

# Removing Federal Judges

James E. Pfander†

## INTRODUCTION

In a provocative recent article,<sup>1</sup> Professors Saikrishna Prakash and Steven D. Smith argue that Congress may provide for the removal of federal judges through means other than the impeachment-and-removal provisions of Articles I and II.<sup>2</sup> Building on the work of Professor Burke Shartel,<sup>3</sup> Prakash and Smith base their claim of impeachment nonexclusivity on the good behavior provisions of Article III.<sup>4</sup> Prakash and Smith suggest that, in addition to congressional impeachment and removal for “treason, bribery, or other high crimes and misdemeanors,” judges may be removed following a judicial determination that they have violated the “good behavior” provisions of their office under Article III. Although they do not dwell on the point,

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† Professor, Northwestern University School of Law. Thanks to Vicki Jackson, Bob Pushaw, Steve Smith, and Bill Van Alstyne for comments on an earlier draft. This Article is © 2007 by James E. Pfander.

<sup>1</sup> See Saikrishna Prakash and Steven D. Smith, *How to Remove a Federal Judge*, 116 Yale L J 72 (2006). But see Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 Yale L J 139 (2006) (responding to and criticizing the Prakash and Smith view).

<sup>2</sup> Article I assigns the “sole Power of Impeachment” to the House and provides the Senate with the “sole Power to try all Impeachments.” US Const Art I, § 2, cl 5 and Art I, § 3, cl 6. Article I also specifies that “[j]udgment 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.” Id Art I, § 3, cl 7. It further expressly preserves the possibility of further criminal sanctions for misconduct by indictment and trial in the criminal courts “according to Law.” Id. Article II specifies the officers subject to impeachment as including the “President, Vice President and all civil Officers of the United States” and specifies impeachable offenses as including “Treason, Bribery, or other high Crimes and Misdemeanors.” Id Art II, § 4. Commentators have long recognized that these interlocking provisions establish rules governing the impeachment of federal judges. See, for example, Federalist 79 (Hamilton), in *The Federalist* 531, 532–33 (Wesleyan 1961) (Jacob E. Cooke, ed) (justifying life tenure during good behavior as a guarantee of judicial independence and indicating that judges were to be removed for misbehavior only by impeachment); Joseph Story, 2 *Commentaries on the Constitution of the United States* § 790 at 258 (Hilliard, Gray 1833) (Fred B. Rothman & Co reprint ed 1991) (stating that judicial officers are civil officers within the meaning of Article II).

<sup>3</sup> See Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich L Rev 485, 723, 870 (1930) (suggesting changes in the organization and administration of the federal bench that could be accomplished without constitutional amendments).

<sup>4</sup> Article III provides that the “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” US Const Art III, § 1.

Prakash and Smith apparently believe that such a judicial removal proceeding would apply with equal force to the judges of the supreme and inferior federal courts.<sup>5</sup>

Prakash and Smith marshal some historical evidence, but their case ultimately fails to persuade. It suffers from three notable flaws. First, Prakash and Smith fail to recognize the degree to which the Act of Settlement of 1701 (with its provision for parliamentary removal by joint address) controlled the removal of superior court judges in England. Thus, while judicial proceedings remained a proper mode of testing the good behavior of inferior judicial officers (such as bailiffs, clerks, and recorders) throughout eighteenth century England, Prakash and Smith fail to cite any examples of cases in which these judicial modes were applied to remove superior court judges.<sup>6</sup> They also downplay the views of English legal commentators who have concluded that the traditional common law proceedings for the determination of good behavior were supplanted by the Act of Settlement's exclusive provision for removal on parliamentary address, at least for the judges of the superior courts whose commissions were governed by the Act rather than by common law.<sup>7</sup>

Second, Prakash and Smith fail to appreciate the degree to which the English model of parliamentary exclusivity was built into the practices of the newly independent states. Although they refer to the provisions, they fail to note that the new state constitutions gave the legislative assembly a role, often exclusive, in the removal of superior court judges. Prakash and Smith offer an unbalanced account of these provisions, either by arguing that they were not impeachment proceedings or by presuming (rather than showing) that they left intact other judicial tools for determining good behavior. But the point remains that, for the most part, state constitutions charged legislative assemblies with removing misbehaving superior court judges, and that they followed the Act of Settlement in failing to identify any alternative mode of removal. (The few constitutions in which a judicial mode of removal was expressly identified prove the rule that this outmoded approach required constitutional specification in order to remain viable.) Thus, Thomas Jefferson's *Proposed Constitution for Virginia*,<sup>8</sup> a model

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<sup>5</sup> See Prakash and Smith, 116 Yale L J at 78 & n 15 (cited in note 1) (discussing judicial proceedings to remove a sitting judge without drawing distinctions among different levels of the federal courts). See also *id* at 125 (discussing the decision of Congress under Thomas Jefferson not to pursue judicial removal proceedings after the failed impeachment of Supreme Court Justice Samuel Chase).

<sup>6</sup> See *id* at 101 (indicating that this failure "does not much matter").

<sup>7</sup> See notes 37–38 and accompanying text.

