

**WILLIAM PATERSON:
CONSERVATIVE REVOLUTIONARY IN AN AGE OF CRISIS**

R. B. Bernstein
Adjunct Professor of Law, New York Law School
William Paterson University
6 December 2002

Tonight I want to explore with you the life and career of William Paterson, and the world that helped to shape him and that, in turn, he did so much to help to shape. It is a cliché by now in talks of this kind that the speaker mourns that his or her subject is not better known, has been obscured by more famous (and less deserving) historical figures, and merits rediscovery. Sometimes clichés become clichés because they start out to be true, and this is one of those occasions when a cliché has a great deal of truth to it.

Paterson was more than the sum of the offices he held and the historic events in which he had a role. He was not a member of that short list of pre-eminent figures among the “Founding Fathers” (a phrase coined by that unintellectual president, Warren G. Harding), consisting of Franklin, Washington, Adams, Jefferson, Jay, Madison, and Hamilton. Nonetheless, he deserves study as a significant *representative* figure of the era of the American Revolution. Although not a brilliant ideologue like Jefferson, although not a profound theorist of government like Adams or Madison, Paterson *was* a shrewd, learned, combative lawyer and politician – a self-made man (like John Adams) who built his own career and achieved distinction through a combination of his own talent, ability, and dogged persistence; the well-timed interventions of friends and mentors and sponsors; and the good luck to be in the right places at the right times.

Paterson was a child of the American Revolution. The Revolution transformed his life and his society; it made possible his career and his achievements. Had the

Revolution not happened, such men as Paterson, Jay, John Marshall, even Jefferson would be remembered, if at all, as provincial lawyers and politicians in the colonial backwaters of British North America. Instead, they helped to found a new nation with a new form of government, which was at once a recognizable descendant of colonial forbears and unlike anything else in the Western world.

Another aspect of William Paterson's life and career justifies studying him – and that is what kind of revolutionary he was. Though he and Jefferson were contemporaries, Paterson and Jefferson were notably different. For one thing, Paterson was a self-made man whereas Jefferson was a born member of the Virginia planter elite. For another, Jefferson was a far-seeing democratic visionary, who sometimes allowed his visions of what could be to cloud his perceptions of what actually was. Paterson (like John Jay and John Adams) was a shrewd pragmatist who harbored no illusions about human nature; indeed, his bleak view of humanity caused Paterson as much trouble as Jefferson's idealism caused for him. Paterson was a conservative revolutionary, who joined the movement for independence to serve two core beliefs: first, that he was revolting on behalf of old, cherished values of constitutionalism and good government; second, that he had to do what he could to keep a restrained, conservative revolution from becoming a tidal wave of social, economic, and political change.

Finally, like his contemporaries, Paterson lived his adult life in a time of crisis, and his responses to that succession of crises defined his career and his historical significance. I plan to explore that question of crisis at the close of my talk this evening.

William Paterson was born on 24 December 1745, in County Antrim, in what is now Northern Ireland. His parents, Richard Paterson and Mary Paterson, came to Ireland

from Scotland. They also had one younger daughter, Frances, and two younger sons, Thomas and Edward. In 1747, when William Paterson was two years old, his family immigrated to the mainland colonies of British North America. After three years of moving from place to place in the middle colonies, in 1750 Richard Paterson established his family in the town of Princeton, where he opened a store. The store was close to the new College of New Jersey, and young Paterson recognized that education was the best means to advance his career and his social standing. His father financed his education; after two years of study in the Latin Grammar School founded by Reverend Aaron Burr (the father of *that* Burr, and a short-lived president of the college), in 1759 Paterson enrolled at the College of New Jersey, graduating in 1763.

At Princeton, Paterson drank in the views of the transatlantic movement known as the Enlightenment, in particular the idea that all history and human experience could be synthesized into general principles of human nature, society, politics, and government. He also absorbed ideas about politics and governance rooted in English constitutional history, in particular the idea that the unwritten English constitution was an ideal blend of institutions designed to balance interests and powers one against the other in the service of constitutional liberty and good government. He studied assiduously such classical writers as the Roman senator, orator, and lawyer Marcus Tullius Cicero, and popular contemporary works of classical history such as Charles Rollin's *Abridgment*. As was customary in his time, Paterson kept a commonplace book into which he copied extracts from literary and philosophical works that he found valuable or insightful – such as Cicero, Alexander Pope, Shakespeare, Tacitus, and even Voltaire. Paterson learned that society was a complex, ordered, organic whole, in which a young man such as himself

could learn to rise based on his own talents and industry, as well as by drawing on ties of friendship with those more fortunately placed.

