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## How To Remove a Federal Judge

**ABSTRACT.** Most everyone assumes that impeachment is the only means of removing federal judges and that the Constitution's grant of good-behavior tenure is an implicit reference to impeachment. This Article challenges that conventional wisdom. Using evidence from England, the colonies, and the revolutionary state constitutions, the Article demonstrates that at the Founding, good-behavior tenure and impeachment had only the most tenuous of relationships. Good-behavior tenure was forfeitable upon a judicial finding of misbehavior. There would have to be a trial, the hearing of witnesses, and the introduction of evidence, with misbehavior proved by the party seeking to oust the tenured individual. Contrary to what many might suppose, judges were not the only ones who could be granted good-behavior tenure. Anything that might be held—land, licenses, employment, etc.—could be granted during good behavior, and private parties could grant good-behavior tenure to other private individuals. Impeachment, by contrast, referred to a criminal procedure conducted in the legislature that could lead to an array of criminal sanctions. In England and in the colonies, impeachment was never seen as a means of judging whether someone with good-behavior tenure had forfeited her tenure by reason of misbehavior. Whether a landholder, employee, or government officer with good-behavior tenure had misbehaved would be determined in the ordinary courts of law. Moreover, the vast majority of state constitutions did not equate good-behavior tenure with impeachment either. To the contrary, many distinguished them explicitly. Taken together, these propositions devastate the conventional conflation of good-behavior tenure with impeachment. More importantly, they indicate that the original Constitution did not render impeachment the only possible means of removing federal judges with good-behavior tenure. Given the long tradition of adjudicating misbehavior in the ordinary courts, Congress may enact necessary and proper legislation permitting the removal of federal judges upon a finding of misbehavior in the ordinary courts of law.

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**INTRODUCTION**

It is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge. But why? The constitutional text does not expressly say as much. The text does not even connect the provision for judicial tenure “during good Behaviour”<sup>1</sup> to impeachment.<sup>2</sup> In fact, these provisions are found in entirely different Articles, suggesting that they stand independent of each other. Why, then, do so many regard it as axiomatic that impeachment is the exclusive method of removing a federal judge?

Perhaps the standard assumption derives from something deeply embedded in the constitutional text or structure. Though the text does not expressly say that judges may be removed only through impeachment, maybe a more careful reading reveals a hidden connection. For example, given that the original Constitution explicitly mentions removal only in the impeachment provisions,<sup>3</sup> scholars might infer that impeachment must be the exclusive means of removing judges.<sup>4</sup> Others might suppose that tenure “during good Behaviour” is actually synonymous with “removable only via impeachment.” For instance, Professor Martin Redish has argued that “the good-behavior language must be construed as nothing more than a cross-reference to the availability of impeachment.”<sup>5</sup> Finally, at least one scholar has suggested that because only judges have good-behavior tenure, the Constitution might be best read as making it *more* difficult to impeach federal judges than other officers.<sup>6</sup>

Another justification for the standard assumption might be history. Neither impeachment nor good-behavior tenure originated with the Constitution. If

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1. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”). For consistency’s sake, we will use “behavior” rather than “behaviour” in the text, but preserve the latter spelling when found in quotations.
  2. See U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6-7; *id.* art. II, § 4.
  3. See *id.* art. I, § 3, cl. 7 (declaring that judgment cannot extend beyond removal and disqualification); *id.* art. II, § 4 (stating that officers convicted shall be removed).
  4. See Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 117 (1970) (arguing that impeachment was intended to be the exclusive means of removal because it is the only mechanism mentioned); Merrill E. Otis, *A Proposed Tribunal: Is It Constitutional?*, 7 U. KAN. CITY L. REV. 3, 38-41 (1938) (same).
  5. Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 692 (1999).
  6. See Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 798 (1998) (suggesting that the grant of good-behavior tenure means that there are good textualist reasons to limit impeachment to extreme cases of judicial misconduct).

we look to the English and American history that preceded the Constitution, we might unearth an obscure but nonetheless deep link between good-behavior tenure and impeachment. Perhaps history reveals a consensus that good-behavior tenure simply meant “removable only through impeachment.”<sup>7</sup>

These possible rationales for the conventional wisdom are unpersuasive and ahistorical. First, these rationales run counter to the customary meaning of good-behavior tenure. As understood throughout the seventeenth and eighteenth centuries, tenure during “good Behaviour” referred to a legal standard by which one could terminate tenure. The standard, everyone agreed, meant that someone with good-behavior tenure could be removed for misbehavior.<sup>8</sup> An officer appointed to serve only during good behavior who then misbehaved obviously had violated the conditions of her tenure.<sup>9</sup>

Second, the means of determining misbehavior, everyone agreed, was a judicial process. There would have to be a trial, the hearing of witnesses, and the introduction of evidence, with misbehavior proved by the party seeking to oust the tenured individual. This judicial process outside the control of the tenure grantor was necessary to ensure that the grantor did not oust people who had not misbehaved. If the grantor could remove without misbehavior, it would make the supposedly durable grant of good-behavior tenure akin to a fickle grant of tenure during pleasure.

Third, good-behavior tenure was not something peculiar to judges. Executive officers might have such tenure. More importantly, ordinary persons could have good-behavior tenure. To have good-behavior tenure meant no more than that one was entitled to hold something (to have “tenure”<sup>10</sup>) so long

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7. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion) (“The ‘good Behaviour’ Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment.”); see also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); Redish, *supra* note 5, at 698-99 (arguing that good behavior is a reference to impeachment).
  8. This Article says relatively little about what constituted misbehavior, focusing instead on the legal means for adjudicating that standard, i.e., for ousting someone serving during “good Behaviour.”
  9. There was a separate but perhaps related meaning of good behavior, one that had nothing to do with tenure. In various contexts, individuals might be asked to post bond or find pledges as a means of ensuring their continued good behavior. See generally 4 WILLIAM BLACKSTONE, COMMENTARIES \*248-54. Of course, we are not concerned with this meaning of good behavior. Nonetheless, we believe that whether an individual had misbehaved and thereby forfeited a pledge was a decision for a court to make.
  10. See 17 OXFORD ENGLISH DICTIONARY 731 (2d ed. 1989); see also MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1288 (11th ed. 2003) (defining “tenure” as “the act, right, manner, or term of holding something (as a landed property, a position, or an office)”).

as one behaved well. Hence anyone who could grant someone else tenure might grant it during the grantee's good behavior. In this way, land, licenses, employment, and many other things could be granted to someone during her good behavior.

Fourth, while impeachment was a means of judging misconduct of various sorts, it was not viewed as a means of determining whether someone had forfeited her good-behavior tenure. In England and the colonies, ordinary courts determined whether government officers with good-behavior tenure had misbehaved. Likewise, private individuals with good-behavior tenure in land, licenses, or the like would have their supposed misbehavior adjudicated in the ordinary courts. There was no need to beseech Parliament or the local assembly to impeach and convict individuals of misbehavior. Indeed, it would have been ridiculously impractical if the only means of ousting a person who held a job or land during good-behavior tenure was to petition Parliament or the local assembly to impeach and convict. Hence it is not surprising that in England and the colonies, impeachment was not even considered a means of judging misbehavior.

Fifth, the revolutionary state constitutions generally followed this practice of judging misbehavior in the ordinary courts. Only one, the New Jersey Constitution, provided that impeachment could be used to judge misbehavior, but even this constitution did not specify that impeachment was the exclusive means of removal. Many more state constitutions made it clear that misbehavior could be determined in the ordinary courts. Some explicitly said as much. Others granted tenure during good behavior but established no impeachment process, thus implicitly incorporating the conventional means of judging misbehavior—i.e., a trial in the ordinary courts.

Given the centuries-old tradition of adjudicating misbehavior in the ordinary courts, the better reading of our Constitution is that it left intact this customary means of judging misbehavior. The Constitution never specifies that impeachment is the exclusive means of removing officers. Nor does it contain any language hinting that it adopts an idiosyncratic meaning of good-behavior tenure. Had the Constitution meant to preclude the use of ordinary courts to judge misbehavior, it would have explicitly provided that impeachment was the *only* means of judging misbehavior. It would have tracked Thomas Jefferson's Proposed Constitution for Virginia, which specified that impeachment would be the sole means of judging certain official misbehavior.<sup>11</sup> Jefferson perhaps understood that if an impeachment tribunal was to enjoy a monopoly on judging misbehavior, that monopoly would have

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11. See *infra* text accompanying notes 171-173.

to be express. Otherwise, people would assume that the ordinary courts could continue to judge whether someone with good-behavior tenure had misbehaved, as they had been doing for centuries.

Put another way, for at least two centuries prior to the Constitution's creation, good-behavior tenure had no necessary relationship to impeachment. Officers might have good-behavior tenure in a regime that wholly lacked impeachment. Conversely, a regime might feature impeachment without any of its officers' having tenure during good behavior. Moreover, regimes that featured impeachment clearly sanctioned the removal of officers with good-behavior tenure by means other than impeachment. Finally, private individuals with good-behavior tenure could have their tenure terminated in the ordinary courts. Hence, in 1787 impeachment was hardly considered the sole means of removing someone with tenure during good behavior. Because the Constitution has nary a clue that it establishes any connection between good-behavior tenure and impeachment, the better reading is that impeachment is not the exclusive means of removing federal judges. Instead, the Constitution adopted the then-established view that officers with good-behavior tenure forfeited their offices upon a finding of misbehavior in the ordinary courts.<sup>12</sup>

Others have argued that judges may be removed by means other than impeachment.<sup>13</sup> This Article differs from these prior treatments in providing a

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12. Our methodology is originalist. We seek to determine what the Constitution likely meant when it was made supreme law. Such research is obviously useful to those who believe that the meaning of the Constitution was fixed at the time it was ratified, but it is also useful to the many nonoriginalist scholars and judges who consider original meaning relevant to ascertain the Constitution's current meaning. Because our focus is on the Constitution's original meaning, we will say little about how the Constitution came to be (mis)understood as making impeachment the only means of removing judges.
13. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 186-87* (1973) [hereinafter BERGER, *IMPEACHMENT*]; Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 *YALE L.J.* 1475, 1531 (1970) [hereinafter Berger, *Impeachment of Judges*]; Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 *TEX. L. REV.* 1, 69-82 (1989); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 *MICH. L. REV.* 870, 882-83 (1930) (arguing that judicial officers retain the right to remove other judicial officers through the writ of *scire facias* or a similar proceeding); Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 *COLUM. L. REV.* 1617, 1619, 1634-36 (1994). A more recent article focusing on the means of inducing aging judges to leave the bench also adopts the view that good-behavior tenure does not mean that judges are removable only by impeachment. See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 *WASH. U. L.Q.* 1397 (2006).

There is more support for the conventional wisdom. See Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 *KY. L.J.* 643, 648-

more comprehensive understanding of good-behavior tenure. In particular, we demonstrate several propositions for the first time: (1) that the English understanding of good-behavior tenure migrated to the colonies and continued in independent America; (2) that good-behavior tenure was not limited to government officials but could be granted to anyone, including tenants in land, licensees, and employees; and (3) that both the Continental Congress and the state constitutions clearly did not equate good-behavior tenure with impeachment. Taken together, these propositions devastate the conventional conflation of good-behavior tenure with impeachment.

Congress, using its authority under the Necessary and Proper Clause,<sup>14</sup> may establish any number of mechanisms for determining whether a judge has forfeited her office through misbehavior. Congress, however, must ensure that any such mechanism consists of a judicial process—a trial, presentation of evidence, witnesses, etc. In other words, Congress can pass statutes that help implement the federal government’s authority to remove federal judges who have misbehaved.<sup>15</sup>

To make our case, Part I argues that the Constitution’s text never equates good-behavior tenure with impeachment. Part II traces the meaning of good behavior in the seventeenth and eighteenth centuries and establishes that good-behavior tenure terminated upon a judicial finding of misbehavior. Finally, Part III briefly considers permissible methods of establishing that a judge has forfeited her office through misbehavior.

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50 (1988) (presuming that impeachment is the exclusive means of removing judges); Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 AM. J. COMP. L. 459, 476-82 (2006) (same); Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 MICH. L. REV. 765, 776, 778-85 (1989) (same); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 668 (1969) (same); Otis, *supra* note 4, at 6-10 (same); Redish, *supra* note 5, at 675 (same); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213-22 (1993) (same); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 148-53 (same).

14. U.S. CONST. art. I, § 8, cl. 18 (providing that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).
15. Just to be clear, our claim is *not* that judges cannot be removed upon impeachment and conviction for high crimes and misdemeanors. Impeachment clearly exists as an independent means of removing federal judges. Our point is that Congress could provide for the removal of federal judges for offenses not constituting high crimes and misdemeanors. Misbehavior, a standard less strict in our view, is enough to remove federal judges. Accordingly, if a judge determines in a judicial proceeding that a colleague has misbehaved, the misbehaving judge may have her good-behavior tenure terminated.

## I. MODERN MISCONCEPTIONS

As noted at the outset, two textual claims might lead scholars to conclude that impeachment is the only means of removing judges. First, echoing a view asserted by some in the First Congress, scholars might believe that impeachment is the only means of removing *any* officers. If that is so, impeachment must be the only method of removing judges. Second, some scholars might conflate impeachment and good behavior, assuming that the latter somehow references the former. To have good-behavior tenure, in this view, is to be removable only by impeachment. Below we disentangle the two distinct concepts.

We also discuss the structural claim that reading the Constitution as permitting removal of federal judges only via impeachment furthers the Constitution's aspiration of judicial independence. While we agree that the Constitution furthers judicial independence, it does not relentlessly pursue that goal at the expense of all other values. In particular, there is no reason to suppose that the desire for judicial independence would have precluded removal of misbehaving judges in the ordinary courts of law.

### A. *Impeachment and Removal*

Because the original Constitution only mentions removal in the context of impeachment,<sup>16</sup> one might suppose that impeachment is the exclusive means of removing officers. During the debate that preceded the Decision of 1789, the famous decision relating to whether the President had a power to remove executive officers, a few Representatives denied that the President could remove or that Congress could grant removal authority. Instead, they insisted that the Constitution established impeachment as the exclusive means of removing officers.<sup>17</sup>

At first blush, the impeachment-only position has a certain plausibility. After all, other than impeachment, the Constitution does not explicitly provide for any method of removing officials. On the familiar doctrine of enumerated powers—the claim that the federal government's branches have only those powers that the text enumerates—it might seem to follow that impeachment is the only means of removing any federal officer.

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16. See U.S. CONST. art. I, § 3, cl. 7 (declaring that judgment cannot extend beyond removal); *id.* art. II, § 4 (stating that officers convicted shall be removed).

17. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1035-36 (2006).

But only a little reflection is—and was—required to conclude that this impeachment-only reading is untenable. As a textual matter, the Constitution's text nowhere makes impeachment the only means of removing officers. It merely provides that the House may impeach and that the Senate may conduct a trial and must remove upon a conviction. To say that the Senate must remove a convicted officer<sup>18</sup> is a far cry from precluding others from removing officers. There is no reason to read a mandatory removal provision (mandatory once someone is convicted) as an implicit bar on discretionary removals by others. As a practical matter, this interpretation points to utterly unacceptable conclusions. Could it possibly be that every postmaster or United States marshal or customs house officer<sup>19</sup> enjoys life tenure subject only to impeachment in Congress for high crimes and misdemeanors? For these reasons, the impeachment provisions are rather poor candidates for a rigorous application of the *expressio unius est exclusio alterius* canon, at least when it comes to the question of whether officers may be removed by other means.<sup>20</sup>

Early statesmen agreed, for they decisively rejected the impeachment-only reading. In the same Decision of 1789 referenced earlier, an overwhelming majority of the House agreed that impeachment was not the only means of removing officers.<sup>21</sup> A healthy majority concluded that the President had a constitutional power to remove executive officers.<sup>22</sup> A sizable minority

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18. See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” (emphasis added)).
  19. For a classic and amusing account of the vicissitudes of tenure in a United States customs office in the nineteenth century, see NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 36-45 (William Charvat et al. eds., Ohio State Univ. Press 1962) (1850). Hawthorne relates how he considered leaving his post as Surveyor of Customs but was unable to sacrifice the salary and then was dismissed after Zachary Taylor was elected President. “In view of my previous weariness of office, and vague thoughts of resignation, my fortune somewhat resembled that of a person who should entertain an idea of committing suicide, and, altogether beyond his hopes, meet with the good hap to be murdered.” *Id.* at 42.
  20. If impeachment were the only means of removing any officer, there would be no way of removing military officers, a category of officers excluded from the set of impeachable officers. See U.S. CONST. art. II, § 4 (“The President, Vice President and all *civil* Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” (emphasis added)). It is hard to fathom why the Constitution would implicitly grant military officers more secure tenure than their civilian counterparts.
  21. See Prakash, *supra* note 17, at 1035-42 (describing how almost all Representatives thought that the Constitution permitted the removal of executive officers by means other than impeachment).
  22. *Id.* at 1040-42, 1067.

disagreed with this conclusion but clearly believed that impeachment was not the only means of removing officers.<sup>23</sup> Less than a handful of Representatives argued that impeachment was the exclusive means of removing officers.<sup>24</sup>

Of course, the Decision of 1789 concerned the removability of executive officers and not federal judges. The First Congress never debated whether impeachment was the only means of removing federal judges. This lack of debate, combined with the superficial plausibility of the general impeachment-only view, perhaps explains why the impeachment-only view still has great currency in the context of federal judges. Yet the same impeachment provisions apply to both judges and executive officers. All judicial officers and almost all executive officers fall into the single category of “civil Officers.”<sup>25</sup> It is hard to imagine that Article II, Section 4 implicitly bifurcates this category of “civil Officers” and then treats judges differently than executive officers. The text does not provide that the “President, Vice President, and civil Officers shall be removed upon impeachment and judges shall be removed *only* via impeachment.”

At this point, some might wonder whether reading the Constitution as permitting removal of officers outside the impeachment process somehow renders the impeachment provisions superfluous. If others can remove officers by means other than impeachment, does the Constitution really grant the House the “sole” power to impeach and the Senate the “sole” power to try impeachments?<sup>26</sup> Relatedly, why make removal a consequence of conviction if others can remove by other means?

The impeachment provisions do have meaning and significance even if there are other means of removing officers. Those provisions were absolutely necessary to invest the House and Senate with nonlegislative authority. In the absence of the impeachment provisions, there would have been no way that the House would have enjoyed a judicial power to indict and an executive power to prosecute.<sup>27</sup> Likewise, but for the grant of power, the Senate would not have

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23. *Id.* at 1036-40.

