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Constitutional Supremacy: An Early Advocate of Judicial Review

Leonard B. Rosenberg†

It has often been said that judicial review is a necessary ingredient in a federated system, for supremacy must reside somewhere; and that in the American system, with its additional tripartite structure, it is an absolute necessity. Even critics of judicial review generally agree that the power of the Supreme Court over acts of state legislatures and state courts, as contradistinguished from its power over congressional legislation and presidential activities, is essential to the American political system and, in addition, is a constitutional directive (Article VI—the "supremacy clause").

However, although the doctrine of judicial review has been the successful solution to Madison's question of how to oblige the government to control itself, it was neither immediately asserted nor immediately accepted. During the first decade of its history the Supreme Court and the federal judiciary, though of relatively minor importance, were never far from the center of political strife. But it was during this period that the fundamental structure of the American judicial system was established and the federal judiciary—especially the circuit courts—began to assert—perhaps self-consciously—the idea of judicial authority and national supremacy. Through numerous court decisions and grand jury charges the people became increasingly aware of the new government and its powers. In short, the federal courts were beginning the long and endless task of refining and particularizing the generalities of the Constitution.

† Professor of Political Science, Paterson State College.
The first ten years under the Constitution deserve better of historians. Although the federal judiciary made the error of using the courts too often as a political instrument to enforce its particular view of governmental powers, judicial statesmanship did not originate with John Marshall. The men who composed the early federal judiciary were aware of their potential powers and were unafraid to use them to protect and enhance that authority which they considered to be within the Constitution's meaning. This paper is concerned with the work of one of these men: William Paterson of New Jersey. Paterson's political and juridical ideas are studied as an illustration of how Marshall's constitutional interpretations were foreshadowed in important respects by some of his predecessors.

Although William Paterson played a significant and respected role in the events which brought the nation into being and which early gave shape to its political and judicial institutions, he remains little more than a footnote in the biography of the Constitution and the early history of the Supreme Court. It is an unfortunate neglect, for he made valuable contributions to the basic American concepts of federalism and constitutional supremacy. As New Jersey Attorney-General during the revolutionary war, constitution-maker at the Philadelphia Convention, Senator, Governor, federal jurist and private citizen, his ideas had considerable circulation and influence.

A Whig in eighteenth century terms, Paterson's views were typical of those maintained by men of property and position. He believed in and accepted as working principles the validity of the social compact, the right of revolution, and the sovereignty of the people. But the war against British despotism was not intended to transform the natural order of things—that is, the rule of persons of learning, integrity, and stature. Once the concepts of popular sovereignty and limited government had been won with independence, his efforts, along with those of Adams, Hamilton, and Marshall, were concentrated on establishing and then sustaining a government which would at the same time secure the rights of man and restrain the forces of partisanship and irresponsible democracy. His advocacy of constitutional supremacy and his assertion of judicial review were not meant as a dilution of the ideals of the revolution but, rather, as a guarantee that they would be enjoyed within the prescribed confines of law, order, and peaceful progress—what he called "rational liberty."
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However devoted Paterson was to the idea of state sovereignty at the Federal Convention—as exemplified by his introduction of the small states' or New Jersey Plan, which envisioned a confederation of equal states—there is ample proof that with the ratification of the Constitution he became, in George Bancroft's words, "for the rest of his life a federalist of federalists." As a United States Senator and as a Supreme Court Justice his work evinced a dedication to the generally accepted tenets of his party and class: the protection of property rights and vested interests, the supremacy of the national government, and the independence and prestige of federal judicial power.

Although Paterson and his Federalist contemporaries failed to recognize that the government they had done so much to bring into being was to be essentially popular in nature, and so suffered the fate of other anachronistic parties, they played an indispensable role in the Constitution's first decade. No one doubted in 1800 as they had in 1789 that the Constitution and the Union would endure. The foundations for a durable and pliable nation had been laid, making it ready for the democratization that was bound to come. Perhaps they served, as Henry Adams said, as the "half-way house between the European past and the American future." While they adopted policies that offered power and benefit to special classes, conducted government with a decided fear of majorities and legislatures, and in the Whisky Rebellion and Sedition Act trials acted with an unfortunate partisanship that gave rise to a deserved opposition, they, nevertheless, built and governed upon the rock of law and orderly change. If Paterson was, as Fred Rodell said, among the most politically minded and motivated of the Federalist judges, it was not so much to advance the fortunes of a particular party as it was to protect those principles for which he and the party stood.

Although the framers of the Constitution devised a number of ways to circumscribe the abuses of power, it has been judicial re-

1. HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES (New York: Appleton, 1882), II, 88. [Editor's note: Although, due to the age of the non-legal works cited, these footnotes are not consistent with A Uniform System of Citation, this style should be helpful to the researcher.]
3. Interestingly, none of these limitations (due process, judicial review, federalism, separation of powers, the system of checks and balances) was originally spelled out; all were more or less either deducible from the general provisions of the Constitution or implicit in its structure and organization. At the Federal Convention the two most persistent proposals to resolve the problem of national-state friction were that the Executive and Supreme Court justices be joined in a council of revision with veto power.

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view that has proven the most successful American solution to Madison’s question of how to oblige the government to control itself. It was originally put forth as a doctrine by Paterson and the early Federalist-minded courts not only for its own sake—as a legal principle divorced from any contemporary context—but as a useful tool to promote the entire Federalist program, which, of course, was identified with the good of the nation, and to thwart the designs of those opposed to that program. It should be remembered, however, that other equally sincere friends of liberty and country, fearing judicial despotism as much as the Federalists feared legislative tyranny, reached rather different views of judicial review. Jefferson, for example, while not denying the authority of the Supreme Court to determine the constitutionality of legislation in cases actually before it, nevertheless strenuously rejected the idea that such judicial decisions were binding on the other departments of government. In 1804 he wrote the following:

Nothing in the Constitution has given the judges a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. . . . But the opinion which gives to the judges the right to decide what laws are Constitutional and what not, not only for themselves in their own sphere of action, but for the legislature and Executive also in their spheres, would make the Judiciary a despotic branch.4

William Paterson began his service to the doctrine of judicial review with his introduction of the supremacy provision of the New Jersey Plan at the Federal Convention. Significantly, in not a single state at the time was the doctrine of judicial control of legislative acts an established institution; everywhere the Blackstonian concept of legislative sovereignty was still dominant.5 The Virginia Plan, for example,

over oppressive or unconstitutional legislation (this had been part of the Virginia Plan) and that Congress possess a “veto” over state statutes. See Max Farrand (ed.), The Records of the Federal Convention of 1787 (New Haven: Yale University Press, 1911-1937), passim.