On graduating in 1763, Paterson apprenticed himself to the lawyer Richard Stockton, and in 1769 qualified for membership in the New Jersey bar; he also earned a master's degree at Princeton in 1767. His legal education followed the traditional pattern of copying writs and other legal documents, and poring over the crabbed 17th-century prose of the legal treatises of Sir Edward Coke. As a young lawyer, Paterson did not begin his practice in the thriving cities of New York or Philadelphia, nor even in the major towns of New Jersey. Instead, he stayed close to Princeton, to assist his father in dealing with legal difficulties and the burdens of debt. That task consumed most of his time and energy. Despite the problems of making his fledgling law practice pay, he distinguished himself for defending the legal profession against the denunciations so common in this period – thus winning the approval of leaders of the provincial bar.

Paterson seems to have sat out the ten years of bickering between Britain and the American colonies that began with the Stamp Act of 1765. Probably, as a lawyer striving to build his practice and to assist his father in coping with the demands of creditors, he had neither the time nor the inclination to throw himself into the great issues of the day. When, in 1775, however, the battles of Lexington and Concord forced the question, Paterson, like many other New Jersey moderates, joined the movement resisting British authority. This drawing of lines helped to provoke the collapse of New Jersey's colonial government. In response, New Jersey elected its first provincial congress. Paterson, one of the delegates for Somerset County, soon became its secretary. He declined election to the second provincial congress, but soon returned and resumed his duties as secretary. In

the spring of 1776, the third congress adopted measures to suppress the colonial government and prevent the royal governor, William Franklin (illegitimate son of Benjamin Franklin), from organizing the province's Loyalists. After arresting Franklin, the congress then promulgated a new state constitution – a substitute form of legitimate government to fill the void of legitimacy left by the end of colonial governance. Paterson opposed the new constitution, because its last clause seemed to leave the door open to reconciliation with Britain and because its form of government did not, as he saw it, provide sufficient protection to the rights of private property. Once the congress had proclaimed the new constitution to be in effect, it chose the state's first governor, William Livingston, who in turn named Paterson the state's first Attorney General.

Paterson's chief responsibility was to vindicate the authority of the new state government. Jerseymen divided into three groups, Patriots, Loyalists (or Tories), and those who wanted to be let alone and not to be forced to choose sides. Attorney General Paterson had little sympathy with this last group – even though, a year before, he had been one of them. With energy and determination, he used the law to punish Loyalists and to drive the undecided into Patriot ranks. He campaigned to win the state government increased powers to deal with the menace posed by Loyalism, denouncing the Tories as enemies to good order, public safety, and constitutional liberty; he prosecuted Loyalists and suspected Loyalists to the fullest extent of the law; and he warned his compatriots that laxity and want of vigilance would defeat the cause of the Revolution. In addition to prosecuting Loyalists, Paterson used the law to confiscate the estates of Loyalists who had fled the state rather than swear allegiance to New Jersey and the United States. This was a common practice throughout the wartorn United States.

We tend to forget that the Revolution was a civil war, often dividing communities and even families. Indeed, the brother of Paterson's cherished wife Cornelia, whom he married in February 1779, was a Loyalist, and Paterson did what he could to use the powers of his office to ease the weight of the law as it fell on his Loyalist in-laws. At the same time, Paterson managed to acquire a Loyalist's house and farm at a forced sale – and installed Cornelia there.

Paterson attended many court sessions through the state to prosecute Loyalists, to ensure that the local courts and institutions of government were functioning with system and energy in this time of crisis, and to keep up his own law practice. In fact, Attorney General Paterson once prosecuted a man in a criminal case whom he represented in the same court session in a civil case. We may find this behavior questionable, but if we do that we are applying the bright-line conflict-of-interest rules of today to an earlier period in which those standards did not exist.

