WARREN, *supra* note 74, at 164-65; *see* F. WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 333-44, 684-87 (Philadelphia 1849). *See generally* Sedition Act, ch. 74, 1 Stat. 596 (1798) (repealed 1801); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (repealed 1801).

¹⁰⁰ *See United States v. Vigol*, 2 U.S. (2 Dall.) 346, 346-47 (Paterson, Circuit Jus-

the sedition trials, Paterson took a severe, federalist position.¹⁰¹

The importance of Paterson's work on the Supreme Court paralleled the importance of the early Court in preparing the way for the great cases of the Marshall era. From reading the early opinions and from the assessments of historians of the early Court, this work appears to have been an indispensable prelude.¹⁰² William Paterson's opinions show that he was both a skillful lawyer on the bench and an articulate exponent of national power, including the power of judicial review. In fact, Paterson's charge to the jury in *Vanhorne's Lessee v. Dorrance*¹⁰³ served as one of the most important justifications of judicial review in the early years. Nevertheless, to the reader today, there is a somewhat unformed quality to these early cases, not only because the opinions of the Justices were delivered separately, or *seriatim*, but also because the great cases would take time to develop. On the Supreme Court, Paterson, who had been the right age for leadership in the Revolutionary War and the Constitutional Convention, would help to prepare the way for younger men like John Marshall, Joseph Story, and others.

When William Paterson joined the Supreme Court in the February Term of 1794, the early Federal judiciary had begun to win some measure of public confidence.¹⁰⁴ Paterson's first full opinion appears in *Penhallow v. Doane's Administrators*,¹⁰⁵ the most important of three cases decided in the February Term of

tice 1795); *United States v. Mitchell*, 2 U.S. (2 Dall.) 348, 355-56 (Paterson, Circuit Justice 1795). See generally L. BALDWIN, *WHISKEY REBELS* 262-64 (1939); Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944).

¹⁰¹ See 1 J. GOEBEL, JR., *supra* note 3, at 637-39; F. WHARTON, *supra* note 99, at 334-42, 684-87.

¹⁰² See 1 J. GOEBEL, JR., *supra* note 3, at 722-93; 1 C. WARREN, *supra* note 74, at 31, 65-84, 91-168. But see 2 G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, at 7, 13-14 (1981). Haskins terms the early Court "[a] relatively feeble institution," ascribing its real beginning to Marshall. *Id.* Nonetheless, Haskins also states that "[b]y this date [1801], the Supreme Court had already upheld and extended Federalist principles of nationalization and centralization; and under Marshall's leadership it would continue much further in that direction." *Id.* at 147.

¹⁰³ 2 U.S. (2 Dall.) 304 (Paterson, Circuit Justice 1795).

¹⁰⁴ 1 C. WARREN, *supra* note 74, at 65. Confidence in the Federal bench had eroded as a result of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). That case had upheld the right of a citizen of South Carolina to sue the State of Georgia. *Id.* at 479 (opinion of Jay, C.J.). The *Chisholm* rule was promptly repealed by a constitutional amendment. See U.S. CONST. amend. XI. See generally 1 C. WARREN, *supra* note 74, at 91-99.

¹⁰⁵ 3 U.S. (3 Dall.) 54 (1795).

1795.¹⁰⁶ In 1777, Congress formed a standing committee of five members to hear appeals from the state admiralty courts in cases of capture.¹⁰⁷ That same year, the brig *M'Clary* captured the brig *Susanna*, and the owners of the *M'Clary*, Penhallow and others, successfully brought a libel in the New Hampshire courts to have the *Susanna* declared a lawful prize.¹⁰⁸ The New Hampshire Superior Court affirmed the judgment.¹⁰⁹ In 1778, the *Susanna's* owners, Doane and others, appealed to Congress, and in 1779, the standing committee determined that it had jurisdiction to decide the controversy.¹¹⁰ In 1780, however, Congress directed that "all appeals in cases of capture, now depending before Congress, or the Commissioners of Appeals" be adjudicated by the newly created "Court of Appeals in cases of capture" established by the Articles of Confederation.¹¹¹ That court in 1783 reversed the decrees of the New Hampshire court and declared in favor of the *Susanna's* owners.¹¹² In 1794, a United States circuit court decree enforced that judgment.¹¹³ The owners of the *M'Clary* appealed on the ground that the New Hampshire courts had exclusive jurisdiction of the cause.¹¹⁴