24. *Id.* at 1035. It also bears noting that ever since the Decision of 1789, no one who has seriously studied the subject has concluded that impeachment is the exclusive means of removing officers. Indeed, government officials and scholars continue to believe that the President may remove executive officers. Hence, the impeachment-only view has been continuously rejected for over two centuries.

25. U.S. CONST. art. II, § 4 (providing that “civil Officers” may be impeached and removed).

26. *Id.* art. I, § 2, cl. 5 (providing that the House has the “sole Power” to impeach); *id.* art. I, § 3, cl. 6 (providing that the Senate has “sole Power” to try impeachments).

27. See generally Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (describing how the power to prosecute was an executive power).

any judicial authority to try impeachments. In this respect, the Constitution's impeachment provisions replicate the judicial means by which the chambers of Parliament could check abuses of power by royal officials.<sup>28</sup> The existence of such judicial powers in Parliament was never understood to preclude other forms of removal.

Beyond authorizing a congressional procedure that would be otherwise nonlegislative, and hence unavailable to Congress, the impeachment provisions are necessary for another reason: the portions that deal with the consequences of an impeachment conviction actually *limit* the punishments the Senate may impose upon impeached officers. Historically, impeachment was used to impose penalties that went well beyond removal from office.<sup>29</sup> Had the Senate been granted the power to try impeachments with no limitation placed on punishments, the Senate might have imposed any number of punishments, including the death penalty. The language in Article I relating to removal itself is instructive—it reads as a limitation rather than a grant of power to the Senate: “Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . .”<sup>30</sup> To read this language as if it provided that “Judgment in Cases of Impeachment shall be the only means of removing officers” is to take unwarranted liberties.

Our reading of the impeachment provisions should hardly be controversial. We merely give them the meaning that they seem most naturally to invite. Those who would read these provisions as somehow providing that impeachment is the exclusive means of removing some or all federal officers have a much harder case to make because they discover restraints and distinctions that appear to have no basis in the text.

### *B. A Case of Mistaken Conflation*

Defenders of the conventional wisdom might suppose that even if the impeachment provisions themselves do not make impeachment the only means of removing judges, perhaps the grant of tenure “during good Behaviour” does. A proponent of the orthodoxy might argue that the good-behavior tenure

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28. See BERGER, *IMPEACHMENT*, *supra* note 13, at 7-52.

29. See PETER CHARLES HOFFER & N.E.H. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 3, 70 (1984).

30. U.S. CONST. art. I, § 3, cl. 7.

granted in Article III implicitly refers back to the impeachment provisions found in Articles I and II.<sup>31</sup>

The conflation of Article III’s “good Behaviour” tenure with the impeachment provisions of Articles I and II would be warranted only if it could somehow be shown that good-behavior tenure simply meant “removable only via impeachment.” Whatever history might reveal about the meaning of good behavior,<sup>32</sup> an examination of the text certainly reveals no hint of any such connection.

In establishing the basic structure for the legislative, executive, and judicial branches, Articles I, II, and III set forth the qualifications, modes of selection, and terms of office for the major officers of those branches. In defining the terms of office, each Article establishes, albeit sometimes in indefinite terms, both the starting and ending points of official tenure – that is, the conditions or events that cause an officer’s term to commence and terminate. In addition, Articles I and II authorize the House and Senate to terminate, via the impeachment process, the tenure of “civil Officers of the United States.”<sup>33</sup>

For members of Congress, the President, and the Vice President, the principal condition of tenure termination is simply the expiration of the constitutionally established term in office.<sup>34</sup> But Articles I and II expressly recognize other possible terminating contingencies as well. Thus, a Senator’s tenure may come to an end not only through expiration of her six-year term but also through “Resignation, or otherwise.”<sup>35</sup> In addition, Senators who assume the office through a gubernatorial appointment to fill a vacancy serve until “the next Meeting of the [state] Legislature.”<sup>36</sup>

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31. See *supra* notes 5–6. We hasten to add that the converse clearly is not true. For good reason, no one thinks that impeachment provisions only cover officers with good-behavior tenure. The Constitution expressly provides otherwise when it lists the officers subject to impeachment. U.S. CONST. art. II, § 4 (listing “[t]he President, Vice President and all civil Officers of the United States”). This observation by itself should at least raise some doubts about reading good behavior as a reference to impeachment.

32. We discuss history in Part II.

33. U.S. CONST. art. II, § 4.

34. See *id.* art. I, § 2, cl. 1 (two-year terms for Representatives); *id.* art. I, § 3, cl. 1 (six-year terms for Senators); *id.* art. II, § 1, cl. 1 (four-year terms for the President and Vice President).

35. *Id.* art. I, § 3, cl. 2, *superseded by id.* amend. XVII, § 2. Though the “or otherwise” makes the provision in the original Constitution indefinite, the provision might plausibly be read as a parallel to the provision in Article II that declares that a President’s tenure in office may terminate not only with the expiration of the term but also upon “Death, Resignation, or Inability to discharge the Powers and Duties of the said Office.” *Id.* art. II, § 1, cl. 6, *superseded by id.* amends. XX, XXV.

36. *Id.* art. I, § 3, cl. 2, *superseded by id.* amend. XVII, § 2.

Judges, by contrast, do not have fixed tenures, but rather “hold their Offices during good Behaviour.”<sup>37</sup> Thus, for judges, the terminating contingencies are a violation of “good Behaviour” and, while Article III does not explicitly say as much, death or resignation. Article I also fails to name these somber possibilities for members of the House of Representatives.

The crucial point is that nothing in the text links these terminating conditions—for members of Congress, Presidents or Vice Presidents, *or* judges—to the independent impeachment provisions of Articles I and II. A close examination of the text suggests that members of Congress are not the sorts of “civil Officers” to which Article II’s impeachment provision applies at all,<sup>38</sup> and terminations triggered by “Resignation, or otherwise” or by “the next Meeting of the Legislature” (for Senators appointed to replace incumbent Senators) necessarily must operate wholly independent of impeachment. Likewise, for the President and the Vice President, the possibility of removal through impeachment for “Treason, Bribery, or other high Crimes and Misdemeanors”<sup>39</sup> is plainly a terminating contingency independent of and in addition to termination through expiration of term, death, resignation, or inability to discharge the duties of office.<sup>40</sup>

Nothing in the text indicates that judges should be treated differently. Just as the text indicates that a President’s occupation of the office can come to an end either through the end of his term, death, resignation, “Inability to discharge the Powers and Duties of the said Office,” *or* through impeachment

37. *Id.* art. III, § 1.

38. Given its placement in Article II, the impeachment provision’s use of the term “Officers” can plausibly be understood in light of that Article’s earlier listing of “Officers”—a list that includes judges but not members of Congress. *See id.* art. II, § 2 (“[The President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .”). By contrast, Article I repeatedly designates Representatives and Senators not as “Officers” but rather as “Members,” *id.* art. I, § 2, cl. 1; *id.* § 5, cls. 1-3, and at one point appears to expressly distinguish between “Members” of Congress and “Officers,” *id.* art. I, § 6, cl. 2 (providing that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office”). However, Article I does recognize that the branches of Congress will have their own “Officers,” such as the Speaker of the House. *Id.* § 2, cl. 6; *id.* § 3, cl. 5.

39. *Id.* art. II, § 4.

40. It is possible to read Article II, Section 1, Clause 6 as using the term “removal” as a term of art referring only to termination through impeachment. Other conditions or events—death, resignation, or inability to discharge the duties of the office—might in this usage lead to “termination of tenure,” but not to “removal” in this technical sense. The term “termination of tenure” is awkward, though, so in this Article we use the term “removal” in its ordinary and more general sense.

and conviction, the Constitution likewise suggests that a judge's tenure can end through a violation of Article III's "good Behaviour" condition or through the impeachment procedures of Article I.

It is true that a violation of good behavior is a less definite terminating contingency than, say, the expiration of a two- or four- or six-year term. While fixed terms might normally be expected to be (and have turned out to be) largely self-executing, the good-behavior condition presumably would usually require some official determination<sup>41</sup>—and hence some sort of legal process for making such a determination.<sup>42</sup> But it hardly follows that impeachment should be the exclusive and mandatory form of determining misbehavior. After all, it is readily conceivable that a terminating contingency for a nonjudicial officer may also require a legal process and official determination in some circumstances,<sup>43</sup> but it does not follow—and no one supposes—that this process and determination must consist of impeachment proceedings.

To be sure, using impeachment to determine whether a judge has misbehaved seems possible: that is because both impeachment for "Treason, Bribery, or other high Crimes and Misdemeanors" and adjudication of the alleged misbehavior of a judge clearly require investigations into possible wrongdoing. But the fact that such a proceeding *could* be used to judge good

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41. There is hardly any logical necessity in this distinction, however. A Representative or Senator *could* deny that his term has expired, thus requiring some official declaration of the fact. Conversely, the fact of misbehavior could be evident, even to the judge herself, and the judge could effectively acknowledge the fact by resigning from office without any official declaration of misbehavior. When Abe Fortas resigned from the Supreme Court, his action could have been regarded as an implicit acknowledgement that he had misbehaved.
  42. We say more about the legal process implicit in good-behavior tenure below.
  43. Both legal and factual determinations might be needed, for example, in deciding whether a Senator's time in office should be terminated based on the "Resignation, or otherwise" contingency. U.S. CONST. art. I, § 3, cl. 2 (emphasis added). What counts as a binding resignation, and has a Senator effectively made such a resignation? What "otherwise" contingencies are covered, and have they been realized in a particular case? With regard to Senators appointed to assume a vacancy until "the next Meeting of the Legislature," *id.*, there might well be questions about whether and exactly when a legislature has met in the requisite sense—and about the consequences if a legislature meets but fails to appoint a new Senator. Even the provisions for termination through expiration of a term might well raise both legal and factual questions requiring authoritative determinations. The text is less than precise in specifying exactly when the terms of Representatives and Senators begin and end. With respect to the President, the text is somewhat more precise, but it does not specify the time of day on which a term shall begin or end; so it is readily imaginable that questions of both law and fact could arise if a President performs official acts—appointments, pardons, etc.—in the waning hours of his term. The scenario is hardly confined to the fevered imaginations of overactive deconstructionists: the most famous of all cases arose precisely out of such a situation. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

behavior hardly implies that it *must* be used, or that it is the exclusive method for making determinations about good behavior. Nothing in the text says as much; indeed, the text does not even explicitly provide that impeachment *can be used* as a means of determining violations of the Article III “good Behaviour” requirement.<sup>44</sup>

Tellingly, the standards for removal in Article III and in Article II’s impeachment provision are conspicuously different. As noted, by providing for tenure during “good Behaviour,” Article III makes the contingency of a violation of that generic standard a condition of termination. In marked contrast, the standard for impeachment given in Article II is the commission of “Treason, Bribery, or other high Crimes and Misdemeanors.” The wording of these provisions is entirely different, leading to the natural inference that their substantive standards are different as well.

As various scholars have stressed, Article II’s impeachment standard seems calculated to be especially rigorous, designed perhaps to limit impeachment to only the most egregious kinds of misconduct, and perhaps only to misconduct of a political nature that is directed against the state.<sup>45</sup> The Article III “good Behaviour” provision, by contrast, seems more general and less severe. There is no reason to suppose that all departures from good behavior would necessarily constitute “high Crimes and Misdemeanors.” For instance, in our view, a judge who seriously neglected his duties would not necessarily have committed any high crime or misdemeanor. Nonetheless, as we discuss in Part II, this shirking judge could be subject to removal for misbehavior.

If we were to confine the removal of judges to impeachment under the more rigorous standard of high crimes and misdemeanors, that interpretation would grant judges a tenure *more secure* than good-behavior tenure and would effectively preclude removal of judges in cases in which Article III appears to authorize their removal. Put another way, if good behavior can be determined only via impeachment, some misbehaving judges will not be removable because their misbehavior will not also amount to “Treason, Bribery, or other high Crimes and Misdemeanors.”

In sum, the standard conflation of the Constitution’s good-behavior and impeachment provisions, far from being required or even authorized by the text, actually seems quite contrary to the Constitution’s text. So, what historical justifications might there be for imposing on the Constitution a meaning that its text does not countenance? In Part II, we argue that there are surprisingly few historical justifications. Before we turn to history, however,

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44. Berger doubts that it can be. BERGER, *IMPEACHMENT*, *supra* note 13, at 159-65.

45. *See, e.g.*, Gerhardt, *supra* note 13, at 6-7.

we address the structural argument that considerations of judicial independence support reading the Constitution to ordain impeachment as the exclusive means of judging misbehavior.

### C. *The Beguiling Role of Judicial Independence*

Even if the textual case for conflating impeachment and good-behavior tenure is rather weak, a champion of the conventional wisdom might cite the Constitution's evident desire for judicial independence as a structural reason supporting conflation. After all, the *purpose* of good-behavior tenure, as well as the bar against diminishing judicial salaries, was surely to protect judicial independence. And limiting removal of federal judges to impeachment—obviously a difficult and rare procedure—would serve to enhance judicial independence. Reading the impeachment and good-behavior provisions in accordance with their purpose, therefore, should we not regard impeachment as the exclusive means of removing federal judges?

This sort of argument is familiar enough in constitutional law, but at least as a way of ascertaining the *original meaning* its basic deficiency is readily apparent. Constitutional provisions, like other positive laws, no doubt serve purposes, but each is hardly a mere endorsement of some unitary, one-directional purpose. Typically, a positive law will reflect not just a single purpose or value, but rather a variety of purposes or values—some of them in conflict or at least tension with others. And far from merely expressing or endorsing those purposes or values, a positive legal provision typically attempts to prescribe some more definite rule or practical resolution for implementing the (possibly conflicting) purposes or values. Thus, to pick out one among various values and then read a provision beyond its terms to further that value is simply to defeat the central purpose of resolving conflicts and pursuing values *through positive law*.<sup>46</sup>

In the case of Article III's good-behavior provision, one purpose of the provision was surely to promote a degree of judicial independence. Indeed, as we discuss later, over the previous decades and centuries good-behavior tenure had been granted to promote greater job security—*independence*—than appointments “at pleasure” provided. But then as now, judicial independence was hardly an absolute value or an unmitigated good. The Framers of the Constitution were concerned about other values as well—in particular, ensuring that government officials (including judges) would be responsible and accountable. These values qualified and limited each other: by definition,

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46. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* (2001).

“independence” in the extreme means freedom from control and oversight by other actors, so the more independence an official enjoys, the less he or she can be held accountable. In defining the terms of the various offices in the national government, the Constitution reflects a careful attempt to balance these competing concerns.

If judicial independence had been an unqualified value or purpose of Article III, the Constitution could simply have given judges an absolute life tenure, unconstrained by any good-behavior condition—or even, for that matter, the possibility of impeachment. The Framers did not do that, obviously, because the value of judicial independence was qualified by, and was to an extent in conflict with, the need to ensure that judges behaved responsibly and to hold accountable judges who fell short of that requirement. So judges needed to be independent, to be sure—but not *too* independent. The Framers sought to strike a balance between these competing values by giving judges life tenure, subject to removal for violations of the good-behavior proviso, and also (as with all other civil officers) to impeachment.

To attribute to this qualified life tenure (“during good Behaviour”) a meaning other than its historical meaning, such as “removable only through impeachment,” is not to interpret the original meaning of the text, but rather in effect to rewrite the document so as to strike a different balance between competing values than the original Constitution struck. Put another way, while it is true that “good Behaviour” worked to promote judicial independence, that observation does nothing to authorize an interpretation—or at least an interpretation of the *original meaning*—that would deviate from the historically established sense of the constitutional provisions.

Below, we turn to the historical meaning of good-behavior tenure. We argue that there are no sound historical reasons for conflating two separate standards and mechanisms for removal. While impeachment can be used to determine whether a judge may be removed for certain forms of misbehavior, impeachment is surely neither the only method nor a sufficient means of policing good behavior. Our review of the history leads us to conclude that good-behavior tenure was understood as tenure terminable upon a judicial finding of misbehavior. As was true for almost two centuries prior to the Constitution, this finding of misbehavior usually could occur outside the impeachment process and in the ordinary courts.

## II. THE MEANING OF TENURE “DURING GOOD BEHAVIOUR”

If the Constitution’s text gives us strong reason to doubt that “good Behaviour” meant “removable only via impeachment,” what *did* “good Behaviour” entail? History answers the question. We begin with some general

claims about the meaning of good behavior. We then use history from England, the colonies, and pre-1787 America to validate our claims. The relevance of English and colonial history should be obvious. The Supreme Court has said that in defining constitutional phrases that trace their lineage to England, the Constitution ought to be read as incorporating English meanings.<sup>47</sup> The same methodology should be applied to discern the original meaning of good behavior.

Given prevailing understandings, some might expect that our discussion of good-behavior tenure necessarily encompasses impeachment. This is the very conflation we hope to refute. Consistent with our claims, we do not turn to the historical relationship between impeachment and good-behavior tenure until after we illuminate the distinct meaning of good-behavior tenure. It turns out that there was no relationship between the two until revolutionary America, and even then impeachment clearly was not regarded as the only means of judging misbehavior. We end this Part by reexamining the Constitution in light of history and argue that it neither silently departed from the preconstitutional meaning of good behavior nor implicitly made impeachment the only means of judging misbehavior.

#### A. *Good-Behavior Tenure: An Overview*

Modern judges, scholars, and politicians sometimes suppose that historically the term “good Behaviour” was merely a code phrase or term of art meaning “life tenure.”<sup>48</sup> Indeed, some such supposition probably underlies the common view that impeachment is the only way to remove federal judges: judges, after all, serve during “good Behaviour,” and if “good Behaviour” were simply a synonym for “life tenure,” then impeachment *would* be the only method of removal.

Equating good-behavior tenure with “life tenure” subject to removal only via impeachment is a mistake. Several aspects of tenure during good behavior in the seventeenth and eighteenth centuries make this clear. We outline them here and provide the supporting evidence below.

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47. See *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (holding that the scope of the pardon power would be determined by reference to English law, as the pardon power was borrowed from England).

48. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955); Redish, *supra* note 5, at 698-99; Jeff Sessions & Andrew Sigler, *Judicial Independence: Did the Clinton Impeachment Trial Erode the Principle?*, 29 CUMB. L. REV. 489, 513 (1999) (citing Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719, 746 (1970)).

