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Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism

INTRODUCTION

The so-called Good Behavior Clause of Article III¹ could well be the most mysterious provision in the United States Constitution—and that, of course, is really saying something. While constitutional text was on occasion chosen for the very purpose of avoiding the resolution of, rather than resolving, disputes,² and while ambiguity permeates many of the most famed and controversial provisions,³ rarely are a provision's purpose, scope, and methodology so totally nonexistent to the naked eye.

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1. U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”).
2. A number of such provisions appear in the judicial article concerning the extent and nature of congressional power over federal court jurisdiction. *See, e.g., id.* cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *id.* § 2, cl. 2 (“[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”). For analysis of these provisions, see MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7-52 (2d ed. 1990).
3. *See, e.g.,* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

It is simply unclear, on the face of it, what the provision is all about. One can search the text in vain for any indication of *how* the concept of “good Behaviour” is to be defined, *who* gets to make that determination, and *what* the method for implementation and enforcement of this provision actually is. Moreover, the text provides absolutely no basis on which to attempt to harmonize the Good Behavior Clause with the Constitution’s other provisions pertaining to the independence or control of the federal judiciary. Perhaps for these reasons, both courts and Congress have largely ignored the provision, choosing instead to focus the political control of the judiciary on the constitutionally recognized congressional powers to regulate federal jurisdiction⁴ and to impeach federal officers (including federal judges).⁵

Scholars, too, have focused on the Good Behavior Clause only rarely.⁶ For these reasons Professors Saikrishna Prakash and Steven Smith, both noted and respected constitutional scholars, are to be applauded for finally assuming this scholarly challenge and responding to it with so controversial and innovative a solution. In their article, *How To Remove a Federal Judge*,⁷ these scholars argue that the Good Behavior Clause is constitutionally capable of playing a far greater role in policing federal judges than it has played up to now. They contend that the traditionally accepted view that impeachment provides the exclusive constitutionally recognized means of removing federal judges from office is “unpersuasive and ahistorical.”⁸ The “better reading,” they suggest, is that under the Good Behavior Clause “officers with good-behavior tenure forfeited their offices upon a finding of misbehavior in the ordinary courts.”⁹ They see the Clause as providing a means for the political branches to regulate

4. See *id.* art. III, §§ 1, 2.

5. See *id.* 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.”); see also *id.* art. I, § 2, cl. 5 (giving the House of Representatives “the sole Power of Impeachment”); *id.* § 3, cl. 6 (giving the Senate the power to try impeachments); *Nixon v. United States*, 506 U.S. 224 (1993).

6. There are, however, certain exceptions. Several scholars have, in fact, commented on the relevance of the Good Behavior Clause to the control of the federal judiciary. See, e.g., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 65-70 (1989); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 35-42 (1998); Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795, 797-802 (1998).

7. Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

8. *Id.* at 75.

9. *Id.* at 77.

the federal judiciary, above and beyond the impeachment power recognized in Article II, Section 4. Moreover, they argue, the standard of improper judicial conduct that justifies invocation of the Good Behavior Clause—while concededly quite murky—must stand at a point that is distinctly lower than that set by the “high Crimes and Misdemeanors” language of the Impeachment Clause.¹⁰ The upshot of acceptance of their proposal would be the recognition of a potentially dramatic expansion in the ability of the political branches to remove from office federal judges protected by the qualified life tenure and salary guarantees of Article III.¹¹

The Prakash-Smith article quite clearly represents the strongest possible compilation of arguments to support so sweeping and radical a doctrinal alteration in the constitutionally authorized practice for removing federal judges. Close analysis, however, reveals that their historical arguments by no means inexorably lead to the constitutional conclusion they reach. To the contrary, a detailed critical review of those arguments shows them to be counterintuitive, incomplete, or inconsistent with unambiguous historical evidence. Ultimately, Prakash and Smith fail to meet their burden of historical proof to show that those who drafted and ratified the Constitution intended, by use of the “good Behaviour” language, to incorporate wholesale the preconstitutional historical practice.

Far more problematic, however, is their deeper flaw: their failure to deal adequately with the broad—and troubling—theoretical implications of their suggested construction of the Good Behavior Clause for foundational notions of American constitutionalism. Because their examination of the “trees” of historical practice is so thorough and seemingly convincing,¹² it is all too easy to ignore the “forest”: the extremely problematic effect that their proposed interpretation would have on the vital role that federal judicial independence necessarily plays in preserving the foundations of our political and constitutional structure. Put bluntly, by substantially expanding the ability of the political branches to remove, and therefore intimidate, members of the federal judiciary, the Prakash-Smith proposal seriously endangers the ability of the independent federal courts to police the constitutional excesses of the political branches and to protect individual rights from majoritarian incursion. By threatening the meaningful exercise of judicial review as a check on the majoritarian branches—and make no mistake, that is undoubtedly the result

10. *Id.* at 78 n.15.