The New Jersey legislature twice chose Paterson as a New Jersey delegate to the Continental Congress, but each time he declined. In this time, most Americans prized their allegiance to their native state above their identity as Americans, and concerns of state and local politics were more familiar and more interesting than concerns of American or national politics. Paterson was not alone in this; Thomas Jefferson left the Continental Congress as soon as he could to return to Virginia to aid in revising the new state's laws, and many other Americans felt the same way.

With the war's end in 1783, Paterson resigned as Attorney General to return to his family and resume the fulltime practice of law. Now he was taking on students, one of them a young former officer of the Continental Army named Aaron Burr. Two tragedies

blighted Paterson's hopes, however. In June of 1783 his youngest daughter, Frances, died. Three months later, after giving birth to Paterson's only son, Cornelia Bell Paterson fell gravely ill; within four days she too was dead. Paterson was devastated. In his private papers, he left a draft of an epitaph for his wife:

Her person was delicate, full of grace and dignity
Kindled by beauty and enlivened by sense
She was loveliness itself.
The beauties of her person were exceeded only
By those of her mind....
Go Passenger
Reflect upon your own mortality
and learn to die.

Cornelia Paterson's death left her husband with a three-year-old daughter, also named Cornelia, and an infant son, William, to care for. A little more than a year after her death, he married one of her closest friends, Euphemia White.

To ease his grief and to support his family, Paterson threw himself into his legal practice, but increasingly he found himself vexed and alarmed by the worsening of national and state affairs. New Jersey was the victim of two large neighbors, New York and Pennsylvania, which imposed taxes on goods crossing state borders; James Madison later compared the state to "a cask tapped at both ends." Also, the demands of debtors and creditors polarized New Jersey's politics, as in other states. Debtors demanded frequent issues of paper money because inflating the currency would drive down the value of debts and make it easier for them to repay what they owed. Creditors opposed such measures because they took away the just value of what was owed to them.

Paterson sided with the hard-money faction. For one thing, many of his clients were creditors suing debtors. For another, his conservative cast of thought led him to see any attempt to ease debtors' plight by driving down the value of money as an attack on

the rights of private property – intensifying his dislike of the New Jersey constitution’s failure to protect the rights of private property. But he came to see that there were greater issues afoot, having to do with New Jersey’s predicament as a small state at the mercy of large states in a fragile confederation that lacked the power to vindicate national interests. Thus, when in 1786 politicians interested in national constitutional reform redirected the agenda of American politics, proposing a general convention of all the states to reform or replace the Articles of Confederation, Paterson was ready to back the proposal.

In May 1787, the Federal Convention opened in Philadelphia, and New Jersey’s legislature chose William Paterson to be de facto leader of the New Jersey delegation. It was his first venture into national politics. Georgia delegate William Pierce penned a set of sketches of the delegates, and he described Paterson this way:

[Paterson is] one of those kind of Men whose powers break in upon you, and create wonder and astonishment. He is a man of great modesty whose looks bespeak talent of no great extent, but he is a Classic and a Lawyer, and an Orator – and of a disposition so favorable to his advancement that everyone seemed ready to exalt him with their praises.

Paterson took a two-part agenda into the Convention: to strengthen the general government so that it could better serve national interests – and New Jersey’s interests, and to be vigilant lest the Convention, in crafting that stronger general government, injure his state’s vital interests. During the Convention’s first two weeks, he sensed danger. The Virginia Plan crafted by James Madison and his large-state colleagues from Virginia and Pennsylvania, which formed the basis of the Convention’s work, *would* threaten New Jersey’s vital interests by creating a two-house national legislature based on proportional representation in both houses, armed with a power to veto state legislation. In other

words, large states such as Virginia and Pennsylvania would call the shots on national policy to suit their interests, and small states such as New Jersey would pay the price.

Paterson therefore was determined to assert the claims of the small states, to thwart the large-state juggernaut behind the Virginia Plan, and to force the large states to pay attention to the need for compromise. He signaled his position with a speech on 9 June 1787 mapping the arguments that he, and other small-state delegates such as his Princeton classmates Luther Martin of Maryland and Oliver Ellsworth of Connecticut, would make in the coming weeks. Next, on 13 June 1787, he asked for a brief recess so that he and other delegates from the small states could assemble an alternative to the Virginia Plan that then formed the basis of the Convention's deliberations.