5. W. C. Webster, A Comparative Study of the State Constitutions of the American Revolution, Annals of the American Academy of Political and Social Science, IX (1897), 398-400. Edward S. Corwin points out, however, that between 1776 and 1787 the ideas of legislative limitation, “higher law,” and the finality of judicial construction of the law were rapidly developing in the United States; The Progress of Constitutional Theory

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proposed instead congressional control over state legislation and a national council of revision over congressional statutes. It is thus to Paterson that credit must go for formally introducing the premise upon which American judicial review (of at least state legislation) rests: that the Constitution is supreme law and that laws made in pursuance of the Constitution and treaties made under the authority of the United States partake of that supremacy. From this fundamental postulate and the concomitant fact that courts administer law, the early federal judiciary—some of whom, like Paterson, Ellsworth, and Wilson, had been members of the Philadelphia Convention—derived, or at least asserted, their rationale for judicial review. What they did was simply to carry the principle and philosophy of applying the Constitution as law to its logical conclusion: that there exists an accepted criterion or standard—the national constitution in this case—by which legislative acts may be judged, and that courts are uniquely competent and empowered to determine the validity of such acts. "For the first time in history," Andrew C. McLaughlin commented, "courts [were] called upon by the simple processes of administering justice . . . to uphold the structure of the body politic and the principles of the Constitution."

However, in introducing to the Convention the idea of the supremacy of the Constitution, Paterson did not stand alone. There seems little doubt that Madison, Hamilton, Wilson, Gouverneur Morris, King, Gerry, Mason, and Luther Martin among others thought the judicial power would pass on the validity of legislative enactments of Congress and state legislatures, whether or not such authority was specifically granted in the Constitution. James Wilson, for example, in the Pennsylvania ratifying convention in 1787 asserted that:

if a law should be made inconsistent with those powers vested by [the Constitution] in Congress, the Judges, as a consequence of

between the Declaration of Independence and the Meeting of the Philadelphia Convention, AMERICAN HISTORICAL REVIEW, XXX (1925), 536. Incidentally, in this essay Corwin's definition of judicial review is used: "the power of courts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce and the power to refuse to enforce such as they find to be unconstitutional and hence void;" Judicial Review, ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (New York: Macmillan, 1937), VIII, 457 [Hereinafter cited as Judicial Review].

6. THE CONFEDERATION AND THE CONSTITUTION (New York: Harper and Brothers, 1905), p. 247. However, until the Marbury v. Madison decision in 1803 there were only hints and indecisive attempts at national judicial review (the authority of the federal courts to pass on the validity of acts of Congress). What the early federal courts did achieve was the application of federal judicial review—the right of the courts to control state legislation that conflicted with the Constitution, treaties, or national laws. See E. S. Corwin, Judicial Review, supra.
their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Anything, therefore, that shall be enacted by Congress thereto, will not have the force of law.\footnote{7}{Quoted in J. B. McMaster and F. D. Stone, Pennsylvania and the Federal Constitution, 1787-1788 (Philadelphia: Historical Society of Pennsylvania, 1888), p. 354. Judicial review was a principle that Wilson was to implement five years later as a member of the Supreme Court in what may have been the Court's first enunciation of the doctrine, Hayburn's Case, 2 Dallas 409 (1792). See Max Farrand, The First Hayburn Case, 1792, American Historical Review, XIII (1908), 281-285.}

Paterson's service to the "nationalist" cause of judicial review continued in the first Senate, where, together with his friend and later court associate, Oliver Ellsworth, he helped give shape and scope to the new federal judicature in the Judiciary Act of 1789. The twenty-fifth article of that act authorized writs of error to the Supreme Court from judgments of state courts, which by implication meant that the Court was empowered to pass on the constitutionality of state statutes. (Of the Senate committee that framed the Act, half had served in the Philadelphia Convention, including its two chief architects, Ellsworth and Paterson, and presumably knew the Convention's views concerning the judiciary.) The Supreme Court was entitled by that article upon a writ of error to re-examine and reverse or affirm

where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of said Constitution, treaty, statute or commission. \ldots \footnote{8}{1 U.S. Statutes 85-86 (September 24, 1789). The Act was chiefly aimed at assuring that a state would fulfill its obligations by providing that a state court decision could be
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But it was with his elevation to the nation’s highest tribunal in 1793 that William Paterson was able to implement whatever possibilities may have been implied in his earlier work. Although other judges on the federal bench had already declared a few state laws invalid on the grounds of constitutional incompatibility, it was in Paterson’s opinion in *Van Horne v. Dorrance* that the concept of judicial review of state legislation by a federal court received its first clear, well-defined, and unqualified expression. Rejecting counsel’s argument that a Pennsylvania statute which repealed an earlier confirming title of certain claimants to lands was an *ex post facto* law, he, nevertheless, accepted the assertion that the act violated the constitutional prohibition against impairment of the obligation of contracts. The decision, which aroused intense and partisan controversy at the time, while popular with Pennsylvania land speculators, was opposed by both Republicans, who were against the doctrine of judicial review, and Connecticut Federalists, who had settled on Pennsylvania lands and now expected to suffer as a result of the ruling. Indeed, it was then generally believed that Paterson lost the opportunity for the chief justiceship because of the opposition of certain influential Federalists over his ruling in the case. A year later in *Ware v. Hylton* he continued to uphold the idea that the judicial power of the United States is empowered to protect federal legislation against hostile state action. A treaty, he declared along with Justices Chase, Cushing, and Wilson, brought to the federal Supreme Court if there was a failure to give full effect to constitutional provisions, federal laws, or treaties. The twenty-fifth section of the Act also implied judicial review of congressional statutes by the Supreme Court, for the Court could agree as well as disagree with a state court’s decision concerning the validity of a federal law, which, in effect, would uphold or reject a congressional act on the grounds of constitutionality. See A. C. McLaughlin, *A Constitutional History of the United States* (New York: D. Appleton-Century, 1935), pp. 235-237. For a view that doubts that the Judiciary Act granted broad powers of judicial review, see Ralston, *Judicial Control over Legislatures as to Constitutional Questions*, p. 10. Charles Warren, however, thought that, although the Act is often cited as an expression of early support for judicial review, the fact is that the final form the Act assumed was a compromise between the extreme Federalist desire to have the federal courts exercise to the fullest extent the judicial powers granted or implied by the Constitution and the fear of those who saw national authority as a threat to states’ rights and wanted all litigation to commence in state courts; *New Light on the History of the Federal Judiciary Act of 1789*, Harvard Law Review, XXXVII (1923), 53, 57, 131. Andrew C. McLaughlin, giving an opposite view, believed that the Judiciary Act’s enactment by a Congress composed of so many members who had also served in the Federal Convention suggested that the judicial review that the Act implied was fully within the intentions of the framers of the Constitution; *A Constitutional History of the United States*, pp. 236-237.