Paterson narrated the facts of the case,¹¹⁵ and he then delivered the first and longest of the opinions affirming the decree of the circuit court.¹¹⁶ He stated that the issue was one of the jurisdiction of the Commissioners of Appeal and the Court of Appeals, and that this issue turned upon the competency of Congress to authorize these tribunals.¹¹⁷ He held that Congress possessed such authority:

Congress was the general, supreme, and controuling [sic] council of the nation, the centre of union, the centre of force, and the sun of the political system. To determine what their powers were, we must enquire what powers they exercised. Congress raised armies, [and] fitted out a navy. . . . These high acts of sovereignty were submitted to, acquiesced in, and

¹⁰⁶ The Court also decided *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795), and *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19 (1795), during that Term.

¹⁰⁷ *Penhallow*, 3 U.S. (3 Dall.) at 60.

¹⁰⁸ *Id.* at 60-61.

¹⁰⁹ *Id.* at 61.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 62.

¹¹² *Id.*

¹¹³ *Id.* at 64.

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 54-66.

¹¹⁶ *See id.* at 79-89 (opinion of Paterson, J.).

¹¹⁷ *Id.* at 79-80 (opinion of Paterson, J.).

approved of, by the people of America. . . . In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will. . . . The truth is, that the States, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now; the States collectively, under Congress, as the connecting point, or head, were acknowledged by foreign powers as sovereign, particularly in that acceptance of the term, which is applicable to all great national concerns. . . .¹¹⁸

Paterson also stated: "Besides, every body must be amenable to the authority under which he acts."¹¹⁹ The captain of the *M'Clary* had been commissioned as a privateer by Congress.¹²⁰ Therefore, "[the captain] must ultimately be responsible to Congress, or their constituted authority."¹²¹

The other Justices expressed a narrower view of the powers of the Continental Congress, though agreeing that the states had given to Congress external sovereignty sufficient for the present case.¹²² Justice Blair noted the argument that New Hampshire could revoke the authority it had given to Congress and said that a satisfactory answer was made to this: if the state had the right, it was never exercised.¹²³

An overriding issue in the early Federal courts was their power to review state acts and, especially, acts of Congress.¹²⁴ Paterson had introduced the supremacy clause of the Constitution during the

¹¹⁸ *Id.* at 80-81 (opinion of Paterson, J.).

¹¹⁹ *Id.* at 81 (opinion of Paterson, J.).

¹²⁰ *Id.*

¹²¹ *Id.* Goebel comments that "Paterson, who knew very well what the actual political conditions had been, was evidently transported by his own rhetoric." 1 J. GOEBEL, JR., *supra* note 3, at 768.

¹²² See, e.g., *Penhallow*, 3 U.S. (3 Dall.) at 94-95 (opinion of Iredell, J.).

¹²³ *Id.* at 112-13 (opinion of Blair, J.). Paterson's view of sovereignty played a role in the case of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Justice Sutherland's opinion drew upon Paterson's *Penhallow* opinion for the doctrine that in the foreign relations field, the Federal Government possesses inherent rather than enumerated powers. *Id.* at 316-17, 319. The argument made was that a Congressional resolution authorizing the President to declare an arms embargo constituted an unconstitutional delegation of legislative power. *Id.* at 314. Sutherland answered by stating that the proposition that the Government can exercise only such express and implied powers as are granted to it applies only to internal affairs. *Id.* at 315-16. *But see* 1 J. GOEBEL, JR., *supra* note 3, at 768 & n.29 (Supreme Court's argument in *Curtiss-Wright* was "historically indefensible").