11. See U.S. CONST. art. III, § 1.

12. *But see infra* Section I.B (challenging the implications drawn by Prakash and Smith from their historical analysis).

that the Prakash-Smith proposal would lead to¹³—their suggested construction of the Good Behavior Clause would dangerously upset the delicate balance of checks and balances the Framers so wisely developed.

As a textualist,¹⁴ I would be forced to accept their proposal were I convinced that it represented the only reasonable construction of the applicable constitutional text, regardless of how dangerous I believed it to be to the foundations of American constitutionalism. After all, as Henry Hart once asked, “Whose Constitution are you talking about—Utopia’s or ours?”¹⁵ But even Prakash and Smith readily concede that their approach is not the only reasonable construction of the text. To the contrary, they acknowledge that, as a purely textual matter, one might believe that the Good Behavior Clause can be read to be nothing more than a cross-reference to the standard for impeachment described in Article II, Section 4.¹⁶ So viewed, the language would be designed simply to prevent possible confusion and conflict between the otherwise unlimited judicial tenure dictated by Article III and the directive of Article II subjecting federal judges to removal from office through exercise of the impeachment power.¹⁷

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13. See *infra* Part II for an elaboration on the point.
 14. See Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 17-33 (1987). Prakash and Smith appear to equate textualism with originalism, and they express puzzlement that one could claim to be one without simultaneously being the other. Saikrishna Prakash & Steven D. Smith, *Reply: (Mis)Understanding Good-Behavior Tenure*, 116 YALE L.J. 159, 159 n.2 (2006). But surely there must exist *some* alternative between the straitjacket of an interpretative model restrained by a usually fruitless effort to ascertain the narrow understanding of a group of drafters some 200 years ago, on the one hand, and utter linguistic chaos, on the other. Language need not be devoid of any restraining impact on an interpreter for one to reject an arid, largely futile attempt to constrain words by some narrow and unchanging historical perspective.
 15. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectics*, 66 HARV. L. REV. 1362, 1372 (1953).
 16. See Prakash & Smith, *supra* note 7, at 79.
 17. See Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 692 (1999). In their reply to this Response, Prakash and Smith suggest that, absent the Good Behavior Clause, it would be impossible to determine what federal judicial tenure would be. Prakash & Smith, *supra* note 14, at 168. However, this ignores the hypothetical and contingent nature of the inquiry. It would be absurd to assume that if the drafters had not included the good-behavior language, they would not have inserted substitute language in its place providing for life tenure. In THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Clinton Rossiter ed., 1999), Hamilton emphasizes the importance of tenure protection as an essential guarantee of judicial independence. Moreover, in THE FEDERALIST NO. 79 (Alexander Hamilton), *supra*, at 440, Hamilton expressly refers to the extent to which “permanency in office” contributes to the independence of judges. Absent the good-behavior language, then, Article III would undoubtedly have provided for life tenure, subject to the subsequently included

When a textualist is faced with more than one linguistically plausible option, the text can of course no longer control the ultimate interpretive choice. Thus, in making that choice it is both necessary and appropriate for the interpreter to attempt to determine what effect each of the alternative constructions would have on both the textual framework of judicial independence and the role that judicial independence is properly deemed to play within the broader framework of American constitutional and political theory. This, I believe, Prakash and Smith have failed to do, or at least to do adequately.¹⁸ Instead, they have employed a form of “constitutional isolationism,” in which each provision is interpreted largely in a textual and political vacuum, without any meaningful examination of how the chosen interpretation fits within this more holistic constitutional structure.¹⁹

There are, then, two different levels on which to critically assess the Prakash-Smith interpretation of the Good Behavior Clause: narrowly, i.e., by examining the text and its history in an interpretive vacuum, considering only the words that appear within its four corners, and holistically, i.e., by construing Article III’s text as merely one element within a broader, organic whole. It is my view that their suggested interpretation of the good-behavior provision fails on both grounds. In Part I, I explain why their historical and textual arguments fail on the narrow level. In Part II, I explain that the Prakash-Smith construction of the Good Behavior Clause fails on the holistic level because it is inconsistent with the role that judicial independence must play for the system to operate effectively within the framework of American constitutional and political theory.

impeachment power. Phrased this way, however, confusion might arise because of the *prima facie* conflict between Article III’s provision of life tenure and Article II’s provision for impeachment. Given this perspective, my argument that the good-behavior language was included in Article III to prevent possible confusion between the otherwise unencumbered life tenure in Article III and the provision for impeachment in Article II makes perfect sense. In retrospect would it have been wiser, as Prakash and Smith suggest, Prakash & Smith, *supra* note 14, at 168-69, to have employed somewhat clearer language? Definitely. But similar criticisms could just as easily be made of numerous other constitutional provisions.

18. As explained in subsequent discussion, while Prakash and Smith do make some effort to consider the broader implications of their analysis for the role that judicial independence appropriately plays in the American constitutional system, it is, at best, a highly limited effort that fails to recognize or deal with the full implications of their proposal. *See infra* Part II.
19. *See infra* Part II.