9. 2 Dallas 304, 308 (1795).
10. Id. at 310.
was in effect superior to any and all state laws that were inconsistent with its provisions or implementation. An interesting side note to this litigation was the position taken by John Marshall, then a lawyer arguing a case before the Supreme Court. In an argument almost diametrically opposite the one that he maintained seven years later in the history-making Marbury v. Madison opinion, Marshall remarked that

the legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law unless such a jurisdiction is expressly given by the constitution. . . .

Thus, at a time when Paterson and other members of the federal bench were consistently assuming the power of judicial review, which later became the essence of the Marbury decision, John Marshall argued that the power had to be “expressly given by the constitution.”

There is even the probability that Paterson participated in the decision that may have first invalidated an act of Congress, nine years before the famous Marshall opinion. There was no official reporter at the time and so evidence must rest upon a note Chief Justice Taney inserted into the record of U.S. v. Ferreira, decided in 1851. Taney cited the 1794 case of U.S. v. Yale Todd, in which Chief Justice Jay and Justices Blair, Cushing, Paterson, and Wilson unanimously held that the act of 1792, which directed Supreme Court justices to act as commissioners in pension cases in their circuit court duties, assigned nonjudicial functions to judges and, being contrary to the Constitution, was therefore void. However, if this case remains historically uncertain, there is no doubt about the famous “Carriage Tax Case” of 1796. Although Paterson and his colleagues upheld federal legislation

12. 3 Dallas 199, 249 (1796).
13. 1 Cranch 137 (1803).
14. Ware v. Hylton, 3 Dallas 199, 211 (1796).
15. 13 Howard 52. J. H. Ralston casts doubt on the authenticity or influence of the Yale Todd decision; Judicial Control, pp. 10-12. An earlier claim to this honor is sometimes made for Hayburn’s Case, 2 Dallas 409 (1792), in which a federal circuit court apparently rejected an attempt by Congress to impose nonjudicial duties on the federal courts. However, before the Supreme Court could render a final decision the Congress by the act of February 28, 1793, altered the law. See Farrand, The First Hayburn Case, 1792, pp. 281-285; E. S. Corwin et al., United States Constitution, annotated (Washington, D.C.: Government Printing Office, 1964), pp. 564-565. Chancellor Kent accepted the Hayburn decision as the first such instance of judicial review; Commentaries on American Law, 14th ed. (Boston: Little, Brown, 1896), I, 450.
in this instance, and hence, however prophetic and suggestive it may seem in retrospect, caused no particular outburst or criticism, the Supreme Court very definitely proclaimed its right to exercise the function of judging the constitutionality of congressional acts. Here, Fred Rodell remarked, "the Supreme Court, for the first time as a Supreme Court, undertook without so much as blinking to pass on the validity of an act of Congress."

The question of the constitutionality of congressional action also came up in Hollingsworth v. Virginia; here a unanimous Court (Paterson concurring) sustained the power of Congress to initiate and accept as enacted an amendment to the Constitution without presidential approval or involvement.

Paterson hinted at or openly expressed this idea of judicial control of legislation on a number of other occasions, although admittedly not until the Marbury case in 1803 (in which Paterson joined in Marshall’s decision) did the nation’s highest court actually declare for the first time a federal law unconstitutional. Although he indirectly sustained the validity of the Sedition Act in the 1798 controversial trial for sedition of Congressman Matthew Lyon, Paterson suggested that there were tribunals or courts competent to judge the validity of congressional statutes.

In one of the several sedition cases that came before him, he drew attention, in enforcing the provisions of the Sedition Act, to the “happy circumstance, that when any act . . . occurs, we have a competent authority to pass upon it, and to decide, whether it be constitutional or not. This authority is vested in the courts of the United States.”

What, in effect, Paterson was saying in these cases was, first, that the Constitution is law, enforceable by courts; second, that the Constitution is law, enforceable by courts;
tion is supreme; and third, that judicial interpretations of the law are binding and final, at least for the cases before the courts. But here as in so many other areas he was more representative than original. Even before the Federal Convention, the principle of judicial review had been enunciated by state courts concerning state statutes in six or seven well-established cases.\textsuperscript{21} James M. Varnum, for example, in the 1786 Rhode Island case of \textit{Trevett v. Weeden}, speaking as counsel for the defendant, was quite definite that "the judiciary have the sole power of judging the law . . . and can not admit any act of the legislatures as law against the Constitution."\textsuperscript{22} The case that is generally accepted as the earliest instance of state judicial review, and the one that probably exercised the most direct influence on Paterson, was the 1780 New Jersey case of \textit{Holmes v. Walton}. Here the state's highest tribunal declared an act which established a jury of six men in violation of the state constitution and therefore invalid. Three of New Jersey's delegates to the Federal Convention were high state officials at the time of the decision and directly or indirectly involved in the litigation.\textsuperscript{23} None of Paterson's own expositions on judicial review—nor, for that matter, Hamilton's classic assertion of the principle in \textit{The Federalist}, No. 78—added anything essential to the early pronouncement by James Iredell of the North Carolina Supreme Court (and later of the United States Supreme Court) when in 1787 he voided a statute that confirmed title to lands confiscated from Tories during the Revolution:

the duty of [the judiciary] I conceive in all cases is to decide according to the laws of the State. It will not be denied . . . that the constitution is a law of the State . . . with this difference only, that it is the fundamental law, and unalterable by the legislature, which derives all its power from it. . . . The judges, therefore, must take care at their peril, that every act of Assembly they pre-