¹²⁴ See 1 J. GOEBEL, JR., *supra* note 3, at 589-92; 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 186-91. According to Goebel, this power was not questioned in the earliest years. See 1 J. GOEBEL, JR., *supra* note 3, at 590.

Convention as part of the New Jersey plan.¹²⁵ In addition, Oliver Ellsworth and William Paterson had co-authored in the Senate the Judiciary Act of 1789.¹²⁶ Section 25 of that Act gave to the Federal judiciary not only the power to pass upon state legislation, but also the power to reverse or affirm a decision of a state court passing upon the validity of an act of Congress.¹²⁷

In the April Term of 1795, Justice Paterson, sitting in the Pennsylvania District of the United States Circuit Court, met the issue judicially for the first time.¹²⁸ The *Vanhorne's Lessee* case involved conflicting claims of title to Pennsylvania land in the possession of the defendant.¹²⁹ The plaintiff based his claim on a chain of title from the proprietors of the colony; the defendant based his on the claim of settlers from Connecticut, whose title rested on a "quieting and confirming act" passed by the Pennsylvania Legislature.¹³⁰ The Act declared title to the land to be in the settlers and recited that those who had title to the land "who will be deprived thereof by the operation of this act" should be compensated in equivalent lands.¹³¹

Paterson's charge to the jury is reported.¹³² The principal question he considered was the constitutionality of the quieting and confirming Act.¹³³ Eight years before *Marbury v. Madison*,¹³⁴ Paterson delivered the following charge:

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered

¹²⁵ J. O'CONNOR, *supra* note 1, at 146; *see supra* notes 28-40 and accompanying text.

¹²⁶ *See supra* notes 71-74 and accompanying text.

¹²⁷ *See supra* notes 85-89 and accompanying text.

¹²⁸ *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (Paterson, Circuit Justice 1795).

¹²⁹ *Id.* at 304-05.

¹³⁰ *Id.* at 304-07.

¹³¹ *Id.* at 313. For the earlier history of the dispute, see 1 J. GOEBEL, JR., *supra* note 3, at 188-94. *See also* L. ROSENBERG, *supra* note 65, at 165-66, 181. One author described the controversy as "[a] few wealthy Philadelphia land speculators with paper titles in their pockets . . . arrayed against several thousand small farmers who had brought schools, churches, and settlements to the upper Susquehanna." Boyd, *William Paterson, Forerunner of John Marshall*, in *THE LIVES OF EIGHTEEN FROM PRINCETON* 16 (W. Thorp ed. 1946). The dispute had been dragging on for 25 years and was extremely bitter. *Id.*

¹³² *See Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 307-20.

¹³³ *See id.* at 307-16.

¹³⁴ 5 U.S. (1 Cranch) 137 (1803).

only by the authority that made it. . . . What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.¹³⁵

Paterson concluded that the confirming Act was void because it gave compensation for the lands taken in the form of other lands, when “[n]o just compensation can be made except in money.”¹³⁶ Therefore, the Act was a deprivation of “one of the natural, inherent, and unalienable rights of man”—“the right of acquiring and possessing property”—which by the Constitution of Pennsylvania “was made a fundamental law.”¹³⁷ Having stated that the Act was unconstitutional, Paterson went on to say that even if it were valid, the settlers had failed to comply with several of its requirements.¹³⁸ Because the Act was now repealed, however, it was too late for them to establish title.¹³⁹

It seems sufficient that this opinion or instruction stand on its own merits. In fact, there is little evidence of its impact on the country, although works on constitutional law note it as an early statement of the doctrine of judicial review.¹⁴⁰

In the August, 1795 Term, the Supreme Court heard two cases.¹⁴¹ A long opinion by Paterson appears in *Talbot v. Janson*.¹⁴²

¹³⁵ *Vanhome's Lessee*, 2 U.S. (2 Dall.) at 308.

¹³⁶ *Id.* at 315; *see id.* at 316.