I. CONSTITUTIONAL HISTORY AND THE GOOD BEHAVIOR CLAUSE

A. *The Prakash-Smith Argument*

Professors Prakash and Smith make an elegantly simple argument to support their position that the Good Behavior Clause provides a distinct means, above and beyond the impeachment power, by which the political branches may remove federal judges from office. They meticulously demonstrate that, under established preconstitutional practice (on both sides of the Atlantic), “good Behaviour” was a term of art, employed as a basis for removing a wide variety of both public and private officeholders from office through resort to the judicial process.²⁰ Apparently, this practice had no clear relationship to the wholly distinct process of impeachment. Thus, when the Framers inserted the term “good Behaviour” as the qualifying standard on the otherwise unlimited tenure of federal judges in Article III, it would be “ahistorical,”²¹ Prakash and Smith believe, to construe the “good Behaviour” language as simply a cross-reference to the “high Crimes and Misdemeanors” standard for impeachment set out in Article II, Section 4, to which federal judges are also subject.

While Prakash and Smith are certain that, as a historical matter, “good Behaviour” represented a distinct, self-contained means for removing officeholders above and beyond the impeachment power, they are far less certain “about what constituted misbehavior.”²² They do suggest—without a great deal of explanation—that the “‘good Behaviour’ provision . . . seems more general and less severe” in its standard for removal than does the “high Crimes and Misdemeanors” language of the Impeachment Clause.²³ In defining the “good Behaviour” standard in preconstitutional historical practice, they occasionally refer to “[t]hose who did not exhibit good behavior—i.e., those who misbehaved.”²⁴ This explication, however, is far from helpful. Although they acknowledge that what constitutes constitutionally recognized “misbehavior” under preconstitutional practice is “murky,” they point to Lord Coke’s description of “three grounds for forfeiture: abuse of office, nonuse of office, and refusal to exercise an office.”²⁵ But at no point do they describe

20. Prakash & Smith, *supra* note 7, at 92-109.

21. *Id.* at 75.

22. *Id.* at 75 n.8.

23. *Id.* at 86.

24. *Id.* at 90.

25. *Id.*

what, historically, counted as “abuse of office.” More importantly, they fail to explain how the historical understanding of “abuse of office” would translate into the nation’s modern political and constitutional structure. Could it today possibly apply to judicial interpretation of the Constitution in a manner found offensive, inaccurate, or politically unacceptable by members of Congress or the President? On this issue, preconstitutional historical practice could not possibly provide meaningful assistance, even if one were able to unearth it, because the inquiry would be anachronistic. The American version of strong judicial review, clearly contemplated by those who crafted the Constitution,²⁶ simply did not exist at that point in time, particularly in England, where, Prakash and Smith tell us, the concept of good-behavior tenure emerged.

Nor is Prakash and Smith’s examination of history, as detailed as it is, particularly helpful in explaining exactly how, under the American constitutional system, the Good Behavior Clause of Article III is to be implemented. To be sure, Prakash and Smith suggest that Congress may invoke its authority under the Necessary and Proper Clause of Article I²⁷ to enact statutes providing for judicial removal on grounds of misbehavior.²⁸ However, that clause is not a freestanding grant of power. Both by its express terms and venerable judicial doctrine,²⁹ that clause is purely catalytic and facilitative of other, preexisting powers. Prakash and Smith fail to tell us exactly which preexisting power of Congress or another branch of the federal government the statutes would facilitate.³⁰

Acceptance of the Prakash-Smith proposal would mean the following: “good Behaviour” provides a distinct method, above and beyond impeachment, for removing federal judges from office, at a standard of misbehavior somewhat lower than that required under impeachment. However, we know virtually nothing about how “good Behaviour” is to be

26. See THE FEDERALIST NO. 78 (Alexander Hamilton); see also *infra* note 70.

27. U.S. CONST. art. I, § 8, cl. 18 (granting Congress power to “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”).

28. Prakash & Smith, *supra* note 7, at 128–30.

29. See, e.g., *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819).

30. Neither the congressional power under Article I, Section 8, Clause 9, to create lower federal courts nor the Good Behavior Clause itself would seem to qualify, as the former provides no removal power while the latter provides no power at all to any branch of the federal government. While arguably the power to create courts logically implies the power to abolish them, removal of an individual judge while leaving the existing judicial structure unaffected would seem to constitute a far more sweeping extension of this congressional power.

defined, who gets to define it either generally or in the individual case, or from where Congress derives the constitutional authority to provide a statutory mechanism by which to enforce the Good Behavior Clause.

B. Constitutional History and Good Behavior Reconsidered

I have no basis on which to question the detailed preconstitutional historical description provided by Prakash and Smith concerning the use of the “good Behaviour” standard for both public and private officer removal.³¹ Even assuming the accuracy of their historical portrayal, however, there are a number of significant gaps or flaws in their attempted linkage of that history with modern constitutional interpretation of Article III’s Good Behavior Clause that may well render their historical inquiry of no modern relevance.