First, as we have suggested, “during good Behaviour” implied a certain tenure. In particular, maintaining “good Behaviour” was a condition of remaining in office. Those who did not exhibit good behavior—i.e., those who misbehaved—no longer had a right to stay in office. Having failed to satisfy one of the conditions for remaining in office, such individuals had forfeited their right to, and could be ousted from, the office.

Contrary to what many suppose, good-behavior tenure was not reflexively associated with life tenure. Rather, one could combine good-behavior tenure with other tenures. For instance, one could have tenure “for five years, during good behavior.”<sup>49</sup> Such tenure clearly was not life tenure. Instead, the individual had tenure for five years, subject to an early ouster for misbehavior. Alternatively, tenure granted to an individual and his heirs might be conditioned on good behavior. Ordinarily, the hereditary office would be passed down from generation to generation, but when an incumbent misbehaved, the office could be stripped away from the officer and his descendants. In this context, good-behavior tenure qualified or limited the otherwise permanent grant of tenure.

Tenure during good behavior could properly be regarded as life tenure only in the absence of qualifying language of the type discussed above. In other words, only an unadorned grant of tenure “during good Behaviour” would be regarded as life tenure. More importantly, this form of “life tenure” was defeasible upon misbehavior. Thus, by the end of the eighteenth century, a simple grant of good-behavior tenure might also be considered “tenure for life” or “life tenure”—with the crucial condition that the tenure lasted only so long as the occupant behaved well.

Second, there is the question of what constituted misbehavior. The exact contours of misbehavior are murky, primarily because they arise from English case law. But several propositions seem well established. Sir Edward Coke listed three grounds for forfeiture: abuse of office, nonuse of office, and refusal to exercise an office.<sup>50</sup> Misbehavior also included any “conviction for such an

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49. The Delaware Constitution of 1776 contained provisions that granted tenures for a set number of years “if they [officeholders] behave themselves well.” DEL. CONST. of 1776, arts. 12, 14. State constitutions cited in this Article can be found in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (Ben Perley Poore ed., Gov’t Printing Office 2d ed. 1878).

50. Henry v. Barkley, (1596) 79 Eng. Rep. 1223, 1224 (K.B.); see also R v. Bailiffs of Ipswich, (1706) 91 Eng. Rep. 378 (K.B.) (holding that the recorder of a corporation forfeits his office if he fails to attend corporate meetings); 16 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 121 (London, 1793) (“If he does *contrary to the duty of his office*, as if he *doth not do right to the parties*, this misfeasance is forfeiture.”).

offense as would make the convicted person unfit to hold a public office.”<sup>51</sup> We discuss this facet of good-behavior tenure for background purposes because our focus lies in the other aspects of good-behavior tenure.

The third feature of good-behavior tenure concerns the mechanism for determining misbehavior. The words “during good Behaviour” always implied a mechanism for determining whether someone had misbehaved. In particular, individuals with good-behavior tenure could have their tenure forfeited only by a judicial process. There would have to be a hearing at which the tenured individual could contest the claim of misbehavior. Witnesses could be called. Testimony could be taken. The burden of proof was on the party seeking forfeiture.

Ordinarily, a grant of good-behavior tenure would imply a trial in the regular courts. That was the standard means of judging whether someone had misbehaved. Yet grantors of good-behavior tenure might depart from this default rule. For instance, Parliament might grant a seemingly nonjudicial board the right to determine whether someone with good-behavior tenure had misbehaved. Or a constitution might grant some entity typically bereft of judicial authority the power to judge whether certain officers had misbehaved. The forum did not matter as much as the process. Those who could judge misbehavior had to conduct a trial-like proceeding, even if they typically never conducted trials. For purposes of judging misbehavior, they were judges who were supposed to conduct a fair hearing.

The final aspect of good-behavior tenure reveals its generality. While governments could grant their officers tenure during good behavior, good-behavior tenure was by no means limited to government officials. Tenants in land might have this tenure. Likewise, private employees might have this tenure. Because tenure comes from the Latin *tenere*, meaning “to hold,”<sup>52</sup> one might have good-behavior tenure in anything one could hold: property, licenses, or offices. The point is that tenure during good behavior was not something peculiar to governments and their officials. This last aspect of good-behavior tenure is crucial because, as we discuss later, it debunks the supposed close nexus between good-behavior tenure and impeachment.

Apart from the notion that good behavior implied a certain tenure, few if any of these features come to mind when reading the phrase “during good Behaviour.” They become evident only by examining the historical understandings of good-behavior tenure as articulated in law and practice in

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51. 2 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 204 (Oxford, Clarendon Press 2d ed. 1892).

52. See 17 *OXFORD ENGLISH DICTIONARY* 791 (2d ed. 1989).

the decades and centuries preceding the Constitution. Accordingly, we turn to an in-depth examination of history in an attempt to prove these claims and in the hopes of demonstrating that the modern conflation of good-behavior tenure and impeachment has no basis in the original Constitution.

### *B. Good Evidence About Good Behavior*

Evidence from England, the colonies, and independent America reveals that to have tenure during good behavior was to have tenure only so long as one behaved well. The same evidence demonstrates that a judicial finding of misbehavior would terminate good-behavior tenure. As noted earlier, we only address good behavior here, leaving impeachment for the next Section.

#### *1. From Seventeenth- and Eighteenth-Century England*

Scholars sometimes erroneously believe that good-behavior tenure began with the Act of Settlement, the famous 1701 Act that regulated succession to the English Crown and that also required judicial commissions to be made during good behavior. Thus, they may infer that good-behavior tenure originated as an external limitation on the Crown's ability to remove judges.<sup>53</sup> But, in fact, that tenure already had a rich history and established meaning well before the Act of Settlement.

As early as the fifteenth century, the Crown voluntarily, though irregularly, granted good-behavior tenure long before Parliament ever required it for judges.<sup>54</sup> By the seventeenth century, writes G.E. Aylmer, the Crown could choose which of several tenures to grant an officer: to an individual and his heirs; for the officer's life; during good behavior (*quamdiu se bene gesserit*); or during the Crown's pleasure,<sup>55</sup> also known as *durante bene placito*. There were some common law constraints on the tenure the Crown might grant. For

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53. Berger, *Impeachment of Judges*, *supra* note 13, at 1526.

54. C.H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 220 (1913).

55. G.E. AYLMEYER, *THE KING'S SERVANTS* 106-07 (1961). Aylmer does not describe the difference between tenure during life and tenure during good behavior. Presumably, in the early and mid-seventeenth century at least, life tenure meant that the Crown could never claim that the officer had forfeited the office as a result of misbehaving. The office may have been the officer's for life, regardless of any misbehavior. By the late seventeenth century, however, life tenure came to be regarded as tenure during good behavior because it was said that good behavior was a requirement of all offices, whether expressed or not. See *Harcourt v. Fox (Harcourt I)*, (1692) 89 Eng. Rep. 680 (K.B.), *reargued*, (*Harcourt II*), (1693) 89 Eng. Rep. 720 (K.B.).

instance, judgeships could not be granted to an individual and his heirs because it was understood that being a judge required knowledge and skill, qualities one could not guarantee in a judge's descendants.<sup>56</sup> Interestingly, the Crown was more likely to grant life tenure to executive officers, while judicial officers were more likely to receive tenure during pleasure.<sup>57</sup> Though this practice seems utterly backward to modern sensibilities, seventeenth-century English monarchs evidently felt that judges should be more accountable than their executive counterparts.<sup>58</sup>

Tenure during "good behaviour" was a tenure determinable by misbehavior. As Aylmer notes, the difference between tenure during pleasure and during good behavior was that in the latter case an "officer had to be shown to have misconducted himself in his office before he could be turned out . . . . Even the strongest King could more easily withdraw his own pleasure than he could prove misbehavior . . . ." <sup>59</sup> More precisely, good-behavior tenure meant that the tenure continued until a judicial proceeding determined that the tenured individual had misbehaved and thereby forfeited his tenure. There would have to be a hearing with the introduction of evidence of misbehavior. Moreover, the tenured individual would have the opportunity to rebut the charge of misbehavior. That is why Aylmer notes that the Crown had to "prove misbehavior" in order to remove someone with good-behavior tenure. The Crown had to prove to the satisfaction of a court that an officer had misbehaved and thus had violated the conditions attached to his commission.<sup>60</sup>

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56. THOMAS COVENTRY, *A READABLE EDITION OF COKE UPON LITTLETON* 3b (London, Saunders & Banning 1830). Another supposed constraint is that without the leave of Parliament, the Crown could not grant tenures for particular offices that were not anciently granted. In other words, the Crown could not attach a tenure to an office that had never had that tenure before. 4 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 75 (London, E. & R. Brooke 1797).

57. AYLMER, *supra* note 55, at 109.

58. *Id.*

59. *Id.* at 108.

60. Why would seventeenth-century monarchs ever voluntarily grant such tenure? After all, good-behavior tenure constrained the Crown's ability to remove (at least as compared to tenure during pleasure). The reasons for granting good-behavior tenure were simple. First, the Crown benefited because granting good-behavior tenure was a means of attracting sound and fit officers. Potential officers would be more willing to assume an office if there was some promise of permanency in their tenure. Second, officers might expend more effort to develop an expertise in office if there was some permanency in office. Finally, as Aylmer notes, the more human reason was that, moved by generosity and affection for a friend or ally, the Crown sometimes would grant offices with improvident tenures. *See id.* Notably missing is the more familiar reason for tenure during good behavior: a desire for tribunals not partial to the Chief Executive. That rationale would be expressed later.

Confirmation of Aylmer's claims about good-behavior tenure comes from several seventeenth-century sources. Consider tenure disputes between the Crown and its judges. Despite having granted good-behavior tenure to particular judges, some seventeenth-century English monarchs tried to oust judges without a trial. In 1629, Charles I sought to force out Sir John Walter, Chief Baron of the Exchequer, a judge holding good-behavior tenure. Charles asked Walter whether he would resign or "submit himself to trial" for misbehavior.<sup>61</sup> Walter chose the latter course: "I desire to be pardoned for making a surrender of my patent, for that were to punish myself. I do with confidence stand upon my innocency and faithful service to his Majesty, and therefore will abide by trial."<sup>62</sup> Walter thereby challenged Charles to seek a writ of *scire facias* seeking his ouster from the bench.<sup>63</sup> "Scire facias" literally means to "make known."<sup>64</sup> Generally speaking, the writ of *scire facias* commands "the person against whom it is issued to appear and show cause why some matter of record should not be annulled or vacated, or why a dormant judgment against that person should not be revived."<sup>65</sup> The Crown used the writ as a means of seeking a definitive ruling that someone had forfeited his grant of tenure.<sup>66</sup> Fearing that he could not prove misbehavior, Charles shrank from the challenge of a trial. Instead Charles ordered Walter to cease his judicial functions. Walter would continue in office and would continue to receive fees but could no longer actually hear cases.<sup>67</sup>

History seemed to repeat itself when, in 1672, Charles II sought to remove Sir John Archer from the Court of Common Pleas. Charles sought Archer's resignation and, like Walter before him, Archer refused. Archer sought a judicial trial showing evidence of misconduct: "[T]he Judge having his patent to be Judge *quamdiu se bene gesserit*, refused to surrender his patent without a *scire facias* . . . ."<sup>68</sup> Charles II followed the same path as his father and avoided a

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61. 7 SAMUEL R. GARDINER, *HISTORY OF ENGLAND* 112 (AMS Press 1965) (1886).

62. *Id.* at 113.

63. McIlwain, *supra* note 54, at 221.

64. BLACK'S LAW DICTIONARY 1373 (8th ed. 2004).

65. *Id.*

66. 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*260-61.

67. 7 GARDINER, *supra* note 61, at 113. We think that by the eighteenth century, the concept of an "office" was more robust than a mere stream of salary.

68. (1674) 83 Eng. Rep. 113 (C.P.); see also Alfred F. Havighurst, *The Judiciary and Politics in the Reign of Charles II*, 66 LAW Q. REV. 62, 76 (1950) (reciting the story of Charles and Archer).

difficult trial. Despite remaining in office and continuing to receive his share of the fines payable to the judges, Archer could no longer hear cases.<sup>69</sup>

The lesson was obvious: grant tenure during pleasure and one could remove without any trial or proof of misbehavior.<sup>70</sup> As one modern scholar of the era put it, “[O]ne holding *durante bene placito* might be removed more gracefully than if holding *quamdiu se bene gesserit*.”<sup>71</sup> Charles II made sure that all subsequent judicial appointments were during pleasure, which permitted him to remove freely.<sup>72</sup> During James II’s reign, removal of judges holding at pleasure “passed all precedent and all decency.”<sup>73</sup>

Given the actions of Charles I and II, it is little wonder that the seventeenth century witnessed a struggle between Parliament and the Stuart kings, in which Parliament attempted to free judges of dependence on royal favor. Central to this effort were Parliament’s periodic attempts either to encourage or to mandate good-behavior tenure. In 1640-1641, Parliament petitioned Charles I to grant judges tenure during good behavior; notwithstanding his tussle with Chief Baron Walter, Charles agreed to do so voluntarily.<sup>74</sup> During the Interregnum, the Commonwealth Parliament mandated tenure during good behavior.<sup>75</sup>

Following the Restoration of the monarchy, Charles II and James II reverted to “at pleasure” judicial appointments.<sup>76</sup> In response, in 1674 and 1680, Parliament considered proposals for mandating good-behavior tenure for judges.<sup>77</sup> An early draft of the 1689 Declaration of Rights included a provision granting good-behavior tenure to judges and also providing that judges “not be removed, nor suspended, from the execution of their office, but by due course of law.”<sup>78</sup> “[D]ue course of law” most likely referenced a judicial

69. McIlwain, *supra* note 54, at 223.

70. Charles apparently had learned this lesson in 1668. Havighurst, *supra* note 68, at 76.

71. *Id.*

72. McIlwain, *supra* note 54, at 223.

73. *Id.*

74. *Id.* at 222-23.

75. James C. Corson, *Judges and Statutory Tenure in England in the Seventeenth Century*, 42 JURID. REV. 136, 141 (1930). Apparently, good-behavior tenure did not preclude Lord Protector Oliver Cromwell from ousting judges not to his liking. See McIlwain, *supra* note 54, at 223.

76. McIlwain, *supra* note 54, at 223.

77. Havighurst, *supra* note 68, at 76; McIlwain, *supra* note 54, at 223.

78. Corson, *supra* note 75, at 145. The Declaration of Rights was a document prepared by Parliament and given to William and Mary for their approval. After they assented to the Declaration, they were offered the throne. Thereafter, the Declaration was codified as the English Bill of Rights. See *id.* at 145-49.

proceeding to determine whether a judge misbehaved.<sup>79</sup> This language suggested that those who composed this draft of the Declaration of Rights understood that tenure during good behavior meant that a judicial determination of misbehavior was necessary prior to removal. In 1693, the Crown vetoed a bill that would have granted good-behavior tenure to judges.<sup>80</sup> Curiously, the Crown's judges supposedly recommended the veto.<sup>81</sup>

Notwithstanding the difficulty of passing a statute mandating good-behavior tenure for judges, Parliament was able to mandate such tenure for less important officers, including clerks. *Harcourt v. Fox*, a case involving the tenure of a clerk of the peace, provides illuminating insights about the meaning of good behavior.<sup>82</sup> *Harcourt* concerned a dispute about who properly occupied the office of the clerk of the peace of Middlesex County.<sup>83</sup> The plaintiff, Harcourt, had been appointed to that office by the Earl of Clare, who occupied the exotic-sounding position of *custos rotulorum*.<sup>84</sup> The Earl of Bedford supplanted the Earl of Clare as the *custos rotulorum* and proceeded to name the defendant Fox to the office of clerk of the peace. A statute passed by Parliament granted any clerk of the peace tenure for "so long time only, as such clerk of the peace shall well demean himself in his said office."<sup>85</sup> Fox argued that Harcourt could remain in office during good behavior, but only so long as Harcourt's appointer remained in office.<sup>86</sup> Because the Earl of Clare no longer was the *custos rotulorum*, his appointee Harcourt was ousted from office, or so Fox claimed.

The case was argued twice before the King's Bench, and even though the meaning of good-behavior tenure was never in dispute, the case discussed that subject. Sir Thomas Powis, counsel for Harcourt, said of officers with good-behavior tenure that "injustice, corruption, or other misdemeanors in an office,

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79. Some speculate that this language was omitted because good-behavior tenure was not considered an existing right of the people. The Declaration was supposed to embody existing principles and not create new rights. If good-behavior tenure was not an existing popular right, there would have been no occasion to include it in the Declaration. *Id.* at 145-46.

80. *Id.* at 148-49.

81. *Id.*; McIlwain, *supra* note 54, at 224.

82. *Harcourt I*, (1692) 89 Eng. Rep. 680 (K.B.).

83. Clerks of the peace worked for the justices of the peace.

84. The *custos rotulorum* was the principal justice of the peace in a county as well as keeper of the rolls and records of the sessions of the peace.

85. *Harcourt I*, 89 Eng. Rep. at 684.

86. *Id.* at 681-82.

were sufficient causes for removal and displacing the offender.”<sup>87</sup> Mr. Serjeant Levins, also for Harcourt, said that good behavior “is an estate for life, unless his misbehaviour in his office [sic].”<sup>88</sup> More clearly, Levins said that Harcourt could not be removed “but for misbehaviour.”<sup>89</sup> Mr. Hawles, representing defendant Fox, agreed. Though good-behavior tenure was life tenure, it also was true that a “misdemeanour in any office” resulted in a forfeiture of the office.<sup>90</sup>

The court ruled in Harcourt’s favor. Justice Eyres noted that Parliament had granted the clerk an “estate for life determinable upon the good behaviour of the [clerk].”<sup>91</sup> Chief Justice Holt agreed that the clerk had “an estate for life in his office . . . determinable only upon misbehaviour.”<sup>92</sup> Parliament affirmed the decision of the King’s Bench, presumably because the statute rather clearly granted tenure during good behavior without any connection to the appointer’s tenure in office. *Harcourt* is instructive because it suggests that on the eve of the Act of Settlement,<sup>93</sup> good-behavior tenure was uniformly regarded as terminable upon a showing of misbehavior.

The 1701 Act of Settlement finally mandated good-behavior tenure for certain judges. The Act required that “Judges[?] Commissions be made *Quamdiu se bene Gesserint*.”<sup>94</sup> Immediately after this required tenure, the Act stated that “but upon the Address of both Houses of Parliament it may be lawfull to remove them.”<sup>95</sup> Removal by address was not a means of judging good behavior; rather, it was a means for Parliament to make sure that judges considered the wishes of Parliament, for Parliament might seek the removal of a judge for any reason and only Parliament could initiate this discretionary, nonjudicial removal process.<sup>96</sup>

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87. *Id.* at 682.