\textsuperscript{21} Ralston, \textit{Judicial Control}, pp. 6-7.
\textsuperscript{22} Quoted in E. S. Corwin, \textit{The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention}, \textit{American Historical Review}, XXX (1925), 526.
\textsuperscript{23} William Livingston was governor and Chancellor; David Brearley was the Chief Justice who delivered the opinion; and William Paterson was the state Attorney-General. See Austin Scott, \textit{Holmes vs. Walton: The New Jersey Precedent}, \textit{American Historical Review}, IV (1899), 456-469. Against Scott's strong and generally accepted thesis on behalf of the Holmes case as a precedent stands Louis Boudin's vigorous rejection of the contention; \textit{Government by Judiciary} (New York: William Godwin, 1932), I, 536ff. C. C. Haines, on the other hand, accepts the case as the first instance of judicial review, but holds that Scott overemphasized its importance and influence in the Convention's work; \textit{The American Doctrine of Judicial Supremacy}, 2d ed., (New York: Russell and Russell, 1958), pp. 93-94. E. S. Corwin also recognized the validity of Scott's averment; \textit{The Progress of Constitutional Theory}, p. 521.
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sume to enforce is warranted by the constitution, since if it is not, they act without lawful authority.\textsuperscript{24}

From the ratification of the Constitution to the \textit{Marbury} decision in 1803 the doctrine of judicial review, despite occasional denials or criticism, gained even more momentum. At least fourteen more state court opinions were rendered that either pronounced statutes unconstitutional or expressed views highly favorable to the doctrine.\textsuperscript{25} No words, for example, could have been plainer than those of Judge Spencer Roane of the Supreme Court of Virginia in 1793, two years before Paterson's own opinion in the \textit{Van Horn} case: "The judiciary may and ought to adjudge a law unconstitutional and void, if it be plainly repugnant to the letter of the Constitution, or the fundamental principles thereof."\textsuperscript{26} The young federal judiciary, moreover, was not far behind state courts in asserting its power over legislative acts. At least a half-dozen state laws were invalidated by federal courts on the grounds of unconstitutionality during this period; Paterson participated in several of these cases.\textsuperscript{27} For example, three years before the \textit{Van Horn} opinion the Circuit Court for the District of Rhode Island (Chief Justice Jay presiding) declared a Rhode Island statute unconstitutional as an impairment of the obligation of contract.\textsuperscript{28}

Innumerable contemporary comments and illustrations on the acceptance of the doctrine of judicial review may be cited, but they all add up to the fact that the idea of judicial control over the acts of
state legislatures—by either state or federal courts—predated Paterson’s Van Horne ruling and had gained such recognition by 1803 that those instances where it was exercised apparently met little opposition and few claims that the courts had acted without constitutional authority. Except for the criticism engendered by the Van Horne v. Dorrance decision, these early assertions of judicial power seemingly aroused little sentiment one way or the other. Indeed, Charles Grove Haines noted that “the opinion that courts could invalidate legislative acts was gaining such popularity that it was to be expected that the national judiciary under Federalist control would at the earliest favorable opportunity, assume the special guardianship of the fundamental law.” Thus while Paterson paved the way for Marshall and others, he also followed in the footsteps of those who preceded him and along the path of contemporary legal theory and practice. His work, rather than isolated or innovational, was part of an evolutionary movement in the development of American constitutional law.

Though not quite as political-minded or obstreperous as his brother justice, Samuel Chase, who vigorously opposed any diminution of judicial prerogatives, Paterson was every bit as insistent on the independence and authority of the judicial arm of the federal government—so much so that his son and others believed that had Chase’s impeachment trial ended in a verdict of guilty Justice Paterson would have been the next victim of the now dominant Republicans. It was an instance, not only on proper constitutional construction, but also in the cause of vested rights—not at all surprising if it is recalled that Paterson had long believed that peace of mind and the security of society were based on the protection of property and contractual obligations and the

29. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 69.
30. Id.
31. THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY, p. 183. E. S. Corwin credits the general acceptance of judicial review by the middle of the nineteenth century not only to the Marbury v. Madison precedent but also to the espousal of the principle in some of the earlier federal court decisions by Paterson and his Federalist colleagues. See CORWIN et al, UNITED STATES CONSTITUTION, 628.
32. Chase strongly protested the provision in the Judiciary Act of 1802 which reinstated the detested circuit court duty for Supreme Court justices. He felt that the judges should refuse such assignments on the grounds of their unconstitutionality. Letters from John Marshall to William Paterson, May 3, 1802, and from Samuel Chase to Paterson, April 24, 1802 (copy of letter sent to John Marshall), Bancroft Transcripts, pp. 651-657, 663-697, N.Y.P.L.
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observance of the law. He early understood that judicial power involved more than a simple declaration of what the law is. "The Powers of the Supreme Court are great—they are to check the Excess of Legislation," he observed in the first Senate during the debates on the establishment of the federal judiciary. Where personal concepts of property rights or national sovereignty were jeopardized by legislative enactments, he often informed legislatures as to their powers and, especially their limitations. An example of judicial behavior motivated by political or personal beliefs may be gathered from the newspaper account of his charge to the grand jury at Portsmouth, New Hampshire, May 24, 1800:

(The judge) delivered a most elegant and appropriate charge. The Law was laid down in a masterly manner. Politics were set in their true light by holding up the Jacobins as the disorganizers of our happy country, and the only instruments of introducing discontent and dissatisfaction among the well meaning part of the community. Religion and Morality were . . . inculcated and enforced as being necessary to good government, good order, and good laws; for 'when the righteous are in authority, the people rejoice.'

But significantly, where programs that he favored were being implemented, such as the Hamilton fiscal policy with its broad powers of taxation, or the suppression of sedition and libel against the government, Paterson invariably was on the side of expanded or implied legislative authority.

Paterson and his Federalist colleagues, however, also understood that a certain measure of judicial restraint was a necessary ingredient of contemporary political life. Whether willingly or not, from the very establishment of the national judiciary federal judges found themselves