1. The Undefended Commitment to Originalism

In undertaking their painstaking preconstitutional historical analysis of the “good Behaviour” concept, Prakash and Smith proceed on the largely undefended premise that modern constitutional interpretation is appropriately controlled by some form of originalism.³² In other words, regardless of the outer reaches of constitutional text, modern normative analysis, or post-constitutional sociopolitical developments, modern constitutional interpretation is necessarily tied in the straitjacket of either original intent or original meaning.³³ However, this is by no means a universally accepted interpretive position, either by scholars³⁴ or jurists.³⁵ Indeed, originalism has

31. Prakash & Smith, *supra* note 7, at 92-109.

32. *Id.* at 77 n.12.

33. There are two dominant forms of originalism: original intent (i.e., the intent of those who drafted, framed, and/or ratified the document) and original meaning (i.e., the meaning generally given to the terms employed in the Constitution at the time of its ratification). The latter approach is the more recent of the two. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-29 (1999); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1134-48 (2003).

34. See, e.g., Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456-74 (1984); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

35. See Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) (“The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This Constitution*

played an almost nonexistent role in much modern constitutional interpretation. For example, the First Amendment's right of free speech, the Fifth and Fourteenth Amendments' Due Process Clauses' guarantee of procedural due process, and the Fourteenth Amendment's Equal Protection Clause have each been construed by the modern-day Supreme Court without any meaningful effort to ascertain either original intent or original meaning.³⁶ One may question, then, why, all of a sudden, in construing Article III's Good Behavior Clause the Supreme Court should be deemed bound by some archaic inquiry into historical practice or Framers' intent, regardless of a proper normative assessment of the clause's role in the American constitutional system.

Strong arguments may be mounted against the originalist perspective. An inquiry into original intent is problematic, simply because it is usually impossible to ascertain some generalized intent of the drafters, framers, and ratifiers of a provision. Moreover, even if such a determination were, in fact, possible, it is by no means clear how that generalized intent applies to specific applications, or how those responsible for the provision would view its reach in light of 200 years of doctrinal and social developments.³⁷ Finally, the words of the document, not some nebulous framers' intention, were ultimately ratified as law. Thus, the fact that the drafters of the Fourteenth Amendment's Equal Protection Clause may have assumed that separate-but-equal schools do not contravene the requirements of equal protection should not bind modern generations, when what they gave us was not a narrow, static understanding of the text, but a broad-based, boldly drafted constitutional concept, capable of normative growth and evolution.

The more recently developed original meaning school of constitutional interpretation suffers from some of the same problems as the original intent school, but includes also an additional difficulty. Instead of at least attempting to view the Constitution as a holistic, purposive document, as the original

does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.”).

36. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332-49 (1976) (developing a utilitarian calculus by which to measure procedural due process, without significant reference to historical practice or Framers' intent); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (construing the Equal Protection Clause to prohibit separate-but-equal school systems without relying upon either practice at the time of ratification or Framers' intent). In the area of the First Amendment's protection of free speech, even the most fervent judicial advocate of original meaning has conceded that this interpretive approach is of no help at all, at least in certain contexts. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (Scalia, J., concurring in part and concurring in the judgment).

37. See Bennett, *supra* note 34.

intent approach seeks to do, this school interprets individual words contained in constitutional text largely in a purposive vacuum, divorced from any effort to understand the document as a structural or contextual whole. As a result, from this interpretive perspective the Constitution is viewed as something akin to the Shakespearean texts that monkeys could type, were they allowed to type long enough. Eventually, all of the words of Shakespeare would be typed, but they would be merely random, unconnected words, divorced from any calculated relationship to the words that came before or after.

It is true that many highly respected scholars today share the hermeneutical perspective of original meaning adopted by Prakash and Smith. But many do not. This is surely neither the time nor place to rehearse all of the arguments for or against originalist interpretive theory. But at the very least, Prakash and Smith should have acknowledged that the persuasive force of their arguments in support of their suggested construction of the Good Behavior Clause relies entirely on acceptance of a preexisting commitment to originalist interpretive theory.

2. *The Implications of Historical Practice for Interpretation of Article III*

The argument that Prakash and Smith make in support of their construction of the Good Behavior Clause effectively underscores the fatal limitations of the narrow original meaning school. While their preconstitutional historical description of the use of “good Behaviour” may be assumed to be entirely accurate, they have failed to establish the requisite link between that preconstitutional practice and the Framers’ use of the term in Article III.