88. *Harcourt II*, (1693) 89 Eng. Rep. 720, 722 (K.B.).

89. *Id.*

90. *Harcourt I*, 89 Eng. Rep. at 687. Despite the reference to “misdemeanours,” none of the lawyers or judges ever referenced impeachment as a means of judging whether someone with good-behavior tenure had forfeited his tenure.

91. *Harcourt II*, 89 Eng. Rep. at 726.

92. *Id.* at 734.

93. As discussed in the next Subsection, the Act of Settlement required the Crown to grant judges good-behavior tenure. See *infra* Subsection II.B.2.

94. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2.

95. *Id.*

96. See F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 312–13 (H.A.L. Fisher ed., 1908). Given the language of the Act of Settlement, the better view is that the Crown may, but need not, act upon any parliamentary request to remove a judge.

Some scholars have erroneously supposed that the Act of Settlement was meant to render removal by address the *only* means of removing judges.<sup>97</sup> This interpretation of the Act suffers from the same flaws as the conventional reading of the Constitution that supposes that impeachment is the only means of removing officers with good-behavior tenure. First, as a matter of text, the Act of Settlement certainly did not provide that removal by address was the only means of removing an official. The clause introducing the address option begins with a “but,” suggesting that it was an exception from the normal rule. There would have been no reason to grant good-behavior tenure had Parliament meant to provide that address was the only means of removing judges. Had the latter been Parliament’s goal, it would have provided that judges could be removed only upon address, something it failed to do explicitly.

Second, the Act never expressly precluded impeachment of judges.<sup>98</sup> As we discuss later, Englishmen did not regard impeachment as a means of judging misbehavior.<sup>99</sup> Given that the two concepts were unrelated, it is hard to suppose that the Act’s grant of good-behavior tenure would have barred impeachment. The Act’s silence regarding existing removal mechanisms is best read as leaving those mechanisms undisturbed. Hence, saying nothing about impeachment meant that it remained a viable option.

Finally, and most importantly for our purposes, the Act certainly did not preclude removals arising upon a judicial finding of misbehavior. By including a familiar tenure that had been granted for more than a century, the Act incorporated the common law understanding of good behavior—a tenure determinable by a judicial finding of misbehavior. Thus, in our view, the Act left the impeachment option undisturbed, added a “new” means of removing judges (upon address),<sup>100</sup> and codified a particular, well-known tenure for judges.<sup>101</sup>

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97. G.R.Y. RADCLIFFE & GEOFFREY CROSS, *THE ENGLISH LEGAL SYSTEM* 379-80 (2d ed. 1946).

98. This paragraph marks a limited departure from our goal of keeping discussions of good-behavior tenure and impeachment separate. This limited exception seemed necessary to show what changes the Act of Settlement made and did not make to existing English practices.

99. See *infra* Subsection II.C.1.

100. There is some doubt whether removal by address was a new option. Given that Parliament was regarded as supreme, Parliament already could have passed a statute that either permitted or required the Crown to remove some officials with good-behavior tenure. See McIlwain, *supra* note 54, at 226.

101. See 3 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 194-95* (London, John Murray 1884); Berger, *Impeachment of Judges*, *supra* note 13, at 1482 n.38 (collecting cites).

Consistent with our claims, eighteenth-century case law continued to track the traditional understanding of good-behavior tenure. In *R v. Banes*, decided some six years after the Act of Settlement, justices of the King’s Bench discussed what was necessary to remove a clerk of the court who had tenure “*dum se bene gesserit*.”<sup>102</sup> Although a few of the justices quibbled with proceedings, each agreed that the Court of Sessions could remove the clerk for misbehavior. In *R v. Bailiffs of Ipswich*, a recorder of a city corporation was appointed for life, so long as he did not misbehave (*nisi interim pro malegestura*). The court concluded that he had misbehaved because he neglected to attend sessions of the corporation.<sup>103</sup> In 1767, the King’s Bench decided in *R v. Wells* that a recorder appointed during good behavior had not misbehaved. Clearly removal would have been appropriate had the recorder actually misbehaved.<sup>104</sup> And finally, in *R v. Warren*, Lord Mansfield noted that a clerk who had tenure *quamdiu bene se gesserit* could only be removed for “good and sufficient cause” and that removals were “subject to the control of this Court.”<sup>105</sup> His colleague Justice Aston said that “[a]s long as the clerk behaves himself well,” he could remain in office.<sup>106</sup> The Court concluded that there was no good cause for the clerk’s removal because there was no “instance produced of any misbehavior of consequence.”<sup>107</sup>

The customary understanding of good-behavior tenure was voiced outside of the courts as well. Discussing the Act of Settlement some fifty years after its passage, one historian wrote that “without all doubt, [it was] the intention of the legislature, that every judge should enjoy his office during life, unless convicted by legal trial of some misbehaviour.”<sup>108</sup> Speaking in Parliament in 1779, the Duke of Richmond observed that in judging misbehavior a nonjudicial Board of Admiralty empowered to remove must “observe something of the usual forms of legal proceedings . . . [The officer] must be charged with some act of misbehavior, as a cause for his removal. That act

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102. (1707) 90 Eng. Rep. 1183 (K.B.).

103. (1706) 91 Eng. Rep. 378 (K.B.).

104. (1767) 98 Eng. Rep. 41 (K.B.). Other cases point to the same conclusion. See 3 RICHARD BURN, ECCLESIASTICAL LAW 71 (London, Strahon 6th ed. 1797) (describing a case in which Lord Mansfield noted that a parish clerk who had tenure during good behavior could be removed on “good and sufficient cause,” and in which Justice Acton noted that the clerk could stay in office as long as he “behaves himself well”).

105. (1776) 96 Eng. Rep. 1135, 1139 (K.B.).

106. *Id.*

107. *Id.*

108. 3 T. SMOLLETT, CONTINUATION OF THE COMPLETE HISTORY OF ENGLAND 50 (London, Baldwin 1762).

must be regularly proved, and he must be heard in own defense.”<sup>109</sup> Likewise, in a short 1787 book, Jeremy Bentham explained that to grant a man good-behavior tenure “is as much as to say, unless specific instances of misbehavior flagrant enough to render his removal expedient be proved on him in a legal way, he shall have it for his life.”<sup>110</sup>

English statutes mandating the removal of misbehaving judges also lend support to our claim about the meaning of good-behavior tenure. For instance, as Blackstone wrote, Parliament provided that an English judge convicted of receiving a bribe would “be discharged from the King’s service for ever.”<sup>111</sup> Likewise, judges could be removed for “oppression and tyrannical partiality.”<sup>112</sup> All officers might lose their offices if they engaged in extortion—the unlawful taking of value from someone under color of office.<sup>113</sup> These and other statutes were not statutory exceptions to grants of good-behavior tenure previously granted. Rather they were wholly consistent with such tenure. These statutes permitted the removal of officers only upon conviction in court, a process that manifestly satisfied any guarantee of tenure during good behavior.

Finally, English documents from the seventeenth and eighteenth centuries reveal that anything that could be held (offices, employments, licenses, land) could be granted during good behavior. Hence, one could grant good-behavior tenure to tenants, secretaries, clerks, hospital administrators, ministers, contractors, licensees, East Indian commissioners, members of corporate boards, employees, and Anglican bishops.<sup>114</sup> In all these situations, we believe

109. 14 THE PARLIAMENTARY REGISTER 429 (London, Printed for J. Almon 1779).

110. JEREMY BENTHAM, PANOPTICON: OR THE INSPECTION-HOUSE 38 (1787), *reprinted in* THE PANOPTICON WRITINGS 29 (Miran Bozovic ed., Verso 1995). Bentham was clearly voicing the general understanding of good-behavior tenure; he was not making a claim about the Act of Settlement.

111. 4 WILLIAM BLACKSTONE, COMMENTARIES \*140.

112. *Id.* at \*141.

113. *Id.*

114. See AN ACCOUNT OF THE INSTITUTION AND PROCEEDINGS OF THE GUARDIANS OF THE ASYLUM, OR, HOUSE OF REFUGE, SITUATE IN THE PARISH OF LAMBETH, IN THE COUNTY OF SURRY, FOR THE RECEPTION OF ORPHAN GIRLS, THE SETTLEMENTS OF WHOSE PARENTS CANNOT BE FOUND (London, Logographic Press 1789) (secretaries); ED BULLINGBROOKE, AN ABRIDGMENT OF THE PUBLIC STATUTES OF IRELAND NOW IN FORCE AND OF GENERAL USE § 38 (Dublin, Boulter Grierson 1763) (licenses); COVENTRY, *supra* note 56, at 42a (“If a man grant an estate to a woman . . . *quamdiu se bene gesserit*, . . . the lessee has in judgment of law an estate for life determinable [on the event mentioned].”); HINTS FOR THE INSTITUTION OF SUNDAY-SCHOOLS AND PARISH CLUBS, FOR THE BENEFIT OF THE POOR 46 (London, W. Blanchard 1789) (clerks); THE HISTORY OF THE TOWN AND PARISH OF HALIFAX, CONTAINING A DESCRIPTION OF THE TOWN, THE NATURE OF THE SOIL, &C. &C. &C. 511 (Halifax, R. Jacobs 1789) (clerks); 2 JOSEPH TOWERS, BRITISH BIOGRAPHY: OR, AN ACCURATE AND IMPARTIAL

that tenure would have been terminable upon a judicial finding of misbehavior.<sup>115</sup> Someone (typically the grantor of tenure) could go to court and prove that the tenured person had misbehaved and had thereby forfeited her tenure.

Some cavil that English practice is not relevant or helpful. One scholar has argued that the removal of English judges did not continue after the eighteenth century.<sup>116</sup> Going further, she has claimed that there is a difference between “precedents and fossils,”<sup>117</sup> thereby suggesting that the idea that judicial good-behavior tenure was defeasible upon a finding of misbehavior was a relic of the pre-Act of Settlement past.

But the notion of tenure during good behavior was hardly a fossil. Repeatedly, English courts and commentators discussed what could happen to judges who misbehaved: they could be removed. Moreover, because English courts terminated the tenure of misbehaving officers (including court officials who were not judges),<sup>118</sup> it does not much matter that there apparently were no eighteenth-century cases of English judges removed for misbehavior. It may be that English judges were on their best behavior, or it may be that misbehaving judges resigned, knowing that they would be ousted if they failed to take matters into their own hands. Or it may be that engaging in a removal proceeding was difficult, and so the good-behavior standard went unenforced. Whatever explains the lack of cases, the point is that it was well understood that good-behavior tenure was forfeit upon a judicial finding of misbehavior. Arguing that the absence of cases involving English judges proves that they

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ACCOUNT OF THE LIVES AND WRITINGS OF EMINENT PERSONS 347 (London, Goadby 1767) (Anglican bishops); HENRY WALSTREAM, CHARTER PARTY OF THE FREE ANNUITY COMPANY OF THE CITY OF DUBLIN, Item IX, at 17 (Dublin, Whitestone 2d ed. 1783) (corporate board members); 2 BRITANNIC MAG. 296 (1793-1807) (East Indian commissioners).

115. To be clear, the grants listed in this paragraph did not always mention that the tenure was terminable via a judicial process. Yet because that was the meaning of good-behavior tenure, everyone at the time would have understood that the tenure was forfeited upon a judicial finding of misbehavior. Otherwise one would have to suppose that grants of good-behavior tenure were not terminable on the misbehavior of the grantee. We do not believe that grantors conveyed good-behavior tenure without any means of judging misbehavior. Instead we believe that when grantors granted good-behavior tenure, the grantee’s alleged misbehavior would be determined in the courts. *See, e.g.*, R v. Gaskin, (1799) 101 Eng. Rep. 1349 (K.B.) (reinstating a parish-clerk upon his demand that his employer show cause for firing him); James Bagg’s Case, (1616) 77 Eng. Rep. 1271, 1278-81 (K.B.) (reinstating a burgess for lack of cause to remove him).

116. *See* Ziskind, *supra* note 13, at 138.

117. *Id.*

118. *Id.* at 153 (listing several court cases from England involving adjudications of misbehavior, some of which resulted in the ouster of officials).

could not be removed for misbehavior is like saying that the absence of impeachment cases against United States attorneys means that they cannot be impeached.

A case from 1852 likewise indicates that the notion that judges could be removed for misbehavior was not a “fossil.” In *Ex parte Ramshay*, the Chancellor removed a county court judge for inability and misbehavior.<sup>119</sup> The court said that because the Chancellor heard evidence from Ramshay and there was some evidence of misbehavior, the removal was proper.<sup>120</sup> Other Englishmen have maintained that removal of misbehaving judges in the ordinary courts remains possible in the wake of the Act of Settlement.<sup>121</sup>

Relatedly, one might argue that the Constitution’s creators were likely unfamiliar with obscure writs like the writ of *scire facias*. To the contrary, the Judiciary Act of 1789 specifically mentions writs of *scire facias*.<sup>122</sup> But in any case, the relevant question is not whether the Framers consciously contemplated that any particular writ would be the appropriate procedure for enforcing the “good Behaviour” condition. What matters, rather, is that they understood that grants of good-behavior tenure, public or private, were defeasible upon a judicial finding of misbehavior. As we discuss below, there is ample evidence that this was well understood in America.

## 2. From Colonial America

Eighteenth-century colonial assemblies waged a protracted struggle to ensure good-behavior tenure for their colonial judges (much as Parliament had done in the previous century). The Declaration of Independence itself complained of the Crown’s practice of appointing judges during pleasure.<sup>123</sup> The episodes that led to this famous protest bespeak a familiar understanding of good-behavior tenure: a tenure forfeit upon a judicial finding of misbehavior.

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119. (1852) 118 Eng. Rep. 65, 65-66 (Q.B.).

120. *Id.* at 71.

121. See BERGER, IMPEACHMENT, *supra* note 13, at 129, 130 & nn.40-42 (collecting sources from parliamentary speeches and treatises).

122. Judiciary Act of 1789 § 14 (The All-Writs Act), 1 Stat. 73, 81-82 (“*And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.*”).

123. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (“[The King] has made Judges dependent on his Will alone, for the tenure of their offices.”).

In 1706, the Pennsylvania Assembly sought to grant good-behavior tenure to its judges but also to reserve the right to remove by address. The Lieutenant Governor objected to the reservation, protesting that while the Governor could remove only after a “Process at Law,” the Assembly could remove “without any trial or Conviction.”<sup>124</sup> His complaint confirmed the generic meaning of good-behavior tenure in two ways. By granting good-behavior tenure, the act would have ensured that the Governor could remove only by proving misbehavior. Only a “Process at Law”—a judicial process—would permit the Governor to remove. On the other hand, the Assembly had sought to grant itself the right to remove the judges by address. This led the Lieutenant Governor to complain that the Assembly could remove without the usual protections (trial and conviction) attending good-behavior tenure.<sup>125</sup> This complaint confirmed that good-behavior tenure was generally regarded as requiring a trial and conviction prior to removal.

A 1751 Jamaican statute yields the same meaning. “An Act providing that all the Judges of the Supreme Court of Judicature of this island shall hold their Offices, *Quam diu se bene gesserint*” directed that the Governor could not remove any supreme court judge unless there first was a showing of cause in an open trial. Both sides would be heard and evidence from each would be examined.<sup>126</sup> Evidently, the Jamaican Assembly recognized that to give an officer tenure during good behavior was to permit his removal only upon a judicial finding of misbehavior. The Act’s title aptly described the Act’s removal process.<sup>127</sup>

In 1753, English Attorney General Dudley Ryder and Solicitor General William Murray wrote an opinion about the meaning of good behavior. New York Governor Clinton had appointed New York Supreme Court Chief Justice James de Lancey during good behavior, apparently inadvertently. The question was whether Clinton’s grant was void because it was issued contrary to the

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124. 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 324 (Harrisburg, State of Pa. 1838).

125. The Lieutenant Governor’s complaint about address was a little odd given that the mother country famously permitted removal by address.

126. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1118 & n.73 (1976).

127. Crown law officers Dudley Ryder and William Murray argued that there was no need for the colonial judges to hold office during good behavior. 2 GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES, FISHERIES, AND COMMERCE OF GREAT BRITAIN 102, 105 (London, Reed & Hunter 1814). Perhaps based on such advice, the Crown disallowed the Act. 4 ACTS OF THE PRIVY COUNCIL OF ENGLAND 216 (photo. reprint 2004) (James Munro & Almeric W. Fitzroy eds., 1911).

Governor's royal instructions.<sup>128</sup> The English law officers deemed the grant good and noted that Justice de Lancey could be removed only for misbehavior.<sup>129</sup>

Writing in 1768, Massachusetts Governor Francis Bernard suggested that the Crown accede to the colonial demands for good-behavior tenure. But Bernard added a twist: "[I]f the Colonies should prevail to have the judges['] commissions during good behaviour, which some of them are now very earnest about, it might be proper that the King in Council should be impowered to judge and determine upon such misbehavior as would void the commission."<sup>130</sup> Bernard's proposal would have combined an innovation with the accepted meaning of good behavior. As was always true of good-behavior tenure, the proposal contemplated a trial, of sorts, to determine whether judges had misbehaved. The innovation was the idea that the King in Council would conduct the trial, thereby permitting the King to exercise a judicial power that had long been denied him.<sup>131</sup>

A Massachusetts dispute on the eve of the Revolution illuminates the meaning of good-behavior tenure. Typically, Massachusetts judges had been paid by the Colony itself. The Crown proposed that the royal budget be used to pay for judicial salaries, causing an uproar. Many citizens believed that the colonial judges already served at the Crown's pleasure. If the Crown controlled salaries as well, it might dominate the judges. Over several weeks, John Adams and General William Brattle debated the tenure of judges. The central disagreement was over whether, under existing law, judges served during good behavior (as Brattle argued) or at pleasure (as Adams contended).

Brattle insisted "that the governor and council can no more constitutionally and legally remove any one justice of the superior court . . . unless there is a fair hearing and trial, and then a judgment that he hath behaved ill, than they can

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128. The Crown issued commissions and instructions to governors. The commissions granted the governors legal powers, while the instructions dictated how the governors were to use their legal powers. Having granted the Governor of New York the ability to issue commissions with variable tenures, any grant of good-behavior tenure was valid even though it was issued contrary to the Governor's royal instructions.