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34. See, for example, [Notes for a Legislative Hearing], November 2, 1784, Pyne-Henry, AM1362, P.U.L.
35. Notes for a Senate speech, probably delivered in July, 1789, Rutgers University Library (R.U.L.); Bancroft Transcripts, p. 495, N.Y.P.L.
36. See, for example, Van Horne v. Dorrance, 2 Dallas 304, 312 (1795); Penhallow v. Doane, 3 Dallas 54, (1795); Ware v. Hylton, 3 Dallas 199, 249 (1796).
37. UNITED STATES ORACLE OF THE DAY, quoted in W. H. Hackett, The Circuit Court for the New Hampshire District One Hundred Years Ago, THE GREEN BAG, II (1890), 264. Interestingly, Paterson refused to give the ORACLE a copy of his charge to the jury. The refusal was probably due to his desire to use the charge again, a common practice of his.
38. See, for example, Hylton v. U.S., 3 Dallas 171, 176 (1796); Sedition trials, c. 1798; trial of Matthew Lyon, 1798, in WHARTON, STATE TRIALS, pp. 333 ff. However, a consistency may be seen here. Paterson's judicial restrictions were generally aimed at state legislatures, which often were debtor-conscious, whereas the espousal of expanded legislative authority was usually limited to Congress, which until the election of 1800 was safely Federalist.
knee-deep in politics and partisanship. Yet, though partisan and dedicated to their particular concept of liberty and law, they were far from being runaway or willful men. Even the not always restrained Chase, in refusing to touch the question of constitutionality in *Calder v. Bull,* remarked that if he were ever to exercise the power of rejecting the validity of an act of Congress, it would have to be in a very clear case\textsuperscript{39}—a view fully shared by Paterson in *Cooper v. Telfair.*\textsuperscript{40} Although the Supreme Court had not yet developed the "cautionary considerations" that now govern the operation of judicial power, there is little doubt that the Court recognized certain bounds to the exercise of its authority. "It is an obvious and just remark," Paterson observed in one of the sedition cases, "that we ought not, on slight grounds, to suppose, that Congress would violate the constitution when they are under oath to support it. The case should be clear, and liable to no well-founded doubt, before we undertake to pronounce an act of Congress to be void for want of constitutionality."\textsuperscript{41} Considering the frequently strained relations between the Executive and Judicial departments of government, the changing economic structure of the country, and the developing sectional polarization during the first half century of the Republic's history, the employment of the power of judicial review over state or federal legislation cannot fairly be said to have been abusive. In *Stuart v. Laird,* for example, Paterson, speaking for the Court, avoided the attempt to secure a decision as to the constitutionality of the repealing act of 1802 (which had reinstated the old system of circuit duty and eliminated one of the Court's two annual sessions) and, in effect, gave judicial sanction to a law he could have only detested.\textsuperscript{42}

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\textsuperscript{39} 3 Dallas 386, 395 (1798). Both Chase and Iredell here clearly expressed the idea of legislative limitation. However, though agreeing that legislatures were limited in power, they parted company in the use of "natural justice" as a deterrent to legislative omnipotence. The former held that there were certain vital principles which would overrule "an apparent and flagrant abuse of legislative power" even without specific constitutional authority, whereas the latter felt that if a legislature passed a law within the general scope of constitutional provisions, "the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice"; 3 Dallas 386, 387, 388, 999.

\textsuperscript{40} 4 Dallas 14, 19 (1800).

\textsuperscript{41} [Opinion from the Bench], c. 1798, AM11457, P.U.L.; Bancroft Transcripts, p. 543, N.Y.P.L. For the courts "to pronounce any law void," he declared in *Cooper v. Telfair,* "It must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative application;" 4 Dallas 14, 19 (1800).

\textsuperscript{42} 1 Cranch 299, 308 (1803). Such restraint was probably a wise move on the Court's part since political power had shifted to the Republicans. See also letters from Paterson to Justice William Cushing, May 6, 1802, and to Chief Justice John Marshall, June 18, 1802, Bancroft Transcripts, pp. 649, 769, N.Y.P.L. Paterson's private and public opinion
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The federal courts, perhaps wisely for their own position, early developed the practice of presuming legislative acts valid unless they were clearly proven otherwise. Paterson was well aware that this principle, which he enunciated on several occasions was among the maxims of law. In the back of an account book he kept for the years 1783-1787, when he was successfully practicing law, are a number of similar well-established maxims:

An act of parliament shall never be construed to be void, if it can possibly be otherwise; but it shall be expounded in such a manner that it may as far as possible attain its End.

When a decln. (declaration) will have two Constructions, and one will make it good and the other bad, the Court, after a Verdict will take it in the better sense.

Acts of Parliament, in what they are silent, are best expounded according to the use and Reason of the Common Law.\(^{43}\)

Here is the suggestion that even before the Philadelphia Convention Paterson was cognizant and probably in favor of the concept of legislative limitation; for, though statutes were to be construed as valid if at all possible, the implication was clear: there was an external criterion of validity—be it "right reason" or the "higher law" of a constitution—by which they could be judged if necessary.

*Van Horne v. Dorrance*\(^{44}\)

Though Paterson's entire judicial career evidenced a strong inclination toward judicial independence and a firm conviction in judicial power, his importance in American constitutional (post-Convention) history rests chiefly on one decision. In most of the other cases in which he asserted the power of the national judiciary he was either sustaining existing laws and governmental authority or acting in concert with fellow justices of the Supreme Court. But in the circuit court ruling of *Van Horne v. Dorrance*, he boldly and independently proclaimed—in the clearest, if not the first, such case—the essence of Federalist principles of government, society, and law. Eight years before Marshall's decision in *Marbury v. Madison*\(^{45}\) and fifteen years was that practice and acquiescence under the system of circuit duty had put the question of its validity to rest.

\(^{43}\) Paterson Account Book, 1783-1787, AM11457, P.U.L.

\(^{44}\) 2 Dallas 304 (1795).

\(^{45}\) Marbury v. Madison, 1 Cranch 137 (1803).
before the Chief Justice's opinion in *Fletcher v. Peck*, Paterson pronounced ideas on judicial authority and the contract clause of the Constitution anticipatory of these later judgments. The *Van Horn* ruling, in which judicial review was made applicable to state laws specifically and to all legislation in theory, encompasses so much of Paterson's thoughts and, indeed, that of his class, profession, and party on such a variety of subjects that much of the opinion—in excerpted form—has already been applied in other areas of this paper. However, it is so illustrative of Paterson's entire political philosophy that it deserves a more complete treatment, both for its historical significance in the development of the concept of judicial review and as a revealing study of a representative Federalist mind.

The facts in the case are as follows: during the colonial period a group of Connecticut farmers settled on land along the Susquehanna River's North Branch in Pennsylvania, having acquired title in 1754 from the Indians (and from Connecticut) rather than from the proprietors as required by the Pennsylvania laws of 1705 and 1729. The proprietors' descendents, however, had sold the land in 1771 to some Philadelphia speculators and Pennsylvania farmers. Frequent warfare broke out between the two groups. After independence and under popular pressure, the legislature of Pennsylvania enacted several "quieting and confirming acts," acknowledging the title of most of the "squatters." But in 1788 the legislature passed an act suspending the earlier confirming law and in 1790 repealed it outright. Renewed violence and bloodshed constantly endangered the peace of the state. The question in the suit involved the conflicting claims.