This was the New Jersey, or Paterson, Plan, which Paterson offered in a speech on 15 June 1787. The resolutions were the handiwork of a small-state caucus including Paterson and several of his New Jersey colleagues, Luther Martin, New Yorkers Robert Yates and John Lansing Jr. (delegates from a large state who thought like delegates from a small state), and Connecticut delegates Roger Sherman and Oliver Ellsworth. Taken together, the resolutions sketch a strengthened version of the Articles of Confederation – pretty much what most of the delegates, from large and small states alike, at first expected the Convention to propose. For Paterson, the plan's key feature was that it represented a purely federal government, one in which the general government was made up of individual states, and had virtually no direct power to bind individual American citizens. Paterson argued that the American people were not ready for a national government – either one that erased all the states' boundaries and threw them together in “hotchpot” or one that preserved the shells of state government while transferring all

sovereignty, or ultimate political power, to the national government.

After three days of debate, which aired all the alternatives, from Luther Martin's vehement defense of state sovereignty to James Madison's scholarly yet forceful argument for the Virginia Plan to Alexander Hamilton's high-toned proposal of a truly national government that would reduce the states to administrative districts, the Convention voted to reject the New Jersey Plan and proceed on the basis of the Virginia Plan. That might seem like a defeat for Paterson, but, like any shrewd lawyer, he had developed the skill of arguing in the alternative. He had offered the New Jersey Plan as a red flag to the Convention – or, as John Dickinson of Delaware, another small-state delegate, put it in a private reproof to James Madison, as a signal of “the consequence of pushing things too far.” Now the Convention was on notice that the small states would not let themselves be trampled; rather, they would insist on a compromise plan that would synthesize and protect the interests of the small states and those of the large states.

For the next three weeks, the Convention struggled to define the structure and composition of the legislature of the United States. Connecticut's Ellsworth and Sherman and Delaware's Dickinson each had sketched the model that the Convention ultimately would adopt – a two-house Congress of the United States in which the people of the several states would be represented proportionately in the House of Representatives and each state, large or small, would elect two members of the Senate. As Clinton Rossiter observed in his history of the Convention, the challenge was not in finding the solution but rather in getting politicians of differing views to live with it.

In this debate, Paterson led the small-state forces and Madison led the large-state forces. It was an ironic juxtaposition, for both men had attended the College of New

Jersey and Madison, while a student, had kept an account at Paterson's father's store. Just as Madison and James Wilson of Pennsylvania were the stubborn, uncompromising spokesmen for the large states, Paterson assumed the role of stubborn, uncompromising spokesman for the small states, allowing Sherman and Ellsworth to play the roles of conciliators and compromisers. It worked, for on 16 July 1787, after perhaps the most bitter and painful period of the Convention, a committee offered the Great Compromise, and a majority of the Convention agreed on it. At the last minute, Randolph demanded that the Convention adjourn so that the small-state forces could find a way to conciliate the large states. It was a breathtakingly ill-timed move, and Paterson seized on it. Jumping to his feet, either truly irate or a consummate actor, Paterson responded:

I agree that it is high time for the Convention to adjourn, that the rule of secrecy ought to be rescinded, and that our constituents should be consulted. No conciliation can be admitted on the part of the smaller States on any other ground than that of an equality of votes in the second branch. If Mr. Randolph would reduce to form his motion for an adjournment sine die, I will second it with all my heart.

Paterson called Randolph's bluff and raised the stakes, threatening to break up the Convention. Randolph tried to escape the trap that Paterson had laid for him, but South Carolina's John Rutledge would not let that happen. He pointed out:

The little States are fixed. All that the large States then have to do is to decide whether they [will] yield or not. For my part I conceive that although we could not do what we thought best, in itself, we ought to do something. Had we not better keep the Govt. up a little longer, hoping that another Convention will supply our omissions, than abandon everything to hazard? Our constituents will be very little satisfied with us if we take the latter course.

The Convention adjourned for the day, and the large-state caucus, which met the next

morning before the full Convention's session, dissolved because it could not find a way out of the Great Compromise. In essence, it was Paterson's victory. As his modern biographer declares, Paterson deserves credit as "the father of the United States Senate," and as one of the key devisers of the American version of federalism, a form of government dividing sovereignty between federal and state governments.