The history described so effectively by Prakash and Smith clearly demonstrates that the good-behavior requirement developed in preconstitutional English practice not as a means of *controlling* officeholders, but rather as a means of *protecting* their tenure. According to the Prakash-Smith historical assessment, absent insertion of the good-behavior requirement, the King would have been able to remove judges or other officeholders at his pleasure. With the requirement, however, the officeholder must have been found, through the judicial process, to have “misbehaved” before the King could remove him.³⁸ The good-behavior requirement developed, then, as a

38. See Prakash & Smith, *supra* note 7, at 92-102.

means of promoting *government* officeholder independence, not expanding the available means for control and removal of officeholders.³⁹

Yet both the purpose and impact of the Prakash-Smith approach to good behavior in Article III are to achieve the diametrically opposite result—namely, to undermine the independence of government officeholders. When the “good Behaviour” language is viewed as merely a cross-reference to the procedurally and substantively protective impeachment standard, it serves much the same purpose it was universally intended to serve (at least in the case of public officeholders) in its preconstitutional historical context—i.e., to protect the officeholder from unduly invasive and capricious treatment by those in power that might compromise performance of his task. Indeed, Hamilton’s relatively brief references to the Good Behavior Clause in *The Federalist No. 78* quite clearly demonstrate that, in Hamilton’s mind, its purpose was to protect federal judges from intimidation, not to serve as an additional means of controlling judicial behavior.⁴⁰

Did the Framers clearly contemplate that good behavior in Article III was to be a mirror image of the standard for impeachment in Article II? It appears likely that they failed to focus sufficiently on the issue to have any defined perspective on the point.⁴¹ But it is clear that they deemed an independent judiciary to be an essential part of the American constitutional system.⁴² It is equally clear that they viewed impeachment as the requisite safety valve by which to control the excesses of individual judges, as evidenced by Hamilton’s exclusive reliance on impeachment for this very purpose in *The Federalist Nos.*

39. This point concededly may not apply to historical extension of the good-behavior standard to *private* officeholders, but for purposes of judicial independence and separation-of-powers theory—which are all we are considering in the present context—it is absolutely true.

40. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 432 (“The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.”).

41. Prakash and Smith note that there is little specific reference to the “good Behaviour” language in the Convention debates. Prakash & Smith, *supra* note 7, at 118.

42. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 434 (“[The judiciary] is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”).

79 and 81.⁴³ Indeed, the only references in *The Federalist* to the Good Behavior Clause—and there are relatively few—are to the protective purposes the clause serves in preserving judicial independence. When *The Federalist* refers to the need to check the actions of federal judges, it refers explicitly to the impeachment power.⁴⁴

Consistent with the view that the impeachment power was intended to be the sole means of regulating judicial excess is the post-ratification history concerning the Jeffersonian efforts to impeach Federalist Supreme Court Justice Samuel Chase.⁴⁵ The Republican effort to satisfy the high standards for conviction in the Senate failed, following impeachment in the House of Representatives.⁴⁶ If, as Prakash and Smith assert, the Good Behavior Clause of Article III were generally understood both to provide an alternative means of judicial removal and to impose substantively and procedurally lower standards for judicial removal than did the Impeachment Clause, it is very puzzling why the Republicans, obviously hellbent on intimidating the largely Federalist judiciary, did not resort to that constitutional strategy. This is especially true once their impeachment strategy failed.⁴⁷

With Professor Steven Calabresi, Prakash has previously argued that post-ratification practice should be considered in assessing Framers' intent only as a

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43. *E.g.*, THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 17, at 452-53 (“[It may be inferred that] the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated is in reality a phantom. . . . [T]he inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.”).
44. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 17, at 442 (“The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is 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.”); *see also* THE FEDERALIST NO. 81 (Alexander Hamilton).
45. *See* David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 249-59 (1998).
46. *See* Prakash & Smith, *supra* note 7, at 123.
47. Prakash and Smith argue that Congress strategically chose to use the impeachment strategy in attempting to remove Justice Chase from office because reliance on the Good Behavior Clause would have required resort to the judicial process, which they sought to avoid. *Id.* at 125. However, they provide no evidence that any Republican strategist at the time actually employed such reasoning, or even considered the possibility. In any event, once the impeachment strategy failed, resort to the Good Behavior Clause strategy would have surely been better than nothing.

last resort.⁴⁸ But that argument makes sense only for the purpose of excluding *strategically self-serving* post-ratification practice—for example, the President’s assumption of additional power above and beyond that seemingly granted by the text of Article II. Such self-serving practices are necessarily colored by considerations of strategic political gain and therefore demonstrate little, if anything, about the Framers’ understanding. However, when the post-ratification practice is *strategically self-restrictive*, as was the case in the Republican failure to consider possible resort to the Good Behavior Clause in the effort to remove Justice Chase from office, the practice is appropriately deemed strongly probative of Framers’ understandings. This is especially true when—as in the case of the Chase impeachment—the practice occurs so temporally close to the Constitution’s drafting and ratification. Indeed, of greatest significance is that apparently at the time of the Chase impeachment no one even suggested resort to the Good Behavior Clause as an alternative means of judicial removal. Thus, while Prakash and Smith attempt to summarily dismiss the incident’s relevance,⁴⁹ the simple fact remains: if those who drafted and ratified the document understood that the Good Behavior Clause was intended to create an alternative means of judicial removal, there is no reason in the world why the Republicans would not have resorted to the good-behavior alternative once their impeachment efforts had failed.