The real issue behind the litigation, however, was not merely the rival claims of the parties seeking adjudication but the struggle for power. It was a contest between the settlers, mostly small farmers, and a few wealthy land speculators of Philadelphia with paper titles. Although the decision in the case may not have been influenced by external factors, it is interesting to note that among the latter group were Paterson's friends and former clients and even colleagues on the Supreme Court. The settlers, on the contrary, were men of no particular prominence, but they were independent and quite ready to defend their rights, by arms if necessary. The question in the case dragged on

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for more than twenty-five years; it continued to hinder the development of Pennsylvania and constantly threatened to disturb the not-too-stable peace of the Union. Paterson, in instructing the jury to find in favor of the plaintiffs, rejected the idea that long and uninterrupted possession conferred legal title and supported, rather, the claim of vested rights, contractual obligations, and the protection of private property (at a time when popularly elected state legislatures were accused of jeopardizing these concepts). In fact, according to Julian P. Boyd, William Paterson “delivered not so much a charge to a jury as an address to the American people on the nature of written constitutions and the rightful duties of courts in determining the bounds of legislative power.”

The case of *Van Horne v. Dorrance*, which aroused considerable expectation, concerned a number of important problems of constitutional law. Perhaps conscious that judicial history was being made, Paterson did not believe, or even desire, that his decision would go unchallenged; rather, he hoped that “for the sake of the parties, as well as for my own sake, [the facts] ought to be put in a train for ultimate adjudication by the supreme court.” He expressed pleasure that the opinion of no one judge need be final or decisive, “but that the same may be removed before the highest tribunal for revision, where, if erroneous, it will be rectified.” Thus he felt the desirability and propriety of deciding upon all the material points in the cause, including the question of constitutionality, even though such treatment was not a necessity for the case’s determination. He advised the jury that frequently it must decide points of law as well as of fact in order to form correct judgments; for, when made in a proper manner judicial decisions have stability and civil rights security. “Hence uniformity and certainty,” he said, returning to a favorite theme, “hence the decisions of tomorrow will be like the decision of to-day; they will run in the same line, because they are founded on the same principles.” After reassuring the jury of its importance and competence, Paterson then commenced the presentation of arguments to establish the validity of the plaintiffs’ claims.

Admitting that “legislation is the exercise of sovereign authority,”

49. *Id.* at 17.
50. 2 Dallas 304, 319.
51. *Id.*, at 307.
he noted that legislative bodies were necessarily vested with important powers and in some countries were entirely without checks and restraints. He cited England as a land in which the parliament was supreme and absolute and where the constitution—unclear and unwritten as it was—was completely at legislative mercy, with no judicial recourse to parliamentary infringements. However, the situation in this country was different; for here each state had its own fundamental law or constitution in a fixed and written form. And, what is a constitution?, he asked.

It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. . . . it contains the permanent will of the people, and is the supreme law of the land.

As the supreme law of the land it was paramount to the power of the legislature and revokable or alterable only by the sovereign will of the people who made it.

But if constitutions were the direct instruments of the popular will, Paterson asked rhetorically, then what were legislatures?

Creatures of the constitution [he answered]; 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.

Thus, whereas the Constitution was the work or will of the people acting in their unlimited, sovereign, and original 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, which fixed limits to and prescribed the

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52. Id., at 308. Paterson probably overstated his description of the English situation. The British constitution, of course, did not exist in fact. There was no legal distinction between constitutional law and ordinary parliamentary enactments, although certain customs, judicial pronouncements, and particular laws were often considered as providing something of a fundamental law for the realm. However, Paterson’s use of the term “British constitution” was correct in the light of contemporary American thought. It will be remembered that the American Revolution was at least partially justified on the grounds of violations of the British constitution.

53. Id.

54. Id. How different in sentiment was this belief in the permanence and stability of constitutions from Jefferson’s well-known conviction that the Constitution should provide “for . . . revision at stated periods” so that “laws and institutions [may] go hand in hand with the progress of the human mind?” letter from Jefferson to Samuel Kercheval, July 12, 1816, in A. A. Lipscomb (ed.), The Writings of Thomas Jefferson (Washington, D.C.: Thomas Jefferson Memorial Association, 1903-1904), XV, 40-42.

55. 2 Dallas 308. Here Paterson seems to have forgotten that both the Constitution and the laws are products of representative bodies and that the legislature may very well
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scope of legislative power, "is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve." Regardless of the situation in other governments, he continued, "there can be no doubt that [in this country] every act of the legislature, repugnant to the constitution, is absolutely void."[56]

Paterson next proceeded to illustrate the limitations of legislatures, using the declaration of rights in the Pennsylvania state constitution as an example of a political area beyond the reach of the lawmaking body's power of annulment or revision.[57] Unlike Jefferson, who believed that each generation, being independent, had "a right to choose for itself the form of government it believes most promotive of its own happiness,"[58] Paterson thought that

the constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events... it remains firm and immovable... as a mountain amidst the strife of storms [party conflicts]...[59]

In terms no less clear and definitive than those of John Marshall in the Marbury decision eight years later, he went on to describe the essence of judicial review.

I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void.[60]

And, in phrases that left no doubt as to their meaning, Paterson asserted the independence and power of the judiciary. The Constitution, he said, as the basis for all law is the rule and commission for both legislators and judges. "It is an important principle, which... ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government."[61]

What Paterson implied was that the courts were empowered to re-

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56. Id.
57. Id., at 309.
58. Letter from Jefferson to Samuel Kercheval, July 12, 1816, in LIPSCOMB, JEFFERSON WRITINGS, XV, 42.
59. 2 Dallas 309.
60. Id.
61. Id.
view legislative acts, not because they were some kind of super censor over undesirable laws (although, as already mentioned, he did believe the Supreme Court was intended to block the excesses of legislatures) or because they were superior to legislatures, but because as an independent and coordinate body they had a right to an independent judgment concerning constitutional construction and the scope of legislative authority.\textsuperscript{62} It was a view fully in line with the frequent emphasis by the federal courts of the period on the status of the judiciary as an equal department within the government.