Paterson then left the Convention and returned home to tend to his family and his law practice for the rest of the summer, but he returned to the Convention in September to sign the proposed Constitution on behalf of New Jersey, for he was satisfied with the Constitution. As a small-state nationalist, he was perfectly willing to give the general government considerable power once he could be sure that the Constitution protected New Jersey's vital interests – including the rights of private property. The Constitution included such safeguards as a provision banning states from interfering with the obligations of contracts, a ban on state taxes on exports and imports, and an exclusive power of Congress to impose taxes on interstate commerce – all of which New Jersey citizens and politicians welcomed happily. There was little or no opposition to the Constitution in New Jersey, which ratified early and unanimously.

In the spring of 1789, New Jersey's legislature again honored Paterson by electing him one of the state's first two United States Senators; Paterson was the runaway favorite among the four candidates for two seats. Paterson was about to serve in a body that his work at Philadelphia had helped to create. He found his election a welcome escape, for he had had to spend most of 1788 contending with the burden of debt that his brothers Thomas and Edward had racked up after a wildly impractical venture in New Orleans. At one point, Paterson exploded to Thomas:

I am harassed and prosecuted for your debts.... My credit is ruined; my reputation is blasted: I and my wife and children are beggars; and, gracious heaven, all this dire calamity is owing to men called Brothers. I may perhaps keep out of Prison during the Winter, but in the Spring a Jayle must be my Doome – unless I experience more Lenity from Creditors, who are strangers, than I have justice from you, who are a Brother.

Though Paterson did manage to survive the “calamity,” the entire episode poisoned his relations with his brothers, and he never had contact with either of them again.

The Senate in which Paterson was to serve was a tiny body. Even if all thirteen state delegations were there, its membership would number only twenty-six, and in 1789, neither North Carolina nor Rhode Island had ratified the Constitution and New York could not agree on its choice of Senators till well into the summer. The Senate also met in private, and as a result it lost a great deal of public interest and sympathy to the House of Representatives, the first regularly-constituted American legislative body to hold its sessions in full public view. The House also had the sole power to introduce revenue and appropriations bills, always interesting subjects. The one major task on which the Senate took the lead was crafting a statute creating the federal court system. Article III of the Constitution authorizes “one supreme Court and such other lower courts as Congress may from time to time ordain and establish.” Some Senators were not convinced that any lower federal courts were needed at all, preferring to leave the enforcement of federal law to the existing state courts. Paterson did not agree. He was one of the key framers of a statute authorizing a fully developed system of federal courts, the first that took the pyramid form of trial court, appellate court, and Supreme Court familiar today. The Judiciary Act of 1789 created federal district courts which had limited grants of judicial power over federal criminal cases and customs cases; federal circuit courts, which were

the main trial courts of the system, though they also could hear appeals from the district courts; and a six-member Supreme Court. It divided the nation into three judicial circuit – Eastern, Middle, and Southern – and required that two Justices of the Supreme Court “ride circuit” twice a year in each region, holding circuit courts with the U.S. district judge of each state. This system was designed, first, to give the members of the Supreme Court something to do, and, second, to keep them from making mischief for the courts of the several states. The Judiciary Act was yet another bundle of compromises between supporters and opponents of national power, and Paterson was at the same time a key advocate of national power and a key broker of compromise.

Within the Senate, Paterson, faithful as always to his conservative world-view, emerged as a leader of those who called themselves Federalists. Claiming the name used by the Constitution’s supporters in 1787-1788, they backed a strong general government, favored Treasury Secretary Alexander Hamilton’s economic and fiscal policies, and stressed the need to maintain at least cordial ties with Great Britain. Paterson thus ranged himself against the emerging Republicans, led by Representative James Madison, his old adversary from the Federal Convention, and Secretary of State Thomas Jefferson.

In 1790, the venerable William Livingston died, leaving the governorship of New Jersey vacant, and the legislature elected Paterson to succeed his old sponsor and friend. Though at first he resisted the pleas of his friends and political allies, Paterson resigned from the United States Senate and returned to New Jersey, no longer a struggling provincial lawyer but his state’s chief executive and leading politician.