129. 2 CHALMERS, *supra* note 127, at 177-78.

130. Letter from Governor Bernard to the Earl of Hillsborough (Nov. 14, 1768), in LETTERS TO THE RIGHT HONOURABLE THE EARL OF HILLSBOROUGH, FROM GOVERNOR BERNARD, GENERAL GAGE, AND THE HONOURABLE HIS MAJESTY'S COUNCIL FOR THE PROVINCE OF MASSACHUSETTS-BAY 26 (Boston, Edes & Gill 1769).

131. Bernard's proposal was never taken up.

hang me for writing this my opinion.”<sup>132</sup> Brattle also noted that no one could appoint a replacement justice until one of the existing judges had, “after an impartial trial, been first adjudged to have behaved ill, and so forfeited his estate by a breach of trust.”<sup>133</sup>

Although disagreeing with Brattle on almost every other point, Adams agreed with Brattle about the meaning of good behavior. He stated that if Massachusetts judges served at pleasure, a judge might be removed “without a hearing and judgment that he had misbehaved.”<sup>134</sup> Conversely, if judges had been appointed during good behavior, Adams acknowledged, then those judges could be removed only upon a “hearing and trial, and an opportunity to defend himself before a fuller board, knowing his accuser and accusation.”<sup>135</sup>

As in England, good-behavior tenure was not limited to judges or even government officials. Writing in 1774, Pastor Zabdiel Adams of Lunenburg, Massachusetts, argued that ministers of a particular church were hired with the understanding that they would serve during good behavior. “It follows,” he wrote, “that they are not to be dismissed until they have had a fair trial, and a judgment that they have forfeited their office, is obtained against them.”<sup>136</sup> As in England, anyone was capable of receiving good-behavior tenure, irrespective of whether they were government officers. Likewise, anyone in a position to give away an item (e.g., land, employment, licenses) was capable of granting that item during the good behavior of the recipient.

### 3. *From Independent America*

Independence did not wipe the slate clean. Good-behavior tenure continued to be understood as terminable upon a finding of misbehavior in the ordinary courts. For instance, Maryland’s 1776 Constitution provided that “the Chancellor, all Judges, the Attorney-General, Clerks of the General Court, the Clerks of the County Courts, the Registers of the Land Office, and the Registers of Wills, shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law.”<sup>137</sup> The

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132. 3 THE WORKS OF JOHN ADAMS 531 (C.F. Adams ed., Boston, Charles C. Little & James Brown 1851).

133. *Id.* at 532.

134. *Id.* at 559; *see also id.* at 556.

135. *Id.* at 571.

136. ZABDIEL ADAMS, AN ANSWER TO A PAMPHLET LATELY PUBLISHED, INTITLED, “A TREATISE ON CHURCH GOVERNMENT” 45 (Boston, Isaiah Thomas 1773).

137. MD. CONST. of 1776, art. XL.

framers of the Maryland Constitution clearly understood that misbehavior was cause for removing an officer with good-behavior tenure and that the regular courts could judge misbehavior.

Neighboring Delaware had similar rules. After granting various officers tenure during good behavior, the Delaware Constitution noted that all officers shall be removed “on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly.”<sup>138</sup> The Delaware Constitution thereby confirmed that good-behavior tenure was terminable upon a finding of misbehavior in the courts of law; impeachment was explicitly listed as an *alternative* method of removal.<sup>139</sup>

Further south, the Virginia Constitution granted good-behavior tenure to the clerks of the court subject to removal by the General Court.<sup>140</sup> Their good behavior was “to be judged of, and determined in the General Court.”<sup>141</sup> Like the other constitutions, Virginia’s expressly reflected the general understanding that good behavior and its converse could be determined in the ordinary courts.

Evidence of the same proposition is found in a speech made in the Continental Congress. While serving as Secretary of the Committee on Foreign Affairs, Thomas Paine was accused of having revealed French secrets in a newspaper article. Congress faced the question of whether it ought to remove Paine from his post. Various members had suggested that Paine be given a chance to plead his case. Gouverneur Morris, a delegate from Pennsylvania, thought this was unnecessary. His reasons are worth quoting in full:

Gentlemen exclaim Do not deprive Mr. Payne of his Office without giving him a Copy of the Charge! Do not punish a Citizen unheard! I ask on what Tenure he holds that Office? Is it during good Behaviour? If it be he must be convicted of Malconduct before he can be removed. But we are not the proper Court to take Cognizance of such Causes. We have no criminal Jurisdiction. Clearly then he ought not to be heard before us. But he does not hold his Office during good Behavior it is during Pleasure that he holds it.<sup>142</sup>

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138. DEL. CONST. of 1776, art. 23.

139. Presumably, as the phrase “conviction of misbehavior *at common law*” suggests, these convictions would occur in the ordinary courts and not in the Delaware legislature.

140. VA. CONST. of 1776, para. 36.

141. *Id.*

142. Gouverneur Morris, Address to Congress (Jan. 7, 1779), in 11 LETTERS OF DELEGATES TO CONGRESS 426 (Paul H. Smith ed., 1985).

Though Paine was given a chance to address Congress, the important point is that Morris confirmed the general understanding that good-behavior tenure required a trial before removal. Like John Adams before him, Morris understood that good-behavior tenure was terminable upon a judicial finding of misbehavior.

In 1787, after the Constitution's drafting, Virginia adopted a statute that reflected the traditional meaning of good-behavior tenure. The Assembly established the Randolph Academy in Clarksburg. The named trustees were to select a president, treasurer, secretary, professors, and masters, each of whom would "continue in office during good behavior."<sup>143</sup> Rather than leaving this judgment to the courts, as would normally be the case, misbehavior was "to be judged of by the [Academy's] trustees."<sup>144</sup> Officers of the Academy were thus protected against removal in the absence of a hearing before the trustees and a finding of misbehavior.

As in England, private parties might enjoy tenure during good behavior. For instance, a minister in 1789 accepted a job from the town of Tyringham, Massachusetts. The town subsequently stopped paying him, and he sued. The members of the court seemed to agree that the minister did not have a fragile tenure during pleasure but instead had tenure for life, removable for misbehavior.<sup>145</sup> As late as 1808, the Phillips Academy at Andover granted its professors tenure during good behavior.<sup>146</sup> In a case involving the removal of a professor from the Academy, the professor's counsel noted that when it came to removal, the trustees and visitors had "a strictly judicial power."<sup>147</sup> Indeed, the professor had a trial before the board of visitors.<sup>148</sup> None of this is surprising because good-behavior tenure was a generic tenure that anyone might grant and that anyone could receive.

There is an extensive body of evidence, stretching from England to the colonies to independent America, indicating that good-behavior tenure was understood to terminate upon a judicial finding of misbehavior. In England, monarchs, lawyers, jurists, and philosophers supported this reading. In the American colonies, the text of colonial bills plus the debate of John Adams and

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143. An Act for Establishing an Academy, and Incorporating the Trustees Thereof, § 8, 1788 Va. Acts 46.

144. *Id.*

145. See *Avery v. Inhabitants of Tyringham*, 3 Mass. (3 Tyng) 160, 170, 174-75, 178-79 (1807).

146. See *In re Murdock*, 24 Mass. (7 Pick.) 303 (1828) (noting that professors could be removed for misbehavior).

147. *Id.* at 314-15.

148. *Id.* at 311-12.

General Brattle confirm the same. In independent America, we have state constitutions, a state statute, and the wisdom of Gouverneur Morris, one of the Constitution's principal authors.

More specifically, these materials reveal that good-behavior tenure was invariably equated with removable for misbehavior. Misbehavior apparently consisted of "injustice, corruption, or other misdemeanors in an office"<sup>149</sup> and also encompassed any act inconsistent with the office or abuse and nonuse of the office, as Coke declared. Most importantly for our purposes, all agreed that misbehavior could be determined only by a judicial process. Normally, a grant of good-behavior tenure would be determinable only by the courts. Hence, when the Crown or Parliament granted tenure during good behavior to judges, that tenure could be terminated via a judicial finding of misbehavior.<sup>150</sup> Nonetheless, authority to determine misbehavior might be granted to non-judges. In these circumstances, these non-judges had to conduct themselves as judges. They would have to conduct a fair, trial-like proceeding, in which the plaintiff would have to prove misbehavior and in which the defendant would have a chance to defend himself.<sup>151</sup>

Finally, English and American documents reveal that good-behavior tenure was not limited to government officers. Offices, employments, licenses, land, and anything else that could be held could be granted during good behavior. The idea behind good-behavior tenure was that people with such tenure would have a more secure hold on some property or interest. Someone with such security might invest more time and effort into his employment, lands, and licenses knowing that these could not be withdrawn at another's whim.

Of course, different offices, employments, and licenses might have different duties and responsibilities, so what would count as good behavior—and misbehavior—might vary depending upon the item held. The condition of good behavior might impose different specific requirements on private tenures than on public tenures, and different requirements on one public office than on another. For instance, what might constitute judicial misbehavior might be a far cry from tenant or licensee misbehavior. Even so, the general standard—"good Behaviour"—was constant for a host of different items that might be

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149. *Harcourt I*, (1692) 89 Eng. Rep. 680, 682 (K.B.).

150. See, e.g., 3 THE WORKS OF JOHN ADAMS, *supra* note 132, at 531, 532, 556, 559, 571 (comments of William Brattle and John Adams); Morris, *supra* note 142.

151. See, e.g., 14 THE PARLIAMENTARY REGISTER, *supra* note 109, at 429 (reproducing comments of the Duke of Richmond that when the Board of Admiralty inquires into alleged misbehavior, it must conduct itself like a court); Letter from Governor Bernard to the Earl of Hillsborough, *supra* note 130.

held,<sup>152</sup> as was the understanding that “good Behaviour” tenure entailed that tenure could be terminated only through some judicial determination of misbehavior. And, most crucially for our present discussion, there was no understanding that this determination should occur through a process of impeachment—a matter to which we now turn.

### *C. The Relation of Impeachment and Good Behavior*

At long last we consider the relation between good-behavior tenure and impeachment. Three points are worth noting at the outset. First, it seems clear that in England and the colonies, good behavior and impeachment were entirely unconnected. Whether someone had misbehaved was to be determined in the ordinary courts of law, regardless of whether she was a chief justice, a pastor, or a tenant in land. Impeachment played no role in judging whether someone with good-behavior tenure had misbehaved.

Second, we think it apparent that in independent America, good-behavior tenure likewise was terminable in the ordinary courts. Of course, people like Gouverneur Morris said as much. Moreover, American governments granted good-behavior tenure even when they lacked impeachment mechanisms. This practice indicates that it was well understood that ordinary courts would determine whether someone had misbehaved. Otherwise, restrictive grants of good-behavior tenure would have been pointless. Even in those states that had impeachment provisions, it is extremely unlikely that impeachment would have been understood as the principal, let alone exclusive, means of judging misbehavior. As we have emphasized throughout, anyone and everyone might enjoy good-behavior tenure. It is impossible to suppose that a state assembly would cease dealing with high matters of state and conduct a lengthy impeachment trial to determine whether a tenant in land or a church’s minister had misbehaved.

Third, having said all this, there is evidence that a few Americans began to regard impeachment as a means of judging whether an officer with good-behavior tenure had forfeited his office by virtue of misbehavior. Even so, impeachment would not have been regarded as the only means of judging misbehavior, except when a constitution so specified. In other words, a constitution that sought to make impeachment the sole means of judging misbehavior would have specific features making it obvious that the customary

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152. Just as the reasonableness inquiry for the Fourth Amendment might be thought to vary depending upon the context of the search (e.g., the item being sought or the crime being investigated), so too the standard of good behavior might vary depending upon the office, license, or land granted during good behavior.

means of judging misbehavior—the ordinary courts—were foreclosed. Moreover, we would expect that such a constitution either would specifically authorize impeachment for misbehavior or would not narrowly define the class of impeachable offenses, thereby making impeachment for *misbehavior* possible.

1. *Originally Unrelated Means of Removal*

In England and in the colonies, impeachment and good-behavior tenure were entirely different concepts, and one did not bring the other to mind. To be sure, officers who had good-behavior tenure could be removed either via impeachment or via proof of misbehavior. Moreover, there was some overlap between the concepts of misbehavior and high crimes and misdemeanors.<sup>153</sup>

The similarities ended there. Impeachment and the process of judging misbehavior were distinct processes, meant to accomplish rather different ends. Impeachment was a process by which the House of Commons could prosecute individuals before the House of Lords. Impeachment was not limited to government officials: anyone might be punished, commoners and peers, officers and non-officers alike.<sup>154</sup> And its purpose was not merely removal from office; on the contrary, impeachment was a means of imposing all sorts of punishments.<sup>155</sup> The House of Lords could put people to death, among other things.<sup>156</sup> In sum, impeachment was an expansive parliamentary tool of criminal prosecution and punishment.

In contrast, forfeiture proceedings had a far more confined scope. Forfeiture actions were concerned with the narrow (but often significant) question of whether someone (a licensee, an employee, a tenant) had misbehaved, with the end of judging whether that individual had forfeited something (a license, a job, or property). A finding of forfeiture and the accompanying removal, ouster, or cancellation were the sole ends of the proceeding. Moreover, people who had granted tenure during good behavior typically could bring a forfeiture action. The Crown could bring an action when an officer it tenured during good behavior had allegedly misbehaved.

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153. While some forms of misbehavior clearly would have amounted to high crimes and misdemeanors, we take no position on whether other forms of high crimes and misdemeanors would have been regarded as misbehavior. Hence we take no position on whether the category of high crimes and misdemeanors was a wholly included subset of the category of misbehavior.

154. See HOFFER & HULL, *supra* note 29, at 3.

155. See *id.* at 3, 70.

156. See *id.* at 3.

Landlords and employers presumably could bring suit against tenants and employees, respectively. Lastly, while the courts generally determined whether someone had misbehaved, others might be authorized to make this judgment as well. As we have seen, a statute or constitution might authorize non-judges to determine whether someone had misbehaved, albeit via the use of standard judicial procedures.<sup>157</sup>

We reach these conclusions through an examination of the same materials that helped us explain good-behavior tenure. In our research on England and the colonies, we never came across anyone who spoke of good behavior as something to be determined (or even something determinable) by the impeachment process. Rather, the authorities who addressed the issue spoke of a judicial process in the courts or before bodies specifically designated as the adjudicators of misbehavior. For instance, when Judges Archer and Walter refused to resign, neither claimed that he could be removed only by impeachment. They referenced the writ of *scire facias*, the Crown's method of removing officers with good-behavior tenure. If the Crown wanted to remove them, the Crown had to seek the writ. Likewise, we found no evidence that colonial Americans regarded impeachment as a means of judging misbehavior. In their voluminous writings on good-behavior tenure in 1774, John Adams and William Brattle did not mention impeachment once. While parliamentary impeachment of colonial officials was surely possible (as Warren Hastings's impeachment attests<sup>158</sup>), impeachment was not a means of judging misbehavior in colonial America.<sup>159</sup>

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157. Finally, we think it quite likely that a forfeiture proceeding did not preclude regular punishment, either via the impeachment process or via the regular courts. A forfeiture proceeding determined whether someone had violated the conditions of his tenure grant; it was not a proceeding meant to punish the tenured person. Even after a court had concluded that someone had misbehaved, the person would still be liable to prosecution for any offenses. We doubt that double jeopardy applied in this situation. If we are right, our conclusion underscores that these were two separate processes serving two very different ends.

158. Hastings, the first Governor General of Bengal in India, was accused of corruption and treating the Indian people brutally. George Mason of Virginia referenced his contemporaneous impeachment during the Philadelphia Convention. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., rev. ed. 1937).

159. Peter Hoffer and N.E.H. Hull demonstrate that provincial assemblies occasionally sought to remove officers in processes that mirrored, to some extent, the English impeachment process. HOFFER & HULL, *supra* note 29, at 15-56. Yet such procedures always were of dubious legality in the sense that they were unauthorized by provincial charters. Moreover, the procedures were necessarily irregular because the legislators were fabricating an impeachment process when there was none. It is impossible to suppose that when governors

The disconnect between impeachment and good-behavior tenure becomes even clearer in the revolutionary state constitutions. We have already pointed out that some constitutions expressly contemplated removal of officers with good-behavior tenure in the ordinary courts. Here we make a different and broader point, namely that some constitutions containing impeachment provisions expressly mentioned that good-behavior-tenured officers could be removed by means other than impeachment. Though Delaware's Constitution authorized impeachment, it also expressly mentioned that misbehavior would be determined before traditional courts.<sup>160</sup> Similarly, while the Virginia Constitution featured impeachment, it authorized the General Court to judge whether the clerks of the court had misbehaved.<sup>161</sup> Finally, North Carolina, Pennsylvania, and Vermont enabled the assembly to remove judges for misbehavior outside of the impeachment process.<sup>162</sup>

Other state constitutions granted tenure during good behavior without including a mechanism for impeachment. The Georgia and Maryland Constitutions, as well as the South Carolina Constitution of 1776, granted good-behavior tenure to some officers even though they lacked impeachment

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granted tenure during good behavior that they contemplated that such officers could be removed only via this haphazard, ad hoc process.

160. DEL. CONST. of 1776, art. 23 ("And all officers shall be removed on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly.").
161. VA. CONST. of 1776, para. 14 ("The present and future Clerks shall hold their offices during good behaviour, to be judged of, and determined in the General Court."); *see also id.* para. 11 ("[T]he governor and Council shall have a power of suspending any [militia] officer, and ordering a Court Martial, on complaint of misbehaviour or inability . . ."). Jefferson's draft of the Virginia Constitution had provided that court of appeals judges could only be removed for misbehavior by a legislative act. *See* THOMAS JEFFERSON, *Draft Constitution for Virginia* (June 1776), in WRITINGS 336, 342 (Merrill D. Peterson ed., 1984), available at <http://etext.virginia.edu/toc/modeng/public/JefPap.html> (follow "Constitution 2" hyperlink). Other judges were removable for misbehavior by the court of appeals. *Id.*
162. N.C. CONST. of 1776, art. XXXIII ("[T]he Governor shall commission them accordingly: and the Justices, when so commissioned, shall hold their offices during good behaviour, and shall not be removed from office by the General Assembly, unless for misbehaviour, absence, or inability."); PA. CONST. of 1776, § 23 ("The judges of the supreme court of judicature shall have fixed salaries, [and] be commissioned for seven years only . . . but [shall be] removable for misbehaviour at any time by the general assembly . . ."); VT. CONST. of 1777, ch. 2, § XXVII (rendering "the judges of [the] inferior court of common pleas, sheriffs, justices of the peace, and judges of probates, commissioned by the Governor and Council, during good behavior, removable by the General Assembly upon proof of maladministration"). The provisions were written in such a way that the state assemblies unilaterally could decide whether the covered officials had misbehaved. This was not an impeachment process, because none of the state assemblies had the power to both impeach and convict.

provisions.<sup>163</sup> It would be implausible to assume that these constitutions granted good-behavior tenure with no means of ousting misbehaving officers. Given the generic meaning of good-behavior tenure, these constitutions would have been understood to mean that officers with good-behavior tenure could be removed via a judicial process in the ordinary courts. In sum, no fewer than eight revolutionary state constitutions provided that good behavior would be determined in the ordinary courts or in a judicial proceeding outside of the impeachment process.