¹³⁷ *Id.* at 310.

¹³⁸ *Id.* at 317-18.

¹³⁹ *Id.* at 319-20.

¹⁴⁰ *E.g.*, 1 J. GOEBEL, JR., *supra* note 3, at 590; 1 C. WARREN, *supra* note 74, at 69. Boyd says that the landowners who filled the courtroom printed Paterson's charge in pamphlet form and distributed it throughout the Nation. Boyd, *supra* note 131, at 17. Goebel confirms this. 1 J. GOEBEL, JR., *supra* note 3, at 590 & n.177.

¹⁴¹ *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795); *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795).

The chief question raised there, although unnecessary to the eventual resolution of the case,¹⁴³ was whether a citizen of Virginia, one Ballard, had been expatriated.¹⁴⁴ Ballard had been commissioned as a privateer by the French and had captured a Dutch brig.¹⁴⁵ If he had remained a United States citizen, his commission was invalid and the capture illegal.¹⁴⁶

The Justices agreed that in any event, the initial outfitting of the brig in Charleston was done in violation of Federal law, and hence the subsequent capture was tainted with illegality.¹⁴⁷ Paterson and Iredell, however, also discussed the question of expatriation and concluded that Ballard had not lost his United States citizenship.¹⁴⁸ One section of Paterson's opinion is noteworthy for the picture of the Federal system that it presents. In rejecting the proposition that the Virginia law on expatriation could operate on United States citizenship, Paterson said:

The sovereignties are different; the allegiance is different. . . . We have sovereignties moving within a sovereignty. Of course there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts, and endanger the machinery of the whole.¹⁴⁹

In the February Term of 1796, the important cases of *Hylton v. United States*¹⁵⁰ and *Ware v. Hylton*¹⁵¹ were decided. The first is famous as holding that a tax on the use of carriages was not a direct tax.¹⁵² It was also the first instance in which the Supreme Court passed upon the constitutionality of a Federal law.¹⁵³ Paterson's opinion in *Hylton* was the second in series; Justice Chase had been appointed recently, and as junior member, he gave the first opinion.¹⁵⁴ Chase stated that the issue was whether "[a]n act to lay duties upon carriages, for the conveyance of persons,' is unconstitu-

¹⁴² 3 U.S. (3 Dall.) 133 (1795).

¹⁴³ *Id.* at 169 (opinion of Rutledge, C.J.).

¹⁴⁴ *Id.* at 152-53 (opinion of Paterson, J.).

¹⁴⁵ *Id.* at 133-34.

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 154-55 (opinion of Paterson, J.).

¹⁴⁸ *Id.* at 152-54 (opinion of Paterson, J.); *see id.* at 161-65 (opinion of Iredell, J.).

Justice Iredell discussed the expatriation of the plaintiff, William Talbot. *Id.*

¹⁴⁹ *Id.* at 154 (opinion of Paterson, J.).

¹⁵⁰ 3 U.S. (3 Dall.) 171 (1796) [hereinafter cited as *Hylton*].

¹⁵¹ 3 U.S. (3 Dall.) 199 (1796) [hereinafter cited as *Ware*].

¹⁵² *Hylton*, 3 U.S. (3 Dall.) at 180 (opinion of Paterson, J.).

¹⁵³ 1 C. WARREN, *supra* note 74, at 147.

¹⁵⁴ *Hylton*, 3 U.S. (3 Dall.) at 172-75 (opinion of Chase, J.).

tional and void[.]”¹⁵⁵ The taxpayer’s argument was that the tax was a direct tax, and was therefore void because it was not apportioned among the states as the Constitution required.¹⁵⁶ The three Justices rendering opinions, Chase, Paterson, and Iredell, agreed that the tax was not direct.¹⁵⁷ Chase added that because it was not direct, it was unnecessary to determine “whether this court, constitutionally possesses the power to declare an act of Congress void.”¹⁵⁸ Neither Paterson nor Iredell expressed any such doubt. At the beginning of Paterson’s opinion, he stated: “If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment.”¹⁵⁹