Paterson’s governorship was a comparatively mild and happy episode in his political career. He never lost his suspicion of the state legislature’s judgment in fiscal

matters and in dealing with matters of debtor and creditor, but the issues that had convulsed the state in the 1780s had ebbed following adoption of the Constitution. Indeed, New Jersey's economic prospect had brightened because of the regularization of interstate commerce and because of the growing interest in fostering manufacturing as a new sector of the state's economy. The Society for Establishing Useful Manufactures (SUM), founded by entrepreneurs such as Tench Coxe to capitalize on Treasury Secretary Hamilton's 1791 *Report on Manufactures*, saw New Jersey as a superb staging area. Paterson was deeply involved in the Society's initial efforts at organization, and worked with Hamilton and with the state's legislators to craft the society's charter to win it the privileges and special powers it would need to carry out its objectives. One of the byproducts of the Society's efforts was the organization of what we would call a company town, a model city that would host the Society's manufacturing ventures, to which the legislature gave the name Paterson, to honor the governor.

Unfortunately for Governor Paterson, who hoped that the Society would be a vehicle for promoting his state's economic growth, and for Hamilton, who hoped that it would be a showcase for his economic policies, most of their collaborators in the SUM were interested in the swift generation of paper profits, via speculation, which neither Paterson nor Hamilton wanted. In 1792, the financial collapse of William Duer, one of the leading speculators of his day and a key figure in the Society, helped to precipitate the slow collapse of the Society as well. By 1796, the "model city" was a ghost town that never got formally incorporated; Paterson, New Jersey, had to wait till the next century for its flowering as an industrial center.

Governor Paterson and the state legislature worked together more successfully to

establish the permanent state capital at Trenton. His single greatest project as governor, however, was that of revising and reorganizing the state's laws, including the colonial laws that had been in force before the Revolution. The legislature assigned this task to Paterson, reserving to itself the authority to re-enact the codified laws once the governor had submitted his report. Other states had launched similar law-revision efforts, most notably Virginia in 1779 under the leadership of Thomas Jefferson. Even so, Virginia's law-reform project was a joint venture by Jefferson, his mentor George Wythe, and Wythe's great adversary Edmund Pendleton. Paterson, by contrast, shouldered the entire burden of research and writing virtually alone. The project proved immense, occupying Paterson's free time long after he resigned as governor. Paterson's task grew in size and complexity as he persevered. In particular, he was aghast at the harshness of British criminal law, declaring, "It is written in Blood, and cannot be described without Horror." Paterson eased the penalties for dozens of crimes, in particular reducing death penalties to imprisonment at hard labor and removing the penalty of corporal punishment. He also revised the laws governing slavery, although he refused to go as far as abolition and worried that an attempted amendment to permit gradual emancipation would cause the whole bill's defeat. Not until the 1840s did New Jersey finally abolish slavery, the last of the northern states to do so. The last and most complex of his law-revision reports were that having to do with New Jersey's chancery courts and legal procedures. Following the English system, New Jersey had divided its courts into two types. Law courts entertained suits for money damages; equity courts issued injunctions, dealt with wills and estates, and otherwise used judicial power to make litigants do things or to prevent them from doing things. Chancery practice in England had not been reformed for centuries, and

grew so tangled and corrupt that Charles Dickens satirized it in his 1853 novel *Bleak House*. Paterson's 1799 report brought order and system to New Jersey's chancery practice, making it parallel the practice in the state's law courts and otherwise purging the law of fossilized doctrines and antiquated procedures. So, too, the last of his reports, that governing the practice of law in New Jersey courts, which he finished in 1800, struck a balance between imposing order on a previously chaotic body of law and preserving the spirit of common-law jurisprudence. As Paterson wrote in that report,

There is a danger in departing from known and established regulation and usages, whenever this happens the law is perplexed, and at a loss how to advise or proceed, and the client in consequence is liable to injury or delay; everything is thrown as it were on the ocean, and afloat for a time; and it requires much litigation, a series of decisions, and a length of practice before certainty and order can be restored.

Paterson's work as law reformer and codifier overlapped his last and most distinguished post. In early 1793, Justice Thomas Johnson of the U.S. Supreme Court died after only two years of service. President George Washington offered the post to Paterson, who accepted the appointment and resigned his governorship.