We believe that the remaining constitutions that granted good-behavior tenure and also had impeachment provisions—the New York Constitution of 1777, the South Carolina Constitution of 1778, and the Massachusetts Constitution of 1780<sup>164</sup>—likewise permitted the adjudication of misbehavior in the ordinary courts.<sup>165</sup> Given the background understandings of how good-behavior tenure would be adjudicated, by granting good-behavior tenure, these constitutions likely incorporated the ordinary understanding that good behavior would be determined in the ordinary courts. Nothing in these three constitutions hints that impeachment was a means of judging misbehavior, let alone that impeachment was the sole means of judging misbehavior. To the contrary, like the Federal Constitution, these state constitutions kept grants of good-behavior tenure quite a distance from their discussions of impeachment and conviction, suggesting that these provisions were unrelated to each other.

The Continental Congress must have thought that good-behavior tenure had nothing to do with impeachment. In the famous Northwest Ordinance, Congress granted territorial judges tenure during good behavior.<sup>166</sup> The mechanism for determining misbehavior could not have been impeachment because the Continental Congress was a unicameral legislature that lacked an

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163. GA. CONST. of 1777, art. XXXIV (“All militia commissions shall specify that the person commissioned shall continue during good behavior.”); MD. CONST. of 1776, ¶ XL (“[T]he Chancellor, all Judges, the Attorney-General, Clerks of the General Court, the Clerks of the County Courts, the Registers of the Land Office, and the Registers of Wills, shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a Court of law.”); S.C. CONST. of 1776 (providing “[t]hat all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior”).

164. MASS. CONST. of 1780 (granting good-behavior tenure and also creating an impeachment process); N.Y. CONST. of 1777 (same); S.C. CONST. of 1778 (same).

165. We discuss the exceptional New Jersey Constitution in Subsection II.C.2.

166. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, ch. 8, 1 Stat. 51, 51 n.a (1787).

impeachment power.<sup>167</sup> We do not believe that Congress established a removal standard with no removal mechanism. We think Congress contemplated that a trial in an ordinary court could result in the forfeiture of a territorial judge's office. This is the same type of trial contemplated by Gouverneur Morris when he addressed the Continental Congress on the subject of good-behavior tenure.

Perhaps the most powerful reasons for doubting the oft-assumed tight nexus between impeachment and good behavior are the grants of good-behavior tenure in wholly private contexts. In England and in America, private parties granted tenure during good behavior to landholders, licensees, and employees.<sup>168</sup> No one could suppose (and we submit no one did) that the impeachment process was the only means (or even *a* means) of removing all private parties with good-behavior tenure. Congregations that granted their pastors tenure during good behavior would not need to beseech Parliament or the state assembly in order to oust their pastors. Academies would not need to seek the intervention of a legislature to remove professors with good-behavior tenure. Important affairs of state would not have to grind to a halt to remove petty clerks, tenants, and employees. A trial before an ordinary court was all that was necessary to oust someone who enjoyed tenure during good behavior.

## 2. *A New, Nonexclusive Means of Judging Good Behavior*

While there apparently was no relationship between impeachment and good behavior in England and the colonies, we find some evidence that late-eighteenth-century Americans had come to regard impeachment as a possible means of judging good behavior. Alone among the state constitutions, the New Jersey Constitution expressly provided that impeachment would be a means of judging misbehavior. After granting fixed tenures to a host of officers, the constitution provided that such officers "shall be liable to be dismissed, when adjudged guilty of misbehaviour, by the Council, on an impeachment of the Assembly."<sup>169</sup> Yet even here, the New Jersey Constitution of 1776 did not provide that impeachment was the *only* means of removing these officers. The New Jersey Constitution, like its counterparts, may very well have permitted ordinary courts to adjudicate allegations of misbehavior.

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167. Congress also considered creating courts of capture with tenure during good behavior. See 15 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1221 (Worthington Chauncey Ford ed., 1909), available at <http://lcweb2.loc.gov/ammem/amlaw/lwjclink.html>; 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 375 (Gaillard Hunt ed., 1912); 20 *id.* at 694; see also ARTICLES OF CONFEDERATION of 1789.

168. See *supra* notes 114, 136 and accompanying text.

169. N.J. CONST. of 1776, para. 12.

The Essex Result, a 1778 document meant to sketch the features of an ideal Massachusetts Constitution, likewise regarded impeachment as an acceptable means of judging good behavior. The Result counseled that the Massachusetts Constitution ought to grant judges good-behavior tenure, with their misbehavior to be determined by the Senate on the impeachment of the House.<sup>170</sup> Once again, however, impeachment was not made the exclusive means of judging misbehavior, leaving open the possibility that misbehavior also might be determined in the ordinary courts.

Thomas Jefferson's 1783 Proposed Constitution for Virginia was unique, for it would have made impeachment the sole means of judging the misbehavior of certain Virginia officers. Jefferson's impeachment court could impeach a judge of the superior court "for such misbehaviour in office as would be sufficient to remove him therefrom."<sup>171</sup> This jurisdiction was the exclusive means of judging the alleged misbehavior of superior court judges.<sup>172</sup> At the same time, Jefferson made the court of appeals (rather than the impeachment court) the judge of "breach[es] of good behavior" by the inferior courts and certain clerks.<sup>173</sup>

Jefferson's Proposed Constitution teaches us quite a bit. First, even though it made impeachment an exclusive means of judging the misbehavior of some officials, it did not make impeachment the exclusive means of judging the misbehavior of *all* officials with good-behavior tenure. In other words, Jefferson chose not to make impeachment the exclusive means of judging misbehavior.

Second, Jefferson evidently felt the need to underscore that impeachment would be the only means of removing certain officials for their misbehavior. Such specification was necessary precisely because impeachment was not generally regarded as the only way of removing officers with good-behavior tenure. The very fact that Jefferson's Proposed Constitution included an exclusive grant of jurisdiction for the impeachment court indicates that he

170. See THE ESSEX RESULT (1778), reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 324 (Oscar Handlin & Mary Handlin eds., 1966), available at <http://www.usconstitution.com/esssexresult.htm> ("Let therefore the judges be appointed by the executive body—let their salaries be independent—and let them hold their places during good behaviour—Let their misbehaviour be determinable by the legislative body—Let one branch thereof impeach, and the other judge.").

171. THOMAS JEFFERSON, *Proposed Constitution for Virginia* (June 1783), in 4 THE WORKS OF THOMAS JEFFERSON 147, 160 (Paul Leicester Ford ed., 1904).

172. *Id.* ("The offenses cognizable by this court shall be cognizable in no other . . .").

173. *Id.* at 161.

understood that there was another means of judging good behavior—i.e., a trial in the ordinary courts. Put another way, background understandings of good-behavior tenure would not have permitted the inference that a grant of “good Behaviour” jurisdiction to an impeachment court was an exclusive grant of jurisdiction. Because impeachment was not a means of judging misbehavior in England at all and only came to be viewed as a possible means by a few late-eighteenth-century Americans, no one could reasonably have supposed that impeachment somehow implicitly was the exclusive means of judging misbehavior. Hence, if exclusive jurisdiction for the impeachment court was the goal, the Proposed Constitution would have had to make that desire express. Jefferson’s Proposed Constitution demonstrates that as late as 1783, there was not a direct correspondence between good-behavior tenure and impeachment.

Nonetheless, there clearly is evidence that some had come to regard impeachment as a possible means of judging misbehavior in America. How did processes and standards previously unconnected in England and the colonies become linked in the minds of some Americans? The answer probably lies in the limited nature of American impeachment. Most state constitutions ensured that impeachment served solely as a means of removing officers and not of imposing other criminal punishments.<sup>174</sup> Given this narrowing of impeachment, and given that impeachment and good behavior had always involved determinations of misconduct, it was natural that some reconceived impeachment as a possible means of judging official misbehavior.

Still, as we have argued, this could not have been the dominant view. The state constitutions are good evidence that many people thought of these concepts as distinct. As we noted earlier, several constitutions granted good-behavior tenure even though they did not authorize impeachment, and others specified that nonimpeachment tribunals could decide misbehavior. This suggests that the New Jersey Constitution was an outlier. Moreover, given the generally limited nature of American impeachment (restricted to officers), impeachment could not have been the means of judging whether a private employee had forfeited his job or whether a tenant had forfeited some land.

Jefferson’s Proposed Constitution provides a template for the way a constitution ought to read if its drafters meant to enshrine impeachment as the sole means of judging misbehavior. First, a constitution had to permit impeachment for misbehavior. Jefferson’s Proposed Constitution easily satisfied this condition because he made superior court judges (and others) expressly subject to removal for misbehavior via impeachment. Second, and

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174. HOFFER & HULL, *supra* note 29, at 68-71.

crucially, Jefferson provided that the impeachment court would be the *exclusive* means of judging whether superior court judges had misbehaved. Without such language, no one would have concluded that impeachment was the sole means of judging alleged misbehavior.

In sum, when the Constitution was written and ratified, the lay of the land was as follows. Good-behavior tenure was understood as tenure terminable upon a judicial finding of misbehavior in the ordinary courts. While in England and in the colonies impeachment clearly was not regarded as a means of judging whether officers with good-behavior tenure had forfeited their offices, in revolutionary America impeachment was occasionally thought an appropriate method of judging misbehavior. Even so, the state constitutions reveal that impeachment was hardly regarded as the sole means of judging misbehavior. Several constitutions explicitly mentioned the traditional mechanism for determining misbehavior—a trial before an ordinary court. Others authorized the legislature to judge misbehavior outside of the impeachment process. And still others granted tenure during good behavior even though they lacked impeachment procedures. Given background understandings of good-behavior tenure, these impeachment-free constitutions provided that good behavior was determinable in the traditional manner by the ordinary courts. Because impeachment was the Johnny-come-lately means of judging whether good-behavior tenure had been terminated, a constitution would have to expressly declare that impeachment was the exclusive means of judging misbehavior if impeachment were to have that exclusive role. Tellingly, none of the state constitutions had this feature. Indeed, we know of no constitution, draft or otherwise, that expressly made impeachment the exclusive means of removing all officials with good-behavior tenure.

Just to be clear, we are not saying that good-behavior tenure always and everywhere must necessarily refer to the idea of a tenure defeasible upon a finding of misbehavior in the ordinary courts. One can imagine entirely different understandings of good behavior, whereby the reference to good behavior no longer implied removal for misbehavior. Likewise, one can conceive of a society in which good-behavior tenure permitted ouster for misbehavior but in which the question of misbehavior was always committed to the chambers of the legislature via the impeachment process. Finally, one can imagine a nation where private grants of good behavior were policed in ordinary courts but allegations of official misbehavior were confined to the impeachment process.

Our point is that there is no evidence that any of these propositions applied to England, the colonies, or the states. No one suggested that good behavior meant something entirely different in the public and private contexts. Likewise

no evidence indicates that the impeachment process was the means of adjudicating all grants of good-behavior tenure. While good behavior surely could be judged outside the ordinary courts, this only occurred when the grantor of good behavior authorized as much. Because such jurisdiction was uncommon, specific language was necessary to accomplish a departure from customary practices.

#### *D. The Constitution's Creation*

It cannot be gainsaid that the evidence from England, the colonies, the states, and the Continental Congress sheds light on what the Constitution's Framers meant when they decided that judges ought to have good-behavior tenure. Likewise, such evidence sheds light on what the Constitution's ratifiers likely took that language to mean and on the generic public meaning of good-behavior tenure. *Harcourt v. Fox*, John Adams's debates about good-behavior tenure, Gouverneur Morris's speech in the Continental Congress, the state constitutions, the Northwest Ordinance, and the Virginia Assembly's Act all point to the same conclusion: good-behavior tenure was determinable in the ordinary courts of law. The Northwest Ordinance and the Virginia Act were written in 1787, the very year the Constitution was drafted. Neither of these Acts contemplated that impeachment would be the sole means of judging misbehavior.

Turning to the Constitution's creation, there was little discussion in the drafting and ratifying debates illuminating the meaning of good behavior. Delegates at Philadelphia generally spoke as if that tenure were a known quantity, a fact that we believe favors the view that the Constitution adopted the conventional meaning of good-behavior tenure we have outlined. There were some discussions that confirm the reading we have advanced, however. When delegate John Dickinson of Delaware proposed making judges removable by address, Gouverneur Morris decried the proposal as being inconsistent with tenure during good behavior. He "thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial."<sup>175</sup> Morris thereby confirmed (once again) that good-behavior tenure required a trial and proof of misbehavior prior to removal. Likewise, Chief Justice of Pennsylvania Thomas McKean, speaking at the state ratifying convention, noted that the judges "may continue

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175. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 158, at 428. Morris was wrong to say it was a contradiction in terms. To grant good-behavior tenure and also permit removals by address would be to create an exception to good-behavior tenure, an exception that mirrored the Act of Settlement. *See id.* (comments of Roger Sherman).

for life, if they shall so long behave themselves well.”<sup>176</sup> The Chief Justice merely echoed what had been said almost a hundred years earlier in *Harcourt v. Fox*.

Those who favor the impeachment-only view have focused on isolated statements. Alexander Hamilton gets much attention, for in *The Federalist No. 79* he described impeachment as “the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges.”<sup>177</sup> Too much has been made of this ambiguous statement.<sup>178</sup>

Hamilton’s other *Federalist* writings all support a narrow reading of the above passage. In another portion of *The Federalist No. 79*, Hamilton observed

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176. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 539 (photo. reprint 1987) (Jonathan Elliot ed., New York, Burt Franklin 1888).

177. THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Brutus, Hamilton’s foil, unequivocally endorsed the proposition that judges could be removed only by impeachment. See *Brutus XIV*, N.Y. J., Feb. 28, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 258, 266 (Bernard Bailyn ed., 1993). In his next paper, Brutus read the impeachment provisions as providing that “civil officers, in which the judges are included, are removable *only* for crimes.” *Brutus XV*, N.Y. J., Mar. 20, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION, *supra*, at 372, 375 (emphasis added). Brutus’s remarks reflect the muscular (and discredited) version of the impeachment-only reading, one that reads impeachment as the sole means of removing any officer.

178. Hamilton’s statement has been misjudged for two reasons. First, many have erroneously read the second clause as a reference to the Federal Constitution. Yet Hamilton could not have been referring to the proposed Constitution when he used the phrases “our own Constitution” and “our own judges” primarily because the proposed Constitution was no one’s constitution and because there were no federal judges. In fact, Hamilton was referring to the New York Constitution and not the proposed Federal Constitution. We must never forget that Hamilton was writing “To the People of the State of New York” and often compared the two constitutions for the benefit of New Yorkers.

Second, the first clause of the sentence does not quite say what people quickly suppose it declares. Many people assume that it provides that limiting removal to impeachment is the only means of removing judges that is consistent with judicial independence. But Hamilton could be read more narrowly, as saying no more than that impeachment is “the only provision” in the proposed Constitution that permits removal and is consistent with judicial independence. If that is what Hamilton meant, it poses no problem for our claims because we believe that the Constitution itself authorizes no other means of removal of federal judges other than impeachment. We believe that if judges are to be removed for misbehavior in the ordinary courts, federal statutes are necessary. See *infra* Part III. This argument parallels arguments made by those who admit that while the Constitution does not abrogate state sovereign immunity, Congress may do so via statute. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 78-94 (1996) (Stevens, J., dissenting).

that judges, “if they behave properly, will be secured in their places for life.”<sup>179</sup> This point hearkens back to English and early American discussions of good-behavior tenure. Earlier, when Hamilton discussed such tenure in *The Federalist No. 78*, he treated it as if it were a standard independent of impeachment. Moreover, he later cited English experiences with good-behavior tenure, experiences that show that impeachment and good-behavior tenure had no relationship whatsoever.<sup>180</sup>

Even if we assumed the correctness of the conventional reading of Hamilton’s sentence, there are ample reasons to doubt his supposed opinion on this point. Hamilton’s draft constitution (a copy of which he provided to James Madison at the end of the Philadelphia Convention<sup>181</sup>) would have expressly provided that impeachment was the sole means of removing judges.<sup>182</sup> It is unclear whether Hamilton ever presented this language to the Convention or whether the language *was* considered but not adopted.<sup>183</sup> What is certain is that the Constitution’s text did *not* explicitly embrace Hamilton’s position.<sup>184</sup> His argument in *The Federalist No. 79* might thus have reflected an effort by subsequent interpretation to foist onto the Constitution a position that he had failed to persuade the Convention to adopt. Alternatively, it might have reflected an idiosyncratic misconception about impeachment and misbehavior. Or it might have represented wishful thinking on his part, namely that the Convention had somehow endorsed his idea without endorsing his crucial language. However we ought to read Hamilton’s statement, it can hardly overcome centuries of contrary practice and the conspicuous absence of constitutional text supporting his reading.<sup>185</sup>

179. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 177, at 473.

180. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 177, at 472 (stating that the experience of Great Britain provides an excellent example of the institution of good behavior).

181. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 158, at 619.

182. *Id.* at 625.

183. See Simon, *supra* note 13, at 1655-56.

184. See *supra* Part I.

185. It is worth noting that history has not been at all kind to Hamilton’s two other “removal” claims. First, he asserted that the President would need the consent of the Senate to remove executive officers. See THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 177, at 459 (“The consent of that body [the Senate] would be necessary to displace as well as to appoint . . .”). Hamilton himself repudiated this claim less than two years later. See Prakash, *supra* note 17, at 1038 n.102. More importantly, the First Congress and subsequent presidents decisively rejected it as well. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. (forthcoming 2006).