Ultimately, the Prakash-Smith historical argument fails because of a simple lack of supporting evidence. While they seem to be capable of providing a historical basis on which to establish some abstract preconstitutional understanding of the good-behavior concept, Prakash and Smith are totally incapable of demonstrating widespread contemporaneous consensus as to how those words are to function when placed within the complex textual and political setting of the Constitution. Nor are they capable of establishing that either the Framers or the post-ratification Congresses understood that by inclusion of the “good Behaviour” language, Article III was intended to employ the Good Behavior Clause as a freestanding, less demanding means of removing federal judges. This is true even though there certainly were situations in which use of such a procedure would have been strategically very helpful. Prakash and Smith have therefore failed to satisfy even the most minimal burden of historical proof that logically rests on their shoulders.

48. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 *YALE L.J.* 541, 550-59 (1994).

49. Prakash & Smith, *supra* note 7, at 125-26.

II. GOOD BEHAVIOR AND AMERICAN CONSTITUTIONALISM

The gaps and flaws in the historical case made by Professors Prakash and Smith are, unfortunately, the least of the problems with their proposal. Whatever one thinks about the implications of the 1701 Act of Settlement,⁵⁰ the 1779 discussion in Parliament,⁵¹ the actions of the Pennsylvania Assembly in 1706,⁵² or any other preconstitutional practice on which they rely, there exist a number of fundamental elements of American political and constitutional theory that their proposal severely undermines. Thus, the historical use of the phrase “good Behaviour” prior to its insertion in Article III should make absolutely no difference because acceptance of the Prakash-Smith proposal contravenes the foundations of American constitutionalism. Put simply, meaningful judicial independence is central to American constitutionalism, and acceptance of the Prakash-Smith suggested interpretation of the Good Behavior Clause would gut any meaningful level of judicial independence.

A. *Defining American Constitutionalism*

The concept of American constitutionalism, as I use it, links two distinct, albeit intertwined, levels of theoretical analysis. One is appropriately described as “macro” and the other as “micro.” Both represent essential elements of American political and constitutional theory.

On the “macro” level, the phrase refers to the basic notion of limited government, confined not solely by the will of the majority or the decisions of the majoritarian branches of government, but also by a binding, written constitutional structure, subject to revision, repeal, or amendment only by an intentionally cumbersome supermajoritarian process. While this is surely not the only form of democratic government a society could select, there can be little question that, at some basic level, this is exactly the system we have chosen. First, we chose to have our system of government laid out in a written, rather than an unwritten, constitutive document. Second, by its express and unambiguous terms the document’s directives are framed as commands, rather than as suggestions, recommendations, or pleas. Third, also by its express terms, the document is subject to alteration only by a cumbersome

50. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, *discussed in Prakash & Smith, supra* note 7, at 97-100.

51. *See Prakash & Smith, supra* note 7, at 99-100.

52. *See id.* at 103.

supermajoritarian process.⁵³ Fourth, if the words contained within the four corners of the document were for some reason deemed insufficient, the unambiguous history of the framing of the document clearly demonstrates that the intent of those who drafted it was to provide for a limited form of government in which the growth of tyranny was to be virtually impossible and minority rights were to be protected from the whims of majorities.⁵⁴ The only way these goals could even conceivably be achieved was through imposition of a binding, written constitutional structure.

On a “micro” level, to maintain their legitimacy all democratic governments must adhere to some form of social contract with their individual constituents. The implicit understanding between them necessarily posits that government will not employ its power in an arbitrary, invidious, or irrational manner against the individuals to whom it is accountable. No truly representative government could appropriately treat its citizens in any other manner. Presumably for this reason, the Constitution (in its Bill of Rights) assures its citizens that government may not deprive them of life, liberty, or property without “due process of law.” As an outgrowth of this commitment to due process, the nation further committed itself to two fundamental postulates. First, our judicial system must comport not only with the demands of procedural justice, but also with “the appearance of justice.”⁵⁵ Second, no person can serve as a judge in her own case.⁵⁶ Without assuring that both of these demands are satisfied, our system cannot satisfy the dictates of due process that are imposed on us positively, by the terms of the Fifth and Fourteenth Amendments, and normatively, by the very notion of legitimate democratic government.

53. U.S. CONST. art. V.

54. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 468 (“This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”); *see also* THE FEDERALIST NOS. 47, 48, 51 (James Madison).

55. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

56. *Tumey v. Ohio*, 273 U.S. 510 (1927). The concept was famously invoked by Lord Coke in *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646 (K.B.).

B. The Role of Judicial Independence in Satisfying the Demands of American Constitutionalism

There can be little question that neither the macro nor the micro demands of American constitutionalism can be satisfied when the very majoritarian government body whose actions have been constitutionally challenged sits in final judgment of the legitimacy of those actions. No more satisfactory would be the vesting of the final power to resolve such disputes in the hands of those who are subject to the direct control of that government body. As a practical matter, such decisions would differ little from having decisions made by the government body itself. At the very least, one most definitely could not be assured of the *appearance* of justice under such circumstances, even if one were to somehow assume the presence of actual justice.