The right of the courts to adjudge the statutes of legislatures having been established—or at least put forth—the next problem Paterson had to face was whether the particular law in question, the Pennsylvania confirming act, had in fact violated the Constitution. To prove this point he resorted to the Lockean idea of the social compact. The right to acquire and possess property, he said, is “one of the natural, inherent and inalienable rights of man.” Men naturally have a sense of property, which is necessary to fulfill their natural wants and desires; “its security was one of the objects that induced them to unite in society.” No man would enter a society unless he could enjoy the fruits of his labor and industry; their preservation, then, was “a primary object of the social compact and, by the late constitution of Pennsylvania, was made a fundamental law.” Since it would be “a monster in legislation” to require a person to surrender or sacrifice his property to the community without just compensation, the legislature of Pennsylvania, therefore, had no authority to enact a law divesting one citizen of his freehold and vesting it in another without remuneration in value.\textsuperscript{63}

It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principle of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case.\textsuperscript{64}

Paterson marshalling his great weapons in the cause of judicial authority and vested rights: Coke’s “higher law” and rule of reason, the

\textsuperscript{63}. 2 Dallas 310.
\textsuperscript{64}. Id.
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ethics of religion, and the logic of property motivation for human sociality.

Paterson denied that even with compensation the legislature could transfer property from one group of citizens to another. Some urged, he said, that it was in the nature of the social contract that the legislature under certain emergencies could exercise this great power. In this cause the defendant claimed that such a power existed in every government when state necessity so required; that no government could exist without this authority; and that it was most safely lodged with the legislature, which would not exercise it unless compelled by circumstances to do so. While admitting the strength of the argument, Paterson declared he found it difficult to think of a case or a necessity that would require the legislature to take property from one group and give it to another. In words and ideas similar to two newspaper articles he wrote at about the same time and reminiscent of one written in 1786 on the inequity of paper money emissions (on the same grounds of reason and natural law), he reaffirmed the eighteenth-century concept of government not as guarantor of social justice but as an "umpire" and a protector of social security:

It is immaterial to the state, in which of its citizens the land is vested; but it is of primary importance, that, when vested, it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles and renders it a holy thing.

He pointed out that the property involved in the case before the court concerned landed, not personal property—property not lost because of war, famine, or temporary conditions. It was property expressly protected and secured by the constitution; "it is a right not ex gratia from the legislature, but ex debito from the constitution." The fundamental law, being the origin and measure of all legislative authority, said in effect to legislatures, "thus far ye shall go and no farther. Not a particle of it should be shaken; not a pebble of it should be removed." Innovation, he warned, was dangerous, for one encroachment, one precedent, leads to others; "thus radical principles are generally broken in upon, and the constitution eventually destroyed."

65. Id., at 311.
67. 2 Dallas 311.
68. Id., at 312.
Where is the security and the inviolability of property, Paterson inquired, if a legislature can, by statute, dispossess one citizen of his land, who had acquired it legally, and assign it to another? The rights of private property were to be regulated and protected not by laws or tribunals created by immediate exigency, but by those that are known, general, and established; "their operation and influence are equal and universal; they press alike on all. Hence security and safety, tranquility and peace."69 Here, in a sense, was the developing concept of due process and the belief that in law, applicable on all alike, is found the security and peace of society.70 How much safer and wiser, Paterson declared, to risk a little possible mischief than to give to the legislature power over property — "a power that . . . is boundless and omnipresent."71

But, he went on, even admitting the power of the legislature to divest a person of his property, it still lacked the authority to fix the value of that property for compensation purposes; that could be determined only by the parties themselves (in this case the owners and the legislature), or by the parties' commissioners mutually elected, or by a jury; only thus may compensation be consistent "with the principles and spirit of the constitution and social alliance." How shocking, he exclaimed, that the British, with their limited monarchy, unwritten constitution, and omnipotent legislature, should seem to afford greater protection to property rights, in the form of just compensation for land taken for public purposes, than the United States, a republic with limited legislatures and written constitutions (in which property is rendered inviolable).72 If the parties themselves or their duly selected commissioners in this particular cause could not settle on the compensation value of the property the legislature was to take away, then it must be left to a jury for determination. A jury in such cases, he noted, stood as a constitutional guard upon property and as a necessary curb to legislative power; as long as this interposition be-

69. Id.
70. The idea of a blind law and a completely impartial judicial system, pressing on all with equal justice, reminds this writer of Anatole France's famous observation: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."
71. 2 Dallas 312. How far removed temperamentally this view was from Jefferson's statement that he "would rather be exposed to the inconveniences attending too much liberty than those attending too small a degree of it"; letter from Jefferson to Archibald Stuart, December 23, 1791, in Lipscomb, Jefferson Writings, 276.
72. As an illustration Paterson pointed to the Isle of Man, which was a refuge for smugglers. There the Crown took almost all properties, but not until purchase was freely made with the owners; 2 Dallas 314.
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tween the legislature and the individual was preserved, private prop-

erty was secure from violation (except in cases of great public utility

or necessity).\textsuperscript{73} Perhaps recalling personal experiences with state legis-

latures, Paterson continued:

Omnipotence in legislation is despotism. According to this doc-

trine, we have nothing that we can call our own, or are sure of,

for a moment; we are all tenants at will, and hold our landed

property at the mere pleasure of the legislature. Wretched situa-

tion, precarious tenure.\textsuperscript{74}

Having framed the principles concerning the competence of the

courts and the inalienable rights of property, Paterson next proceeded
to the consideration of the specific statute involved in the case. He

held that the Pennsylvania act, which confirmed title on the Con-

necticut settlers, did not meet the requirements for establishing just

compensation—indeed, it was both unjust and arbitrary—and, there-

fore, was void. "It never had constitutional existence, it is a dead let-

ter, and of no more virtue or avail, than if it never had been made."\textsuperscript{75}

Warmed up to the task of putting legislative power in its place, he

going on:

When the legislature undertake to give away what is not their

own, when they attempt to take the property of one man, which

he fairly acquired, and the general law of the land protects, in

order to transfer it to another, even upon complete indemnifica-
tion, it will naturally be considered as an extraordinary act of

legislation, which ought to be viewed with jealous eyes, examined

with critical exactness, and scrutinized with all the severity of

legal exposition. An act of this sort deserves no favor; to construe

it liberally would be sinning against the rights of private

property.\textsuperscript{76}

In addition, the confirming act of Pennsylvania was unconstitutional

as an impairment of the obligation of contract. Over public lands

the legislature had plenary authority, but, Paterson remarked,

\dots over private property, they have none, except, perhaps, in cer-
nain cases, and those under restrictions, and except also, what may

\textsuperscript{73} Id. at 313, 314, 315.