Finally, those who favor the impeachment-only reading might believe that the Constitution's creation of equal and coordinate branches suggests that "good Behaviour" tenure meant something different than it did in the English context of parliamentary supremacy or the state context in which the assemblies, if not supreme, were surely dominant. We fail to see why treating the judiciary as a coordinate branch of the federal government requires a change in the understanding of good-behavior tenure. The judiciary is no less equal or coordinate merely because its members can be ousted for misbehavior. Removal for misbehavior does not place judges at the mercy of either Congress or the President.

On the other hand, if a more secure tenure was required than the good-behavior tenure provided to English, colonial, and state judges (and many others), it would have been a surpassingly odd choice to use language that already had a generic meaning to create that more secure tenure. If the preexisting good-behavior tenure standard was insufficiently protective of judicial independence, why use the very phrase encapsulating the deficient standard? If the goal was to give federal judges even more secure tenure than their English and state counterparts who also had "good Behaviour" tenure, the Constitution's creators left us precious little evidence of that goal.

Ultimately, the claim that the Constitution somehow incorporated an idiosyncratic and unprecedented understanding of good-behavior tenure rests on one of two untenable propositions. The first is that the impeachment provisions somehow make impeachment the only means of removing judges. This proposition has extremely little historical support and no textual support. The second is that the Constitution's makers implicitly meant to make impeachment the sole means of removing judges. Like the previous proposition, this too has scant historical foundation.

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Second, Hamilton wrote as if impeachment had to precede criminal prosecution. See THE FEDERALIST NO. 65 (Alexander Hamilton), *supra* note 177, at 398-99 ("[T]he punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law."); THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 177, at 464 (discussing how the President is always "liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law"). Courts have specifically held that a federal judge is indictable and may be convicted prior to removal from office. See *United States v. Claiborne*, 727 F.2d 842, 847-48 (9th Cir. 1984); *United States v. Hastings*, 681 F.2d 706, 710-11 (11th Cir. 1982); *United States v. Isaacs*, 493 F.2d 1124, 1142 (7th Cir. 1974).

*E. The Constitution's Early Years and Beyond*

As compared to Hamilton's ambiguous comments, an act of Congress surely carries more interpretive weight: in satisfying the demands of bicameralism and presentment, after all, an enacted statute reflects multiple judgments affirming its constitutionality. It is significant, therefore, that in the 1790 Crimes Act, Congress passed an effective refutation of the impeachment-only reading. The Act barred judges from taking bribes. Besides attaching fines and imprisonment as punishment, the statute also provided that bribe-taking judges "shall forever be disqualified to hold any office of honour, trust or profit under the United States."<sup>186</sup> In other words, the Act contemplated that ordinary courts could remove judges from office for their misbehavior—in this case the taking of bribes.<sup>187</sup>

Other provisions of the Crimes Act authorized a different sort of removal. About half a dozen provisions listed execution as the appropriate punishment. There is nothing in the Act suggesting that federal judges could not be subjected to this punishment (or any other punishment for that matter) prior to being impeached. Had a federal judge been found guilty of murder, piracy, or making counterfeit securities, he could have been put to death.<sup>188</sup> In a number of ways, the Crimes Act provides compelling evidence that members of Congress did not regard impeachment as the only means of removing judges.<sup>189</sup>

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<sup>186</sup>. An Act for the Punishment of Certain Crimes Against the United States, § 21, 1 Stat. 112, 117 (1790).

<sup>187</sup>. Some scholars committed to the entrenched impeachment-only position have argued that "disqualification" to serve in office did not entail "removal" from office. For a careful analysis and refutation of this argument, see Simon, *supra* note 13, at 1647-53.

<sup>188</sup>. It has long been understood that the Constitution does not require impeachment prior to prosecution in the ordinary courts. See *supra* note 185 (collecting modern cases); see also Office of Legal Counsel, A Sitting President's Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000), [http://www.usdoj.gov/olc/sitting\\_president.htm](http://www.usdoj.gov/olc/sitting_president.htm) (discussing how Vice President Aaron Burr was twice indicted while in office).

<sup>189</sup>. It is true that some comments from the House debates that preceded the Decision of 1789 support the view that judges could be removed only by impeachment. See, e.g., THE CONGRESSIONAL REGISTER (1789), reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 871 (Charlene Bangs Bickford et al. eds., 1992) (reproducing comments of Rep. Alexander White that because judges had good-behavior tenure they could be removed only by impeachment). We do not think much weight should be given to these claims. They were made in the midst of a debate not about good-behavior tenure but about the removal of executive officers—a debate in which some representatives claimed that impeachment was the exclusive means for removing *any* civil officers. Because no one was clearly focused on the meaning of good behavior, we think that these Representatives

Incidents occurring well after the enactment of the Crimes Act might cause some to doubt our claims about good-behavior tenure. During Thomas Jefferson's first term, Congress impeached and convicted New Hampshire District Judge John Pickering and impeached but failed to convict Supreme Court Justice Samuel Chase. In each case, the articles of impeachment alleged acts that may well have amounted to misbehavior in office but that from a detached perspective do not look like high crimes or misdemeanors.<sup>190</sup> So the fact that in these circumstances Congress relied upon impeachment rather than devising some other procedure more tailored to misbehavior may suggest that, by 1803 at least, Congress regarded the Constitution as doing what we have argued it did not do—namely, conflating impeachment and the removal of judges for misbehavior.

Of course, 1803 was separated by over a decade—and by some tumultuous political developments<sup>191</sup>—from the original Constitution. Beliefs of members of the 1803-1805 Congresses that impeached Pickering and Chase are surely less probative of the *original meaning* of these provisions, especially as compared to the Crimes Act of 1790. Moreover, if anything is clear from the turbulent and fractious proceedings against Pickering and Chase, it is that members of Congress and others who were involved differed drastically in their understandings of the Constitution's impeachment provisions.<sup>192</sup> In any case, whatever their significance, the actions of the impeachment Congresses can only be appreciated in the context of the impassioned and highly partisan atmosphere in which Congress was acting.

As most students of constitutional law recall from studying *Marbury v. Madison*, in 1801 Jefferson's Republican Party had ousted John Adams's

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advanced mistaken readings of the Constitution. Moreover, in the Crimes Act, Congress rejected the notion that impeachment was the only means of removing judges.

190. Both judges were charged with mishandling cases contrary to law: these charges look very much like the sort of claims of error that are typically dealt with through appellate review. In addition, Pickering had allegedly appeared in court in a state of intoxication and had uttered profanities in court, and Chase had allegedly issued intemperate harangues against the government in his instructions to grand juries. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 238-40, 249-54 (1998). Regarding Chase, Currie observes that “[w]ith respect to most of the allegations, the House’s position was that Chase had misapplied the law. Much of the record in Chase’s trial reads like an appellate argument.” *Id.* at 254 (footnotes omitted).
191. Jefferson described the election of 1800 as “the revolution of 1800” and declared it “as real a revolution in the principles of our government as that of 1776 was in its form.” NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 237 (1987).
192. See Currie, *supra* note 190.

Federalists following a bitterly fought election,<sup>193</sup> and before the change of administrations the Federalists had attempted to entrench their party by enacting the Judiciary Act of 1801,<sup>194</sup> creating new judgeships that were hastily filled with Federalist appointees. Understandably resentful, Jefferson launched an all-out and multifaceted assault on the judiciary. Despite Article III's life-tenure provisions, the recent Judiciary Act was repealed and the new judgeships eliminated: Jefferson's congressional allies explained that if the Federalist judges could not be removed from their offices, the offices would be removed from the judges.<sup>195</sup> And Congress tinkered with the Supreme Court's term, thereby preventing the Court from sitting for fourteen months. The impeachments of Pickering and Chase (an eminent Federalist detested by the Republicans<sup>196</sup>) were the culmination of this campaign against the judiciary.

In this context, the Republicans for their partisan purposes surely did expand the concept of high crimes and misdemeanors up to—and probably beyond—the limits of plausibility in order to press their campaign against Pickering and Chase. In this respect, they behaved as politicians have sometimes done, stretching the Constitution for political ends. Arguably, they anticipated Gerald Ford's later comment that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment."<sup>197</sup> Nonetheless, even the Republicans at least paid lip service to constitutional requirements: thus, the articles of impeachment approved by the House in each case explicitly charged the accused judges with high crimes and misdemeanors.<sup>198</sup> And the Senate's failure to convict Chase suggests that

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193. See CUNNINGHAM, *supra* note 191, at 221-37.

194. 2 Stat. 89.

195. Currie, *supra* note 190, at 226.

196. Joseph Ellis describes Chase as, "[n]ext to [John] Marshall, . . . the most formidable Federalist presence on the Supreme Court, a white-maned giant who preferred to play the role of Jehovah with all Jeffersonians who had the misfortune to land in his courtroom." JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 225 (1997).

197. Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2096 (2002) (book review) (alteration in original).

198. Currie, *supra* note 190, at 240, 252. In Pickering's case, though the House alleged "high crimes and misdemeanors," a concern arose in the Senate that Pickering could not be guilty of criminal conduct because of his acknowledged insanity; the Senate finessed the issue by striking the language of "high crimes and misdemeanors" and asking senators to decide only whether Pickering was "guilty as charged." *Id.* at 241-49.

many senators came to recognize the impropriety of impeachment in this situation.<sup>199</sup>

Even so, given the difficulty of characterizing these judges' alleged misconduct as a high crime or misdemeanor as opposed to mere misbehavior, why did Congress employ impeachment rather than explore the possibility of some other method for finding a breach of the Article III's "good Behaviour" requirement? Once the political context is taken into account, that question is easily answered. As noted, the impeachments of Pickering and Chase were part of a political struggle in which the Republicans, who controlled Congress and the Presidency, were attempting to curtail the power of the judiciary, in which the Federalists had sought to entrench themselves. Our research suggests that under the historically established meaning of "good Behaviour" tenure, Congress could have enacted a statute authorizing the President or perhaps even a private party<sup>200</sup> to bring an action in court to determine whether a judge had departed from "good Behaviour." A court so finding could then have ordered the judge's removal—subject of course to appellate review (by, ultimately, John Marshall's Supreme Court).

But this sort of procedure was precisely what the Republican Congress did not want to use. Such a strategy would have placed the removal power in the very branch that Jefferson and the Republicans distrusted and were attempting to curtail—and that was dominated by the party against which they were struggling. The Republicans needed a way of effecting the removal of individual judges *by Congress*, and impeachment was indeed the only constitutionally authorized method of achieving that result. Understandably, therefore, Republicans chose to stretch the impeachment provisions to the breaking point rather than employ a different, Article III-centric method of adjudging breaches of good behavior. In other words, a strategic decision to bypass the Federalist courts may have accounted for the decision to use impeachment.

Relatedly, the Republicans feared the idea of reading power grants expansively and might have resisted the notion that Congress could enact necessary and proper laws designed to carry into execution the federal government's latent power to remove misbehaving judges. However, committed as they were to national power, the Federalists could not be expected to make arguments that would have furthered the interests of their

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199. *Id.* at 258-59; see also CUNNINGHAM, *supra* note 191, at 273 (noting that even many Republicans doubted the propriety of impeachment for the sort of misconduct of which Chase was accused).

200. We elaborate on these possibilities *infra* Part III.

adversaries, namely that Federalist judges might be ousted for misbehavior and hence could be removed for offenses short of high crimes and misdemeanors. If Republicans were going to read the text expansively, it made more sense to read the phrase “high Crimes and Misdemeanors” broadly, for that reading had few collateral consequences.

In the midst of these bitter political struggles, it would hardly be surprising if some Federalists uttered the view that impeachment was the only means of removing federal judges. But such statements deserve little credence. To begin with, no formal congressional decision or statute endorsed the view that impeachment was the sole means of removing judges. Unlike the Decision of 1789, there was nothing resembling a “Decision of 1803” that impeachment was the sole means of removing judges. To the contrary, the Repeal Act of 1802 clearly indicates that a majority in both chambers plus the President concluded that impeachment was *not* the sole means of removing judges.<sup>201</sup> These politicians concluded that judges might be removed for reasons of economy, notwithstanding the grants of good-behavior tenure. This conclusion invites the question of whether misbehavior might be adjudicated in the ordinary courts, a question answered in the affirmative for over two centuries prior to the extraordinary fights over the judiciary in the early part of the nineteenth century.

All in all, the Republicans’ behavior in the Pickering and Chase affairs hardly stands out as one of Congress’s finest hours. “It was all pretty disreputable,” as David Currie writes of the Pickering impeachment.<sup>202</sup> In retrospect, it may be that these impeachment episodes were one of the developments that contributed over time to the currently prevailing assumption that impeachment is *the* method of removing judges. Whatever the case, drawing far-reaching lessons from this bitter episode is a mistake. Congress’s actions from 1803 to 1805 do nothing to demonstrate that the original Constitution made impeachment the exclusive method of effecting such removal.

Even if these episodes contributed to the eventual conflation of impeachment and good behavior, that conflation did not occur immediately. On the contrary, state constitutions that expressly referenced determining misbehavior in courts of law remained in place for years. The Maryland

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201. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

202. Currie, *supra* note 190, at 244; *see also* ELLIS, *supra* note 196, at 225-26 (“[T]he trial [of Chase] in the Senate had a distinctly partisan flavor that struck several observers as a Republican version of the Sedition Act.”).

Constitution of 1776 remained in place until 1851.<sup>203</sup> The Pennsylvania Constitution of 1790 provided that justices of the peace who served during good behavior could be removed upon a conviction of misbehavior.<sup>204</sup> The Georgia Constitution of 1798 did the same.<sup>205</sup>

The idea that good-behavior tenure was defeasible by a finding of misbehavior also survived in the courts. We previously noted two court cases about private parties who had good-behavior tenure.<sup>206</sup> There are many more cases addressing whether public employees had forfeited their tenure via alleged misbehaviors. Consider *Page v. Hardin*, a Kentucky case from 1848.<sup>207</sup> The state supreme court concluded that because the Secretary of State served during good behavior, the Secretary “must be convicted of misbehavior in office” prior to being removed.<sup>208</sup> In *Commonwealth ex rel. Bowman v. Slifer*, the Supreme Court of Pennsylvania noted that even though the Governor had authority to judge the misbehavior of an officer and remove him, the Governor would first have to give notice and conduct a hearing in which the officer could defend himself.<sup>209</sup> There are similar cases involving clerks of the court,<sup>210</sup> sheriffs,<sup>211</sup> and jailers.<sup>212</sup> Not surprisingly, a late-nineteenth-century treatise on “Public Offices and Officers” noted that when an officer has good-behavior tenure, “it is now clearly established . . . that the power of removal can not . . . be exercised” without a trial-like proceeding.<sup>213</sup>

In sum, the modern orthodoxy that casually conflates impeachment and good-behavior tenure has a number of serious flaws. First, this conflation flies

203. Amendments to the Constitution of 1776 explicitly recodified the principle that good behavior could be judged in a court of law. MD. CONST. of 1776, art. IX, § 1 (1805); *id.* art. V.

204. PA. CONST. of 1790, art. V, § 10.

205. GA. CONST. of 1798, art. III, § 5.

206. *See supra* text accompanying notes 145-148.

207. 47 Ky. (8 B. Mon.) 648 (1848).

208. *Id.* at 672.

209. 25 Pa. (1 Casey) 23, 28 (1855).

210. *See, e.g.,* Ledbetter v. State, 10 Ala. 241 (1846); Commonwealth v. Rodes, 45 Ky. (6 B. Mon.) 171 (1845).

211. *See* Catching v. Davis, 42 Ky. (3 B. Mon.) 61 (1842).

212. *See* Gorham v. Luckett, 45 Ky. (6 B. Mon.) 146 (1845).

213. FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 287 & n.3 (Chicago, Callaghan & Co. 1890) (citing cases); *see also* 3 JOHN BOUVIER, BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2401 (1914) (same). Our reading of these materials suggests that “for cause” removal provisions are but a species of good-behavior tenure. While many perhaps associate the latter with constitutions and the former with statutes, there is no reason for this classification.

in the face of the text because the Constitution never makes impeachment the sole means of removal, either for judges or for anyone else. The conflation also implausibly equates two standards—good behavior and high crimes and misdemeanors—that have different scopes and that never had been equated before. The impeachment-only position is also incongruent with constitutional structure. Each Article lays out its officers' tenures, tenures that are generally independent of impeachment. The impeachment provisions provide an additional means of terminating tenure.

Lastly and perhaps most importantly, the impeachment reading of good-behavior tenure flies in the face of history. Nothing preceding the Constitution suggested that "good Behaviour" tenure had come to mean removable only via impeachment. There was no seminal American event that would have produced such a change in meaning in one fell swoop. Nor was there in the period preceding the Constitution's creation some gradual movement toward this understanding. To the contrary, state constitutions clearly distinguished good-behavior tenure from impeachment. And the Continental Congress adopted a statute in 1787 that did not equate the two. While we agree that some believed that impeachment could be used as one means of judging misbehavior, that is a far cry from the extraordinary notion that impeachment was generally regarded as the sole means of determining misbehavior. Such a view could not have been prevalent because even after the Constitution's ratification, good-behavior tenure continued to be understood as a tenure terminable upon a judicial finding of misbehavior.

### III. JUDGING MISBEHAVIOR IN THE ORDINARY COURTS

How then, other than by impeachment, can a federal judge be removed from office? Using its Necessary and Proper authority, Congress may provide means for determining violations of good behavior. From the Constitution's beginning, Congress has set the terms and features of the offices it creates. Hence, using the Necessary and Proper Clause, Congress may set the salary, jurisdiction, and tenure of all federal judges, just as it may for executive officers.<sup>214</sup> Because the Constitution contains restraints as to judicial salary and tenure, whatever Congress enacts must not run afoul of those restrictions. Hence Congress cannot reduce a judge's salary. Likewise, Congress cannot provide a fixed term for federal judges, for federal judges must enjoy tenure during good behavior. But Congress can provide a judicial means of adjudicating whether a judge has misbehaved, because such a process in no

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214. See Prakash, *supra* note 185.

way violates or negates good-behavior tenure. To the contrary, as we have demonstrated, the existence of a judicial process as a means of policing grants of good behavior is wholly consistent with the grant of good-behavior tenure.

As we have argued, good-behavior tenure grants certain meaningful protections for judges. Any proceeding for judging misbehavior must have certain familiar features. There must be a trial, in which the burden of proving misbehavior rests on the moving party. The tenured individual must have the opportunity to call witnesses, testify on her own behalf, and present her side of the story. These features are required because, historically, they were the requisite features of a hearing regarding misbehavior.<sup>215</sup> If Congress passed a statute that permitted the removal of federal judges without these safeguards, that statute would be improper (within the meaning of the Necessary and Proper Clause) because it would be at odds with the express grant of good-behavior tenure.