On the macro level, recognition of this basic precept goes back to Hamilton in *The Federalist No. 78*⁵⁷ and Chief Justice Marshall's famed opinion in *Marbury v. Madison*.⁵⁸ Both recognized that the practice of independent judicial review was necessary to prevent "giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that these limits may be passed at pleasure."⁵⁹ Acceptance of such an argument, Marshall concluded, "reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution."⁶⁰

On a micro level, the Supreme Court has long recognized that decisions involving the potential loss of life, liberty, or property do not comply with the requirements of procedural due process when the adjudicator stands to gain or lose financially on the basis of her decision.⁶¹ This is so even absent any concrete showing that the potential financial interest actually influenced the

57. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 435 ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.").

58. 5 U.S. (1 Cranch) 137 (1803).

59. *Id.* at 178.

60. *Id.*

61. The constitutional standard, according to the Court, is "possible temptation to the average man as a judge." *Tumey*, 273 U.S. at 532. For a detailed examination of this precept in Supreme Court doctrine, see Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 494-500 (1986).

adjudicator's decision.⁶² The obvious reason for so strict a constitutional standard is the reasonable apprehension that otherwise the adjudicator's decision would be deprived of all legitimacy in the eyes of the litigants. This concern is intensified when the government is on one side of the case and the adjudicator is potentially subject to its financial control depending on the outcome of the case. Presumably, similar concerns led the Framers to impose an unwavering prohibition on reductions in the salaries of Article III judges.⁶³

C. Implications of the Prakash-Smith Proposal for Judicial Independence

Absent acceptance of the Prakash-Smith proposed interpretation of the Good Behavior Clause, our structure of judicial independence looks roughly like this: once appointed and confirmed, Article III judges sit for life, and their salaries cannot be reduced; however, for the commission of "high Crimes and Misdemeanors," they (like other civil officers) can be subjected to a difficult two-House process of impeachment and removal.⁶⁴ The reference in Article III to judicial tenure during "good Behaviour," in the non-Prakash-Smith world, is construed as nothing more than a textual cross-reference to the impeachment power set out in Article II, Section 4. It was presumably included to avoid a confusing conflict between the seemingly unlimited tenure guaranteed in Article III and the simultaneous presence of the impeachment power.

When one adds the Prakash-Smith proposal to this framework, we are left with the following structure of judicial independence: much of the previously described scenario concerning the role of impeachment would continue to exist; however, some nebulous power in Congress to legislatively establish an as-yet undefined judicial procedure by which Article III federal judges could be removed, absent either the protections of the substantively demanding "high Crimes and Misdemeanors" standard or the procedurally demanding two-House supermajority process set out by Article I's impeachment method, would also be recognized. We would have no clear concept of what activity on the part of federal judges actually constitutes the absence of "good Behaviour,"

62. See Redish & Marshall, *supra* note 61, at 494-95.

63. U.S. CONST. art. III, § 1. See generally THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 17, at 440-41 (emphasizing the importance of Article III salary protections as a guarantee of judicial independence).

64. U.S. CONST. art. III, § 1; *id.* art. II, § 4. I make no reference here to the controversial issue of judicial discipline short of removal, though I have commented on that issue in the past. See Redish, *supra* note 17, at 701-04. On the general issue, see Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989).

other than that it is some form of “misbehavior”⁶⁵ or “abuse of office.”⁶⁶ Moreover, whether Congress would possess unreviewable power to define the concept, or whether Congress would be permitted only to set up the process with the enforcing courts construing it, remains unclear. Indeed, whether Congress’s legislatively established definition of the phrase would constitute an unreviewable “political question,” effectively excluding the courts from involvement in the definitional process, also remains unclear.⁶⁷

The impact of this proposal on the judicial independence necessary for the success of the two branches of American constitutionalism would be devastating. At present, federal judges know that they may be removed only by resort to an extremely difficult process and that as long as they stay in office their salaries cannot be reduced for any reason. That removal process exists simply as a safety valve in extreme cases.⁶⁸ Under the Prakash-Smith proposal, in contrast, judges would know that not only their financial interests,⁶⁹ but their very employment might well rest on the extent to which their decisions—interpreting both constitutional and sub-constitutional federal law—offend

65. Prakash & Smith, *supra* note 7, at 134.

66. *Id.* at 90-91; *see supra* notes 25-26 and accompanying text. Prakash and Smith, in their reply to this Response, assert that

as between impeachment by Congress and removal through a legal procedure for misbehavior, it is arguable that the latter procedure affords *more* protection to an accused judge. With impeachment, a judge can be removed by officials who act and are expected to act as politicians, under a standard that (as Gerald Ford famously remarked) can as a practical matter mean whatever Congress wants it to mean, and without any possibility of appeal.