\textsuperscript{74} Id., at 316.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 318. This comment by Paterson on the rights of private property is interesting

when compared with Chief Justice Marshall's opinion in Barron v. Baltimore, 7 Peters

243 (1833), that the Fifth Amendment's prohibition against the taking of private property

for public use without just compensation restrained the national government and not

the states.
arise from the enactment and operation of general laws respecting property, which will affect themselves as well as their constituents.

If the confirming act was a contract between Connecticut settlers and the legislature of Pennsylvania, it must be regulated by rules and principles governing all contracts; if this was true, then the act was clearly invalid,

... because it tends ... to defraud the Pennsylvania claimants, who are third persons, of their just rights; rights ascertained, protected and secured by the Constitution and known laws of the land. The plaintiff's title to the land ... is legally derived from Pennsylvania; how then, on the principles of contract, could Pennsylvania lawfully dispose of it to another? As a contract, it could convey no right, without the owner's consent; without that, it was fraudulent and void.\textsuperscript{77}

The argument for the decision having been established to his satisfaction, Paterson unequivocally concluded his charge to the jury and thereby made judicial history. “The confirming act is unconstitutional and void,” he declared, “it was invalid, from the beginning, had no life or operation, and is precisely in the same state, as if it had not been made.”\textsuperscript{78}

In what is often considered the first \textit{clear} enunciation of the doctrine of judicial review of state legislation by a federal court, Paterson was careful to employ several supports in determining the unconstitutionality of the act: first, and from the standpoint of subsequent constitutional history the most important, he declared that the act violated the Federal Constitution's prohibition against state legislation impairing the obligation of contracts; second, and at the time probably of greater weight, he pronounced the law incompatible with the constitution of Pennsylvania, which gave the legislature no unusual powers over private property and, indeed, guaranteed the protection of property rights; and third, he maintained that the act was invalid as a violation of the law of nature, which included the inalienable rights

\textsuperscript{77} 2 Dallas 320. The construction Paterson gave the contract clause of the Constitution has not been unanimously accepted. Benjamin Wright in his work on the contract clause thinks that the members of the Federal Convention and those who supported its ratification probably never intended the clause to be so extensive in meaning as to include within its prohibition provisions a contract to which a state was the party. Most of the framers, he says, seemingly thought it simply placed a limitation on the states' monetary powers; \textit{The Contract Clause of the Constitution} (Cambridge: Harvard University Press, 1938), pp. 32-33, 248. Wright's view of the framers' intentions is in marked contrast to Marshall's opinion in \textit{Fletcher v. Peck}, 6 Cranch 87 (1810).

\textsuperscript{78} 2 Dallas 320.
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of man and the motivation for forming the social contract. This latter rationale implied, of course, that even without specific constitutional provision the natural law, which antedated all societies and all constitutions (and, indeed, what both were predicated upon) was judicably enforceable as a restraint on legislative authority; that as Chancellor Kent later put it: "the right of property is before and higher than any constitutional sanction."\(^7\)\(^9\) Apparently Coke and not Blackstone was sitting in the courtroom on that day in 1795. However, more was at stake than the rights of property. A decision in favor of the "squatters," which in effect would have upheld the Pennsylvania confirming act, would not have afforded opportunity for the judicial promotion of the power and prestige of the federal government (then in the hands of Federalists) and the advancement of the idea of judicial supremacy over legislative actions.

The *Van Horne* opinion is a revealing study of one man's personal and political philosophy. Yet, it is more than an insight into the mind of William Paterson—even more than just a significant part of American constitutional development. It is illuminative of representative Federalist thought of the period and—when put alongside contemporary liberal (especially Jeffersonian) thought—of how men starting from similar philosophic foundations reached opposing political conclusions. Paterson thus accepted—as did Madison, Hamilton, Jefferson, and others—the validity of natural law and the "inherent and unalienable" rights of man; he also shared with most Americans of the late eighteenth century—conservative and liberal alike—the prevailing ideas on property and property rights and the social-contract theory of social organization (largely based on Locke); and as a lawyer, trained in Coke and Blackstone, he acknowledged with other Americans the supremacy of law. From these shared premises Paterson and the Federalists in general derived not a Jeffersonian confidence in popular rule but a belief in government by the "better classes," a fear of legislative majorities, and an acceptance of the principle of judicial protection of the Constitution.

Popular with Philadelphia land speculators and most Federalists, the Paterson decision was printed in pamphlet form and circulated throughout the country. When, in 1801, Jefferson vigorously opposed the concept of judicial supremacy, it was once more put forward as a support for judicial review. Ironically, Van Horne's lessee never
took possession of the land that Paterson's ruling awarded him. Dor-
rance and his descendants continued to occupy the land. For a while,
however, there was threat of a separatist movement in Pennsylvania
as a result of the decision. In 1799 the Pennsylvania legislature set-
tled the issue finally in a way that Paterson said was a "shame to Amer-
ican legislation." A settlement of the controversy was really brought
about by a collapse in land speculation, which saw Robert Morris in
debtor's prison and Associate Justice James Wilson driven to an ign-
noble death.80

CONCLUSION

There is little doubt that, though Paterson and his judicial col-
leagues were able men, yet in achievement they fell below their Fed-
eralist contemporaries who organized the government and set it in
motion during its first decade and a half. Indeed, they even fell below
their own earlier achievement when, as Founding Fathers, they helped
write the Constitution and secure its ratification.

The reason for this "failure" may lie in their political use of the
courts to enhance their own particular view of what the government
of the United States should be. In the Whisky Rebellion trials and
in the Sedition Act trials Paterson and the federal courts permitted
partisan bias to compromise themselves and so to render the federal
judiciary inaccessible, in the eyes of the Republicans, as an instrument
of legal as opposed to political control.

However, in recognizing the weaknesses and failures of the early
Federal judiciary, one need not derogate its impact and its very real
accomplishments. In this sense Marbury was less of a constitutional
revolution than a more pronounced emphasis of work already begun.
Marshall's victory was not as one critic said, "a victory over Paterson
and Chase as much as over the Republicans."81 Not only were both
Paterson and Chase members of the Marshall Court which promul-
gated the Marbury decision, but correspondence among the Court's
members reveals that on most important matters the justices were in
essential agreement.

80. J. P. Boyd, William Paterson, Forerunner of John Marshall, in WILLARD THORP,
81. Letter from Marc L. Dembling (editor-in-chief of the Rutgers Law Review) to the
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The Marshallian statesmanship undoubtedly achieved a prestige and authority unknown to the earlier judiciary. But it was built on a foundation—though perhaps a shaky foundation—constructed by Paterson and his colleagues.