What kinds of procedures are constitutionally permissible for forfeiture actions? Below we discuss three possibilities. Each ensures that prior to any forfeiture federal judges receive a fair and adequate judicial determination of whether they have misbehaved. Other constitutional constraints on the conduct of the trial presumably apply to the adjudication of misbehavior, but we won't say much about them.<sup>216</sup> We conclude with a discussion of Congress's role in defining good behavior and its converse.

#### *A. Removal as a Consequence of a Criminal Conviction*

Fully consistent with the grant of good-behavior tenure, judges might be removed from office upon a conviction of some offense. For instance, Congress might provide that a judge convicted of receiving a bribe would, as a consequence of conviction, not only be fined and jailed, but automatically removed from office as well. A bribe-taking judge clearly has misbehaved and there is no reason for a separate forfeiture proceeding to reconsider issues determined in a criminal trial.

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<sup>215</sup>. While Congress might choose to grant additional safeguards for judging misbehavior, any procedures Congress chooses to authorize must at least satisfy the minimal requirements.

<sup>216</sup>. For instance, it might well be that judges would have a right to a jury in all misbehavior adjudications, whether civil or criminal. *See* U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”); *see also* DEL. CONST. of 1776, art. 23.

Such statutes would hardly be revolutionary. Blackstone discussed English statutes that provided that judges convicted of certain offenses would be removed from office (in addition to being fined and jailed).<sup>217</sup> The 1790 Crimes Act disqualified from office federal judges who had been convicted of receiving a bribe.<sup>218</sup>

Such statutes make eminent sense. There is no reason for a separate forfeiture proceeding when a court has already adjudged the officer guilty of some misbehavior. If a court may send a judge to jail, the court may likewise remove her from office when a legislature so provides by statute.

So long as the underlying offense encompasses misbehavior, there is no reason why Congress could not make removal automatic upon the conviction of a judge. As we have seen, the Constitution does not dictate that removals occur only via impeachment. Nor does it declare that good-behavior tenure shall be terminated only in impeachment proceedings. Given the Constitution's flexibility, Congress conceivably could make many offenses punishable by removal.

In this respect, the original meaning of good behavior has undoubted practical benefits. So understood, the Constitution does not command that jailed felons must continue to receive a salary and other perks of office until such time as Congress conducts a costly and slow impeachment process. The example of judge-cum-inmate Walter Nixon was an embarrassment.<sup>219</sup> Congress can prevent such embarrassments and make removal an automatic consequence of misbehavior.

### *B. Civil Forfeiture of an Office*

In England, the Crown had a right to police its grants of good-behavior tenure. It granted power of various sorts subject to conditions (such as good behavior) and it had a right to enforce those conditions through the writ of

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217. See *supra* notes 111-113 and accompanying text.

218. See *supra* note 186 and accompanying text. We add that several provisions of the Crimes Act imposed the death penalty. As compared to imprisonment, the death penalty certainly terminated an officer's time in office. Judges found guilty of such offenses and executed obviously would have been removed from office without an impeachment process. This poses no problem for our theory because judges convicted of a capital offense had misbehaved. Those who believe that the only means of removing judges is impeachment must find an unwritten exception in these provisions that favored federal judges.

219. Judge Walter Nixon was convicted of bribery but continued to receive his salary while in prison until he was ultimately impeached and convicted. The facts are recounted in *Nixon v. United States*, 506 U.S. 224 (1993) (rejecting Nixon's challenge to the Senate proceedings in which he was convicted).

*scire facias*. This raises the natural question of whether the President has a constitutional right or power to play the same role vis-à-vis federal judges.

We doubt the President has any such power. When it comes to the judicial power, our Constitution has a markedly different structure. Blackstone maintained that the people delegated their judicial power to the Crown.<sup>220</sup> At one time the Crown actually decided cases, but gradually it was barred from exercising the judicial power. Instead, the Crown came to be regarded as the font of justice that would distribute the judicial power to the courts, which would then exercise it. Given this context, it made sense to suppose that the intermediate source of the judicial authority—the Crown—was empowered to police the supposed misbehavior of those who actually wielded the judicial power. In contrast, our Constitution never grants the President any judicial power. The Constitution directly grants such power to the courts, and the President is but a conveyer of that power. He may nominate and, with the Senate's advice and consent, appoint judges, but he does not grant them any of *his* constitutional power. That being the case, he lacks a constitutional right to police their alleged misbehaviors.

Nonetheless, Congress might grant the Chief Executive the authority to police grants of good-behavior tenure. By statute, Congress could empower the President to bring forfeiture actions in court to determine whether a judge had forfeited her office by engaging in misbehavior. Acting on behalf of the federal government, the President and his attorneys could execute this statute and try to prove that some judge had misbehaved. Of course, a federal judge would be free to argue that the executive had failed to prove misbehavior.

Alternatively, Congress might create a statutory cause of action for private citizens. Those with standing could use this cause of action to adjudicate whether a judge should be removed because of misbehavior. In England, the Crown was obligated (presumably by custom) to lend its sanction to forfeiture cases when a private citizen complained of misbehavior.<sup>221</sup> Congress might accomplish a similar result by granting a cause of action to those with standing to pursue alleged misbehaviors.<sup>222</sup>

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220. 1 WILLIAM BLACKSTONE, COMMENTARIES \*257, \*261.

221. See 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 416 (London, Worrall 3d ed. 1768).

222. The courts have in a few instances recognized private rights of action directly under the Constitution. In such actions, aggrieved parties can sue to obtain a remedy for a violation of a constitutional right even though Congress has not passed legislation authorizing that remedy. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (permitting a private right of action under the Fourth Amendment). We doubt that these decisions are directly relevant to the subject of this Article; a judge who

### C. Judicial Disciplinary Proceedings

As others have argued, the Constitution enables Congress to grant judges the ability to remove their fellow judges in disciplinary proceedings. Current law states that while judges can discipline their comrades on the bench, they cannot order their complete removal from the bench.<sup>223</sup> This provision certainly poses no constitutional problems for our claims. While the Constitution permits the removal of misbehaving judges via means other than impeachment, nothing in the Constitution affirmatively requires the removal of misbehaving judges.

At the same time, we must question why, under the orthodox view of judicial removal, it is possible for Congress to authorize judicial councils to “discipline” their colleagues by, among other measures, temporarily suspending them from hearing and deciding cases.<sup>224</sup> Should members of a judicial council believe that there is merit to a complaint filed against one of their colleagues, they may order “on a temporary basis for a time certain, [that] no further cases be assigned to the judge whose conduct is the subject of a complaint.”<sup>225</sup> Acceptance of such disciplinary measures seriously undermines the claim that impeachment is the only means of removing judges. More ominously, if we believe that good-behavior tenure was meant to further the interests of litigants, the ability to suspend a federal judge from deciding cases strikes at the heart of the commitment to judicial independence that was the reason for good-behavior tenure.<sup>226</sup>

A bigger affront to the impeachment-only view is Congress’s decision to automatically and indefinitely suspend any judge from her duties whenever the judge has been convicted of a state or federal felony.<sup>227</sup> Even if a judge so disabled may continue to have a title and salary, such “discipline” seems close

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misbehaves has violated a condition of tenure but seemingly has not actually violated the constitutional rights of particular individuals. However, whether some remedy for breaches of “good Behaviour” analogous to *Bivens*-type actions could develop, and if so who could sue for such a remedy, are questions that go beyond the scope of this Article.

223. 28 U.S.C. § 354(a)(3)(A) (Supp. 2006) (“Under no circumstances may the judicial council order removal from office of any [Article III] judge appointed to hold office during good behavior.”).

224. *See id.* § 354(a)(2)(A).

225. *Id.*

226. As we suggested *supra* note 67, we think that a judicial office consists of the right to receive a salary and the right to exercise judicial power.

227. 28 U.S.C. § 364(1) (“The judge [convicted of a felony] shall not hear or decide cases unless the judicial council of the circuit . . . determines otherwise.”).

to a de facto removal from the judicial *office* in the most essential sense. Though the judicial council of the judge's circuit may lift the indefinite suspension, there is no obligation that it review the suspension periodically. Should the House and Senate never impeach and convict and should the judicial council never lift the suspension, a judge's suspension could last for life.

Congressional statutes permitting the temporary and indefinite suspension of Article III judges stand as embarrassing and unjustifiable exceptions to the widely held conventional view that conflates impeachment and good-behavior tenure. Rather than treating these statutes as uncomfortable exceptions created by politicians as a means of rationalizing an outdated Constitution, we can legitimate them.

As we have argued, so long as misbehavior is proved in a judicial proceeding, judges with good-behavior tenure have received all the protections of good-behavior tenure. If Article III and the Bill of Rights (such as the Seventh Amendment) permit judges to discipline other judges in a host of ways based on complaints filed with their courts, it should be equally permissible for judges to remove their comrades on the basis of ethics complaints involving misbehavior. So long as the judge receives the procedural protections required by good-behavior tenure (a trial and opportunity to present evidence and witnesses) and so long as there is no violation of the Constitution's structural protections, she has no cause for complaint.<sup>228</sup>

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228. At this point, some might object that even if these three procedures respect the grant of good behavior, they somehow violate other constitutional constraints, like the case or controversy requirement and the separation of powers. Some might say that consistent with the Constitution, neither the President nor private citizens should be able to go to court and seek the ouster of a federal judge. First, it violates the separation of powers to allow the Chief Executive to oust judges. After all, the grant of good-behavior tenure was meant to make judges independent of the Chief Executive. Second, some may claim that standing doctrine bars private parties from seeking the ouster of a federal judge.

This is not the place to provide a complete response to such possible claims. Nonetheless a few comments seem appropriate. While it is true that good-behavior tenure was meant to protect judges from arbitrary executive dismissals, the schemes discussed above do not make judges subject to removal at executive pleasure. The President could not remove judges; only courts could do that. And such judicial removals could only occur after a fair trial on the question of whether judges had misbehaved. Moreover, Presidents already have the awful power to seek the death penalty and jail time for federal judges. To our minds, it should hardly matter that Presidents might also seek the ouster of misbehaving judges. Reading the Constitution's system of separated powers as if it barred the President from seeking the ouster of misbehaving federal judges while permitting him to seek the imposition of far more serious punishments makes little sense.

The objection against citizens seeking the removal of misbehaving federal judges fares no better. When seeking civil forfeiture of a judge's good-behavior tenure, citizens must

### D. Defining Misbehavior

We have argued that Congress, using its “necessary and proper” powers, could enact legislation providing for judicial proceedings to remove judges who have violated Article III’s requirement of “good Behaviour.” Does it follow that Congress could define what good behavior, and hence misbehavior, consists of? We have no doubt that Congress may express its views about what constitutes misbehavior, say by listing offenses that it believed would be sufficient to oust a federal judge.<sup>229</sup> In the Crimes Act of 1790, Congress effectively did just this. Subject to some exceptions, such as the executive’s duty to enforce judicial judgments, every branch may decide for itself the meaning of the Constitution and act on its own reading. But, of course, the judiciary would be free to disagree with Congress’s reading of “good Behaviour.” Should the judiciary agree to review the constitutionality of legislation specifying what constituted misbehavior,<sup>230</sup> we see nothing in the history of good-behavior tenure suggesting that the judiciary ought to defer to Congress’s judgment. For example, if Congress were to enact a statute providing for removal of judges found guilty of parking violations, a court could find this statute invalid as a departure from the constitutional assurance of judicial tenure during good behavior. In so doing, the court would have concluded that such parking violations did not constitute misbehavior. In

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have standing to bring their suit. That is, they must have a concrete injury in fact, fairly traceable to the judge’s action, and their injury must be redressed by the judge’s ouster. A litigant before a bribe-taking judge would clearly meet the standing requirement. A litigant before a judge who utterly shirked her judicial duties would likewise meet the standing test.

229. Alternatively, Congress could, if it chose, enact a statute providing for removal of a judge for a breach of “good Behaviour” without specifying what sort of conduct would warrant such removal. In that case, it would fall to an implementing court to give more specific content to the standard. Presumably such a statute would be read as incorporating the constitutional standard and the implementing court would consider practice and doctrine from England, the colonies, and the states.
230. We can see reasons why the judiciary might not wish to adjudicate challenges to congressional views about what constitutes good behavior or its converse. In particular, the judiciary might be reluctant to second-guess a congressional attempt to police the judiciary given that it might seem unseemly for the courts to so openly favor their own interests. *Cf.* *Nixon v. United States*, 506 U.S. 224 (1993) (holding that questions about a judge’s impeachment trial are nonjusticiable based in part on the idea that it would be counterintuitive to have judicial review of a check on judicial power). At the same time, the Constitution never textually commits to Congress the power to define misbehavior. Congress just acts pursuant to the Necessary and Proper Clause when it provides that certain actions constitute misbehavior. Such legislation has always been subject to judicial review. More generally, the courts traditionally determined what constituted misbehavior and whether someone had actually misbehaved.

short, Congress's ability to voice its opinion about what counts as good behavior is no different from its ability to voice its opinion about any of its other constitutional powers. In establishing the mechanisms and institutions of government—the federal judiciary, for example—Congress often reaches interpretive conclusions on controversial matters about which the Constitution speaks in generalities, or not at all. Whenever Congress enacts a statute, we hope that the statute reflects Congress's understanding of the Constitution. But Congress does not have the only word; America and its courts long ago determined that “it is emphatically the province and duty of the judicial department to say what the law is”<sup>231</sup>—including the law of the Constitution. Congress's undoubted power to express its view about what constitutes judicial misbehavior is subject to the standard, constitutionally entrenched principle of judicial review. This leaves unanswered the more fundamental question: how should Congress and the courts decide what constitutes misbehavior? The standard originalist answer is that the Constitution's meaning should be discerned by reference to the Constitution's original meaning. For good behavior, one would examine statutes and case law from England, the colonies, and the states and draw from these materials evidence of what constituted misbehavior. This inquiry would no doubt be difficult, but no more difficult than many of the questions that plague constitutional interpretation generally.

## CONCLUSION

Over time, the two provisions that the Constitution presented as independent—impeachment and “good Behaviour” tenure—have come to be conflated in the general understanding. We have not offered an explanation of exactly when and how the original meaning of the Constitution came to be altered in this way—our goal was to show that they originally were two distinct concepts. But it seems clear that at least one factor that led to this reading was the impeachment-only argument that suggested that because the Constitution did not explicitly provide for any other procedure for removing judges, impeachment must be the only method of removal.

The impeachment-only argument has a superficial plausibility, especially because it resonates with the sensible intuition that the Constitution is a document of enumerated powers. Yet the impeachment-only argument is the same one that was raised, debated, and decisively rejected in the First Congress with respect to executive officials. Nonetheless, it is perhaps understandable that the untenability of the argument did not immediately register with respect

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231. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

to judges. After all, the Constitution said nothing about the tenure of executive officials other than the President and Vice President, so in creating executive offices, Congress was forced to think about how an official's tenure in office would come to an end. So it was natural that the impeachment-only interpretation would be raised and considered—and rejected.

There was no similar necessity to provide for termination of tenure for judges because the Constitution itself gave them the defeasible life tenure associated with the term “good Behaviour.” So there was no occasion for the impeachment-only view to be carefully considered—or for its superficial plausibility to be rejected—in the context of federal judges. Even had the question been considered, moreover, the intuitive response is likely to be different for judges than for executive officials. The initial plausibility of the impeachment-only argument is immediately and decisively refuted by the plain fact that it is patently implausible to imagine that a marshal or postmaster or director of the customs house should be appointed for life, subject only to removal by impeachment. On the other hand, it is not at all implausible that a federal judge would enjoy this sort of tenure; indeed, the normal assumption is that most judges *will* effectively serve for life, or at least until they choose to resign.

In short, it is not hard to imagine how the impeachment-only argument might pass without serious scrutiny with respect to judges, and how it would, in any case, appear more attractive than the same argument seems with respect to many other officials. The question we have asked in this Article, however, is whether there is any basis *in the original Constitution* for accepting the argument for judicial officers. And the reality is that there is no more support for the argument—either in the constitutional text or in the long history that lay behind that text—for judges than for executive officials generally.

As discussed in Part I, the Constitution's impeachment provisions refer to “civil Officers” as a class, never distinguishing between judicial and executive officials. Thus Article II, Section 4 provides no basis for concluding that impeachment is one removal method among many for executive officials but the exclusive method for judicial officers. Moreover, the Constitution in no way links the grant of good behavior to impeachment. The impeachment-only argument imagines a connection that is not there because it hastily reaches a conclusion—that impeachment is the sole means of removing judges—and then seeks to read the grant of good-behavior tenure as if that grant confirmed the preconceived conclusion. This is a clause-bound reading masquerading as a holistic interpretation and is no way to read a constitution.

As discussed in Part II, the history of “good Behaviour” tenure provides no support for—indeed, it powerfully contradicts—the suggestion that impeachment was an exclusive means of determining “good Behaviour.” Over

and over again, evidence from the seventeenth and eighteenth centuries demonstrates that good-behavior tenure was terminable in the ordinary courts. English courts, colonial statutes, state constitutions, American patriots, and Framers of the Constitution understood that courts would judge whether those with good-behavior tenure had misbehaved. Though an understandable misreading, the impeachment-only interpretation is an imposition upon the Constitution's text and original meaning.

The impeachment-only argument, it seems to us, reflects an unwillingness to come to grips with what it means to grant tenure during good behavior. The tendency has been to conclude that, based on a preference for judicial independence and on a superficial reading of the impeachment provisions, impeachment must be the only means of removing judges. In this mindset, the grant of good-behavior tenure is quickly read to merely echo this conclusion reached by other means. This treats the grant of good behavior as a redundant, almost ornamental provision. Our research establishes the error of this mindset, a mindset that we once shared.

There of course remains the overarching question of whether it is too late to embrace the original meaning of good behavior. It may well be that the country has collectively decided that impeachment should be the only means of removing federal judges, notwithstanding the best reading of the original Constitution. But many who hold this position likely reach it not through an independent reading and analysis of the Constitution, but rather because for quite a long time, other people have unreflectively accepted and passed on a received wisdom that has little or nothing in the Constitution's text, structure, and history to support it. There may be a good argument for concluding that uninformed "practice" precludes removing judges via means other than impeachment. But that argument has not been and will not be made so long as many continue to cling to the misguided view that the Constitution itself conflates good-behavior tenure with removal only by impeachment.