The Justices agreed that since the carriage tax would not admit of apportionment, it must be an indirect rather than a direct tax.¹⁶⁰ In the words of Iredell, “it is evident that the Constitution contemplated none as direct but such *as could be apportioned*.”¹⁶¹ Paterson, however, analyzed the nature of the tax itself. He stated:

All taxes on expences or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. I shall close the discourse with reading a passage or two from *Smith’s Wealth of Nations*.¹⁶²

Paterson then quoted Adam Smith’s proposition that the state, finding it impossible to tax people directly in proportion to their revenue, does it indirectly by taxing their expenses through a levy upon the consumable commodities for which they pay out their income.¹⁶³

In *Ware*, the second landmark case decided during the Febru-

¹⁵⁵ *Id.* at 172 (opinion of Chase, J.).

¹⁵⁶ *Id.* at 172-73 (opinion of Chase, J.).

¹⁵⁷ *Id.* at 175 (opinion of Chase, J.); *id.* at 180 (opinion of Paterson, J.); *id.* at 183 (opinion of Iredell, J.).

¹⁵⁸ *Id.* at 175 (opinion of Chase, J.).

¹⁵⁹ *Id.* at 176 (opinion of Paterson, J.).

¹⁶⁰ *Id.* at 181 (opinion of Iredell, J.).

¹⁶¹ *Id.*

¹⁶² *Id.* at 180 (opinion of Paterson, J.).

¹⁶³ *Id.* at 180-81 (opinion of Paterson, J.). “Paterson had been present at the Federal Convention when the rule of apportionment of taxes as well as representation was decided. He was thus qualified to speak with some assurance about the intentions of that body.” 1 J. GOEBEL, JR., *supra* note 3, at 781. In his opinion in *Hylton*, Paterson also said: “It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself. . . . Land,

ary, 1796 Term, the Court declared the supremacy of the treaty power over state law and held that a clause in the Treaty of 1783 providing for recovery of debts owed British creditors nullified a Virginia law that had confiscated those debts.¹⁶⁴ Of the four opinions, Justice Iredell's furnished the most extended discussion of the nature of the treaty power.¹⁶⁵ Paterson's opinion was devoted principally to the meaning of the treaty itself, ending on the note that commercial contracts should be inviolable even in wartime.¹⁶⁶ Paterson also stated that "[t]he construction of a treaty made . . . for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign."¹⁶⁷

Justice Paterson's next significant opinion appeared in *Calder v. Bull*,¹⁶⁸ a 1798 decision. The Connecticut Legislature had passed a law setting aside a decree of the probate court, which had invalidated a will.¹⁶⁹ The law also granted a new trial.¹⁷⁰ On appeal from the new trial, which upheld the will, the Connecticut law was attacked as *ex post facto*.¹⁷¹ The Supreme Court of Errors of Connecticut rejected this argument and affirmed the second decree.¹⁷²

The United States Supreme Court affirmed the decision of the Connecticut court.¹⁷³ The Justices agreed that only penal and criminal statutes could be *ex post facto* laws and that the Constitutional

independently of its produce, is of no value." *Hylton*, 3 U.S. (3 Dall.) at 176-77 (opinion of Paterson, J.).

Justice Fuller's opinion in the income tax case, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895), quoted this, and Fuller appears to have relied heavily upon Paterson's notion that land and its product are identical in order to justify his holding that a tax on the income from land is a direct tax on the land itself. *Id.* at 581, 583. Fuller stated: "This law taxes the income received from land and the growth or produce of the land. Justice Paterson observed in *Hylton's* case, 'land, independently of its produce, is of no value;' and certainly had no thought that direct taxes were confined to unproductive land." *Id.* at 581 (quoting *Hylton*, 3 U.S. (3 Dall.) at 177 (opinion of Paterson, J.)). The dissenting opinion in *Pollock*, however, pointed out that Paterson had also stated that "[he] never entertained a doubt that the principal . . . objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land." *Id.* at 640 (White, J., dissenting) (quoting *Hylton*, 3 U.S. (3 Dall.) at 177 (opinion of Paterson, J.)).