Prakash & Smith, *supra* note 14, at 161 (footnote omitted). For many of the same reasons I oppose the Prakash-Smith proposal, however, I reject an unlimited construction of the constitutionally prescribed grounds for impeachment. *See* Redish, *supra* note 17, at 677, 682-86. In any event, what Prakash and Smith give us is *not* “good Behaviour” removal *rather than* removal by impeachment; it is both. My point, simply, is that judicial independence is threatened more when there exist two constitutionally recognized ways to remove federal judges, rather than one. This is especially true when the added method of removal employs a substantive standard that is avowedly lower than the existing method. *See* Prakash & Smith, *supra* note 7, at 78 n.15.

67. In *Nixon v. United States*, 506 U.S. 224 (1993), the Supreme Court found the basis for invoking the political question doctrine in the language of Article II, Section 4 vesting “the power to try” officials in the Senate. For an attack on this extension of the political question doctrine, *see* Redish, *supra* note 17, at 693-96. For support of this extension, *see* MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 118-38 (1996).

68. *See* THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 17, at 449-59.

69. *See* THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 17, at 440-43.

those in political power.⁷⁰ This would be true even if it were the enforcing judges, rather than Congress, who were to exercise final say on the meaning of “good Behaviour.” Judges appointed by the current administration could then use that power as a means of intimidating or removing judges appointed by prior administrations that held political viewpoints in conflict with those of the current administration.

Whether recognition of the political power under the Good Behavior Clause advocated by Prakash and Smith would, in fact, be employed retributively is, of course, largely beside the point. It is the impact of the fear that it might be so employed on federal judicial decision-making, and the fear on the part of the citizenry that the judges might be affected in their decision-making, that could so dramatically disrupt the notion of American constitutionalism and the social contract between democratic government and private citizens that underlies that concept.

CONCLUSION

In their article, Professors Prakash and Smith argue that while judicial independence is of course important, it cannot be unlimited.⁷¹ They therefore conclude that acceptance of their proposed dramatic expansion of the political control of federal judicial tenure is “the better” approach.⁷² What they fail to recognize, however, is that their proposal does not merely reduce judicial independence by some limited amount. Rather, it effectively guts it, by failing to place any outer limits on the reach of the club they are putting in the hands of the political branches, to be held over the heads of the members of the judicial branch.

More important is the fact that other than their contention that preconstitutional historical practice somehow inexorably leads to acceptance of their interpretation of the Good Behavior Clause, they never make any serious attempt to explain *why* their approach is “better” than the generally accepted

70. Prakash and Smith contend that “good Behaviour” could not properly be construed to include simple disagreement with judicial decisions. Prakash & Smith, *supra* note 14, at 162. However, because they fail to provide a coherently confined, historically grounded definition of the phrase in the first place, it is difficult to understand how they can reach this conclusion with any level of confidence. Moreover, because our form of strong judicial review, combined with a binding supermajoritarian written constitution, never existed when “good Behaviour” developed in preconstitutional times, it is impossible to know with any certainty how a judicial invalidation of legislative action deemed not to be reasonably grounded in text or original intent would be treated.

71. Prakash & Smith, *supra* note 7, at 79.

72. *Id.* at 76-77.

structure, under which federal judges have life tenure, subject in extreme cases only to the complex supermajoritarian process of impeachment. Presumably, to establish that their practice is “better,” they would need to demonstrate that there is some invidious judicial practice currently taking place that the impeachment process is incapable of remedying, or at least has failed to remedy to this point. But I am aware of no such practice. Has there been some recent epidemic of wild judicial misbehavior that the impeachment process has been ineffective in policing? Have the federal courts gone haywire in their interpretations of federal law? Have federal judges been taking lunch breaks that are too long? Have they been engaging in sit-in strikes? Unless I have missed some memo describing such judicial debauchery, I do not believe any of these events to have taken place.⁷³

I am able to come up with only two conceivable reasons to support the Prakash and Smith approach, one hermeneutical and the other politically normative. The first is the originalist argument that we must adopt their interpretation of good behavior for the simple reason that that is what the phrase meant at the time of drafting and ratification. But for reasons previously discussed,⁷⁴ their historical arguments are far less than persuasive. To the contrary, they are counterintuitive, given the broader theoretical context in which the “good Behaviour” concept was unambiguously employed by the Framers. In any event, such rigid originalism should play no role in modern constitutional interpretation. The second conceivable reason is that it is necessary to empower the political branches in this manner, in order to enable them to intimidate federal judges into confining their constitutional interpretations to those that comport with the political and constitutional views of the majoritarian branches themselves. On a theoretical level, such a rationale directly undermines the very purpose of inserting the constitutional protections of judicial independence in the first place. On a narrower political level, I would just say to anyone who supports such expanded political power over the federal judiciary: be careful what you wish for.

73. Prakash and Smith criticize me for “effectively reading [the Good Behavior Clause] out of the Constitution as an independent constraint on judges.” Prakash & Smith, *supra* note 14, at 163. But this criticism completely begs the question, for the entire subject of our debate is whether that clause is, in fact, “an independent constraint on judges” or instead merely a textual cross-reference to impeachment, as I argue. See *supra* note 16 and accompanying text.

74. See *supra* Subsection I.B.2.