Within two years of his appointment to the Court, Paterson decided what would be his most famous case, the technical and complex matter of *Van Hunter's Lessee v. Dorrance*. Paterson heard and decided this case while presiding over the U.S. Circuit Court for the District of Pennsylvania. In it, he ruled that a state law that violated the U.S. Constitution was invalid. He also took part in the Court's 1796 case of *Hylton v. United States*, in which the Court upheld a federal tax on carriages as constitutional, the clear implication being that if it found the statute unconstitutional, it could have voided it. Both decisions predate the famous decision by Chief Justice John Marshall in *Marbury v.*

Madison, which in 1803 established the federal courts' power of judicial review.

Paterson joined the Court at a time when partisan alliances of Federalists and Republicans clashed more and more often over issues of domestic and foreign policy. Paterson presided over one set of controversial cases, those of defendants charged with taking part in the Whiskey Rebellion of 1794. The federal tax on whiskey outraged small farmers in Pennsylvania, who felt – with reason – that it prevented them from making ends meet by distilling part of their grain crop as whiskey and selling it. They refused to pay, and threatened to rise up in rebellion against any effort to enforce the tax. President Washington and Treasury Secretary Hamilton called out the militia and led a force of 15,000 men in search of the Whiskey Rebels. An outraged Paterson urged the grand jury to indict those who were apprehended on charges of high treason. In presiding over their trials, he all but ordered the trial juries to return verdicts of guilty, and he sentenced the convicted defendants to death; later scholars have criticized his actions on legal grounds. Paterson also penned anonymous newspaper essays defending the 1795 Jay Treaty with Great Britain and denouncing those who dared to oppose it.

In the crisis of 1798, Paterson and his colleagues on the federal bench sacrificed all pretense of impartiality. Relations between France and the United States had worsened through the decade, and in response to President John Adams's peace mission of 1798, three French diplomats allegedly demanded a bribe from the Americans (Charles C. Pinckney, John Marshall, and Elbridge Gerry). Marshall returned home to report the insult, and in the resulting furor the Federalists pushed through Congress statutes known as the Alien and Sedition Acts. These laws prohibited criticism of the government or of specific officials, such as the President of the United States. Federalist prosecutors

targeted Republican newspaper editors under the Sedition Act, and Justice Paterson presided over the grand jury that indicted Representative Matthew Lyon, Republican of Vermont, who was both a member of the House and a newspaper editor. Charging that the nation's existence was in peril, Paterson declared, "No government, indeed, can long subsist, where offenders of this kind are suffered to spread their poison with impunity." The grand jury followed through and indicted Lyon, and at trial (the first under the Sedition Act) Paterson was as committed to securing a conviction as he had been to securing an indictment. Lyon was convicted, and Paterson sentenced him to the harsh sentence of four months in jail and a \$1,000 fine. For the rest of his days, Paterson faced repeated criticism of his conduct in the Lyon case, even more so than in the case of the Whiskey rebels. Paterson's conduct in the Lyon case was typical of the vehemence, anger, and intolerance that raged on both sides of the political divide in the late 1790s.

In the election of 1800, Paterson may have written newspaper articles attacking the Jeffersonian Republicans, though there is no conclusive proof, but otherwise he was far calmer than many of his political allies. Aghast at their defeat for the Presidency and their loss of control of both houses of Congress, Federalists sought to maintain a foothold for themselves in at least one branch of the federal government. They enacted a new judiciary act creating a new set of appellate courts, a step that also relieved the Justices of the tiresome burden of riding circuit. Also, with the decision of Chief Justice Oliver Ellsworth to retire, pressure mounted on President John Adams to name a reliable Federalist as his successor. John Jay turned down a chance to return to the Court, and Paterson became a leading candidate. When Adams instead named Secretary of State John Marshall, many of Paterson's friends were outraged that a man ten years his junior

received the post; even Marshall suggested that Paterson would have been a more appropriate nominee. However, in light of Paterson's conduct of the Whiskey Rebels trials in 1795 and the Lyon trial in 1798; Paterson's good relations with Hamilton (whom Adams loathed); and Adams's refusal to do anything that Federalist senators demanded that he do, it was unlikely that Adams would ever have chosen Paterson.