¹⁶⁴ *Ware*, 3 U.S. (3 Dall.) at 244-45 (opinion of Chase, J.).

¹⁶⁵ *Id.* at 271-79 (opinion of Iredell, J.).

¹⁶⁶ *Id.* at 255 (opinion of Paterson, J.).

¹⁶⁷ *Id.* at 256 (opinion of Paterson, J.).

¹⁶⁸ 3 U.S. (3 Dall.) 386 (1798).

¹⁶⁹ *Id.* at 386 (opinion of Chase, J.).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 386-87 (opinion of Chase, J.).

¹⁷² *Id.* at 386 (opinion of Chase, J.).

¹⁷³ *Id.* at 401.

prohibition does not extend to retroactive civil laws.¹⁷⁴ Chase's opinion was again the first and seems to be the most frequently cited.¹⁷⁵ Paterson stated that his decision was made despite "an ardent desire to have extended the provision . . . to retrospective laws in general," since such laws do not accord with "the fundamental principles of the social compact."¹⁷⁶ Nevertheless, he was convinced that ex post facto provisions were limited to criminal laws.¹⁷⁷

Calder was the first case to review state legislation on a writ of error to a state court. *Ware*, which had declared a state law invalid as in conflict with the treaty power, and *Fletcher v. Peck*,¹⁷⁸ which was to be the first decision in which the Supreme Court held a state law violative of a provision of the Federal Constitution,¹⁷⁹ came before the Supreme Court from Federal circuit courts.¹⁸⁰ The *Calder* Court, in reviewing the decision of the Supreme Court of Errors of Connecticut, tacitly expressed not only the rule of *Fletcher*, but also the power to review state court decisions,¹⁸¹ which was promulgated by Story in *Martin v. Hunter's Lessee*¹⁸² and Marshall in *Cohens v. Virginia*.¹⁸³

Paterson's contribution to this important question was not limited to his participation in *Calder*, however. The power to review state court decisions on Federal questions was conferred on the Supreme Court by the twenty-fifth section of the Judiciary Act of 1789, which Ellsworth and Paterson had co-authored.¹⁸⁴ It was the validity of this section that was challenged and upheld in *Martin v. Hunter's Lessee* and *Cohens v. Virginia*.

There were no opinions by Paterson among the three Supreme Court decisions rendered in 1799. In 1800, Paterson gave opinions in *Cooper v. Telfair*¹⁸⁵ and *Bas v. Tingy*.¹⁸⁶ In *Cooper*, it was contended

¹⁷⁴ See *id.* at 390-91 (opinion of Chase, J.); *id.* at 397 (opinion of Paterson, J.); *id.* at 399 (opinion of Iredell, J.).

¹⁷⁵ See, e.g., 1 J. GOEBEL, JR., *supra* note 3, at 704-05.

¹⁷⁶ *Id.* at 397 (opinion of Paterson, J.).

¹⁷⁷ *Id.*

¹⁷⁸ 10 U.S. (6 Cranch) 87 (1810).

¹⁷⁹ See *id.* at 139.

¹⁸⁰ See *id.* at 87; *Ware*, 3 U.S. (3 Dall.) at 199.

¹⁸¹ *Calder*, 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.).

¹⁸² 14 U.S. (1 Wheat.) 304 (1816).

¹⁸³ 19 U.S. (6 Wheat.) 264 (1821).

¹⁸⁴ See *supra* notes 85-89 and accompanying text. Paterson's co-authorship of the Judiciary Act has had more effect than all of his decisions. Warren quotes John C. Calhoun as stating that without the Judiciary Act of 1789, the entire course of the Federal Government would have been altered. 1 C. WARREN, *supra* note 74, at 18.

¹⁸⁵ 4 U.S. (4 Dall.) 14 (1800).

¹⁸⁶ 4 U.S. (4 Dall.) 37 (1800).

that an Act of the Georgia Legislature that had confiscated Cooper's estate for treason was an unconstitutional exercise of the judicial power by the legislature and also constituted a denial of the right to a trial by jury.¹⁸⁷ The Justices found nothing in the Georgia Constitution prohibiting the Act, and Paterson added:

[W]herever the legislative power of a government is *undefined*, it includes the judicial and executive attributes. . . . [T]he power of confiscation and banishment . . . is a power, that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution.¹⁸⁸

In *Bas*, Congress had provided that if a ship should be recaptured from "the enemy" after being in the captor's hands for more than ninety-six hours, one-half instead of one-eighth salvage would be earned.¹⁸⁹ An American ship had been recaptured from the French under these conditions, but its owners claimed that France was not an "enemy" because war had not been declared.¹⁹⁰ The Justices, including Paterson, agreed in separate opinions that the limited hostilities authorized by Congress against France qualified her as an enemy and that therefore a "limited" war was being conducted at sea.¹⁹¹

John Marshall joined the Supreme Court as Chief Justice in the August Term, 1801.¹⁹² Marshall's practice of writing the opinions for the Court necessarily relegated Paterson and the other Justices to a relatively obscure role.¹⁹³ On one important occasion, however, Paterson wrote the opinion for the Court, Marshall having disqualified himself. The case was *Stuart v. Laird*,¹⁹⁴ decided less than a week after *Marbury* in 1803. In 1802, Congress repealed the Federalists' Judiciary Act of 1801,¹⁹⁵ which had created sixteen new circuit court judgeships and had also relieved the Supreme Court Justices of their circuit-riding duties.¹⁹⁶ The repealer by the Republican

¹⁸⁷ See *Cooper*, 4 U.S. (4 Dall.) at 16-17.

¹⁸⁸ *Id.* at 19 (opinion of Paterson, J.).

¹⁸⁹ *Bas*, 4 U.S. (4 Dall.) at 37; see Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 709, 716 (repealed 1800).

¹⁹⁰ *Bas*, 4 U.S. (4 Dall.) at 38.

¹⁹¹ *Id.* at 43 (opinion of Chase, J.); see *id.* at 45-46 (opinion of Paterson, J.).

¹⁹² See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

¹⁹³ 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 105, 382-86.

¹⁹⁴ 5 U.S. (1 Cranch) 299 (1803). Marshall had decided the case below. *Id.* at 308.

¹⁹⁵ 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 163-68.

¹⁹⁶ See *id.* at 122-33.

Congress, the Judiciary Act of 1802, was passed over the opposition's claim that Congress had no power to destroy the judgeships it had created.¹⁹⁷ *Stuart* decided this question.

At issue was the transfer of a case from the Fourth Circuit to the Fifth, made pursuant to the Act of 1802, which had abolished the Fourth Circuit court.¹⁹⁸ The appellant contended that the transfer in question could not take place because the Act was unconstitutional.¹⁹⁹ Congress had no constitutional power to destroy the circuit courts, it was argued, if it thereby deprived a judge of his office, because the Constitution placed the Federal judges beyond the reach of the legislative and executive powers.²⁰⁰ The appellant also claimed that the Act had unconstitutionally assigned Supreme Court Justices to circuit court duty because the Constitution vested only appellate jurisdiction in the Supreme Court.²⁰¹

Paterson wrote a very brief opinion. He dealt first with the argument raised against the transfer, and stated merely that "Congress have [sic] constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another."²⁰² The present case, he held, was nothing more than such a transfer.²⁰³ This short rejection or avoidance of the argument raised by the Federalists not only established Congress's power in this field, but disposed of an especially dangerous threat to the Court's power.²⁰⁴ The Republicans were in no mood to submit to an attempt to void the Act.²⁰⁵

Paterson's answer to the second argument—that the Justices could not ride circuit—established an important principle of constitutional construction. He stated:

To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the

¹⁹⁷ *Id.* at 163-68. The argument of the Federalists resulted in the famous debate in Congress over the power of the Supreme Court to review acts of Congress. 1 C. WARREN, *supra* note 74, at 215-22.