In any event, Paterson discovered that he and Marshall got on well, and the two men worked closely to rally their colleagues on the Court. The new Congress repealed the 1801 Judiciary Act, and the new 1802 Judiciary Act once more imposed the burden of circuit-riding on the Justices. Two unrelated cases were headed for the Court; either one could have plunged the Court into crisis. In *Stuart v. Laird*, Marshall had already ruled on the Circuit Court for Virginia that the 1802 statute was constitutional. In *Marbury v. Madison*, a disgruntled would-be justice of the peace for the District of Columbia wanted the Supreme Court to order Secretary of State James Madison to deliver his judicial commission (thus entitling him to his office and his salary). Marshall wrote the Court's opinion in *Marbury*, and asked Paterson to write for the Court in *Stuart v. Laird*.

Time precludes my retelling the familiar story of *Marbury v. Madison*, in which Marshall ducked Marbury's lawsuit while proclaiming the Court's power to hold acts of Congress unconstitutional. And Paterson's learned and technical opinion in *Stuart v. Laird* all but defies easy summary. But the important point about these cases is that Marshall *and* Paterson showed judicial statesmanship of a high order and saved the Supreme Court from disaster.

In his last judicial opinion, written in the summer of 1806, Paterson summarized his core beliefs about law and the Constitution:

The law, like the beneficent author of our existence, is no respecter of persons; it is inflexible and even-handed, and should not be subservient to any improper considerations or views. This ought to be the case particularly in the United States, which we have been always led to consider is a government not of men, but of laws, of which the constitution is the basis.

It was his valedictory. As he approached his sixtieth birthday in 1805, Paterson was increasingly aware of his growing frailty. He had always had great reserves of energy that he could call on almost without thinking about it. But now, he was more conscious of his failing powers. While riding circuit in 1806, he wrote his will and put his affairs in order. He then went to visit his daughter Cornelia, who had married the noted New York landowner Stephen Van Rensselaer, a relation of his old political ally John Jay. Paterson had planned to take the waters at Ballston Spa, but he fell gravely ill and, after six weeks, he died on 6 September 1806, three months shy of his sixty-first birthday.

What relevance does the life of William Paterson have to us, after September 11? We live in what we assure one another is an era of unprecedented crisis. And yet Paterson and his contemporaries lived their entire adult lives in a constant state of crisis. From 1765 to 1775, they had to weather the dispute with Great Britain over the American colonists' rights and responsibilities under the unwritten English constitution. From 1775 through 1783, they had to declare and then to win American independence in an unprecedented, grueling war against one of the world's most formidable military and naval powers. Beginning in 1776, they undertook a series of complex, unprecedented struggles to devise new forms of government to secure the fruits of that Revolution. Even with the framing and adoption of the Constitution in 1787-1788, their sense of crisis was not at an end. Now they faced yet another series of struggles, spanning the rest of

their lives, to make their new systems and institutions of government work, to conduct politics within a new and untried constitutional framework, to test whether political conflict and factional strife could be contained within the matrix of the Constitution.

Paterson did not live to achieve the seeming serenity of retirement, but even in retirement, Jefferson, Madison, and their colleagues were besieged by questions, pleas, demands for advice and guidance – and sometimes doubted the experiment’s success.

Throughout their careers, then, Paterson and his contemporaries always were aware of the fragility of their endeavors, and that awareness of fragility fed and fanned their sense of crisis. Not only were they aware of these risks, they were committed to combating them. Their commitment – and their willingness to pay the price of grinding toil and heartbreak that it exacted from them – ought to reassure us and to challenge us. Paterson and the other members of the Revolutionary generation (a group that actually spanned three generations) were forced by their circumstances to learn on the run, and their most remarkable exercises of creative adaptation should inspire us and challenge us to do likewise.

Bridging the gap between the past and the present, while at the same time preserving a sense of the inescapable differentness of the past, is the ultimate challenge facing the historian and the biographer. As the English biographer and literary critic Victoria Glendinning has written, “Rebecca West once said that to understand is not to forgive. It is only to understand. It’s not an end but a beginning. Knowledge is power.”

R.B. Bernstein is Distinguished Adjunct Professor of Law at New York Law School. He has written, edited, or coedited nineteen books on American constitutional and legal history including *Thomas Jefferson* and *The Founding Fathers Reconsidered*.