¹⁹⁸ *Stuart*, 5 U.S. (1 Cranch) at 302-03.

¹⁹⁹ *Id.* at 303.

²⁰⁰ *Id.* at 304.

²⁰¹ *Id.* at 305.

²⁰² *Id.* at 309.

²⁰³ *Id.*

²⁰⁴ See 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 217, 650; 1 C. WARREN, *supra* note 74, at 269-73.

²⁰⁵ See 1 C. WARREN, *supra* note 74, at 269-73.

most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.²⁰⁶

When Marshall disqualified himself in a few other cases, the other Justices delivered opinions in series.²⁰⁷ Paterson's opinions appear in these, but none of them are of special importance. Paterson voted with Marshall in *Marbury*, and he concurred in the other opinions by Marshall with one exception.²⁰⁸ His relationship with Marshall appears to have been a cordial one during the period they served together. Paterson's last opinion was delivered in *Randolph v. Ware*,²⁰⁹ the last case reported for the February Term, 1806. His was the longest and most detailed of the separate opinions, which dealt with a breach of a promise to insure.²¹⁰

The title page of Cranch's report for the February Term of 1807 lists a new Justice, Brockholst Livingston, appointed "in the place of the honourable WILLIAM PATERSON, deceased."²¹¹ Paterson had become ill during the summer recess.²¹² He died on September 9, 1806.²¹³

William Paterson's thirteen years on the Supreme Court capped, in a quiet way, the great work and themes of his political life. There was, first, the new system of national power, with the states operating as "sovereignties within a sovereignty." Paterson consistently supported an extensive national power. Although the states retained the inherent powers of government, they remained subject to Federal law. Thus, the doctrines of judicial review of state laws and of acts of Congress were necessary elements of national sovereignty and constitutional government.

Behind Paterson's constitutional theories of power and sovereignty was a constant awareness of the principle upon which the Revolution had been fought and the Constitution established: the compact or consent of the people. The Constitution was the supreme law of the land not because it said so, but because the people had created it. "What is a Constitution?" Paterson asked the jury in *Vanhorne's Lessee*.²¹⁴ "It is the form of government, delineated

²⁰⁶ *Stuart*, 5 U.S. (1 Cranch) at 309.

²⁰⁷ See 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 382-86.

²⁰⁸ *Simms v. Slacum*, 7 U.S. (3 Cranch) 300, 309-11 (1806) (Paterson, J., dissenting).

²⁰⁹ 7 U.S. (3 Cranch) 503 (1806).

²¹⁰ See *id.* at 510-13 (opinion of Paterson, J.).

²¹¹ 8 U.S. (4 Cranch) xiii (1807).

²¹² J. O'CONNOR, *supra* note 1, at 278.

²¹³ *Id.* at xiii.

²¹⁴ *Vanhorne's Lessee*, 2 U.S. (2 Dall.) at 308.

by the mighty hand of the people, in which certain first principles of fundamental laws are established."²¹⁵

Paterson's devotion to law, property, authority, and stability and his Federalist view of the judicial role were tempered, one thinks on reading his opinions, by his experience at constitution-making in New Jersey and in the Convention of 1787. The Constitution, he continued in *Vanhorne's Lessee*, "is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. . . . In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve."²¹⁶ Thus, for William Paterson, no branch of government, including the judicial, was master of the Constitution.²¹⁷ The Constitution belonged to the people in their sovereign capacity.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See 2 G. HASKINS & H. JOHNSON, *supra* note 102, at 650. *Marbury v. Madison* and *Stuart v. Laird* "presaged the development of a full-scale concept of rule of law and a deep-seated respect for the primacy of legislative power as well as for the concept of separation of powers." *Id.*