<sup>8</sup> Thomas Jefferson, *Proposed Constitution for Virginia* (June 1783), in Paul L. Ford, ed, 4 *The Works of Thomas Jefferson* 147 (G.P. Putnam's Sons 1904).

on which Prakash and Smith place much reliance, provided for the removal of superior court judges by legislative impeachment alone and authorized judicial proceedings only for the removal of inferior judicial officers.<sup>9</sup>

Third, Prakash and Smith fail to recognize that the federal Constitution adopted the dominant legislative mode for the removal of federal judges. The provisions of Articles I and II provide for the impeachment and removal of federal “civil” officers and plainly include federal judges among those subject to such removal.<sup>10</sup> At the same time, the Constitution provides no other mechanism for the removal of federal judges. To be sure, one can argue that impeachment and removal was not viewed as the exclusive mode for removing non-judicial federal civil officers. Thus, Article II envisions that the president may remove “inferior” and other executive branch officers from their positions; Article II and Article III similarly envision a role for the Supreme Court in appointing “inferior” officers and removing them from office. But it would be controversial, to say the least, to conclude that the Court’s supervisory power extends to the appointment and removal of the judges of inferior courts (even if proceedings to terminate their office were to respect their tenure during good behavior).<sup>11</sup> That presidential appointment and Senate confirmation of all federal judges has the sanction of two hundred years of experience surely counts for something. Just as the Constitution fails to provide any alternative mode for the removal of the two highest officials of the executive branch (the President and Vice President of the United States), it fails to set forth an alternative mode for the removal of federal judges.

Due to the combined effect of these misperceptions, much of the evidence that Prakash and Smith collect simply misses the point. Impeachment does not serve as the sole mechanism for the removal of many civil officers working in the executive and judicial branches of government.<sup>12</sup> But none of the officers in question enjoys a tenure in office fixed by the Constitution itself; only the President, Vice President, and Article III judges enjoy such a tenure and as to them, the argument for impeachment exclusivity remains, well, unimpeached.

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<sup>9</sup> See *id.* at 159–60 (describing impeachment proceedings for superior court judges and removal proceedings for judges of inferior courts).

<sup>10</sup> See note 2.

<sup>11</sup> See Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U Pa J Const L 341, 369–70 (2004) (expressing doubt that Article III judges can be treated as inferior officers within the appointment power of the Supreme Court as a court of law). But see James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 Colum L Rev 1515, 1603 n 374 (2001) (suggesting tentatively that the Court’s supervisory power may extend to the appointment of lower court judges), citing Shartel, 28 Mich L Rev at 882–83 (cited in note 3).

<sup>12</sup> See Prakash and Smith, 116 Yale L J at 80–83 (cited in note 1).

Similarly, the fact that judicial proceedings remained a viable mechanism to remove such inferior judicial officers as recorders, clerks, and bailiffs simply confirms that courts of law enjoyed the power to oversee the work of their subordinate officers, including those (if any) who held office during good behavior. One can only conclude that while it was possible for the newly independent states to draft constitutions reviving judicial proceedings to determine the good behavior of sitting judges, it took an explicit constitutional provision to do so. The Constitution of the United States contains no such rider.

This brief essay includes four parts. Part I shows that the framers of the Constitution consistently expressed the view that impeachment provided the only way to remove a federal judge. Part II connects this view to English and American constitutional history, tracing the evolution away from removal by judicial decree to removal by legislative action under the Act of Settlement. Part III demonstrates that the evolution away from judicial removal proceedings continued in North America, culminating in the adoption of constitutions for the newly independent states that rely broadly on legislative modes for the removal of superior court judges. Part IV shows that the Constitution itself follows the dominant state pattern, assigning the task of removing federal judges to the Senate after an impeachment trial and thereby implicitly but unavoidably foreclosing alternative methods of removal.

#### I. THE VIEWS OF THE FRAMERS: IMPEACHMENT-AND-REMOVAL EXCLUSIVITY

Perhaps because they set out to criticize the orthodox view, Prakash and Smith do not spend much time on the fact that the framers of the Constitution repeatedly and quite uniformly described impeachment and removal as the exclusive mode of judging judicial misbehavior. The most penetrating ratification-era discussion of the judicial Article took place in New York, where the anti-Federalist Brutus mounted a wide-ranging criticism of the structure of the proposed federal judicial department. Brutus contended that the federal judiciary would exercise powers of judicial review, that it would tend to expand the scope of its own jurisdiction through the interpretive process, and that it would tend to favor expansive interpretations of national power in cases of conflict with local authority. He also argued that the judges were to be made “totally independent, both of the people and the legislature, both with respect to their offices and salaries.”<sup>13</sup> As for removal, Brutus saw impeachment as the exclusive remedy. As he ex-

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<sup>13</sup> Brutus XI, NY J (Jan 21, 1788), reprinted in John P. Kaminski, et al, eds, 20 *The Documentary History of the Ratification of the Constitution* 680, 681 (Wisconsin Historical Society 2004).

plained, quoting the impeachment clause, federal judges can be displaced only upon “conviction of treason, bribery, and high crimes and misdemeanors.”<sup>14</sup> In later papers, Brutus reiterated this strong view of impeachment exclusivity.<sup>15</sup>

Responding in the guise of Publius, Alexander Hamilton had every incentive to downplay the degree of judicial independence contemplated by the Constitution and to point out any available alternative modes of removing judges from office. But in Federalist 79, Hamilton agreed with Brutus that judges would serve during good behavior and that impeachment provided the only mode of removal. After describing impeachment by the House and conviction and removal from office after trial in the Senate, Hamilton explained that “[t]his is the only provision on the point [of impeachment], 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>16</sup> One can strain to find ambiguities in this comment, as Prakash and Smith do, but Hamilton appears to have embraced impeachment-and-removal exclusivity as a feature of both the New York state constitution and the proposed federal Constitution.<sup>17</sup> He did not identify any alternative judicial mode by which judges were to be removed from their offices.<sup>18</sup>

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<sup>14</sup> Id.

<sup>15</sup> See, for example, Brutus XV, NY J (Mar 20, 1788), reprinted in Kaminski, et al, eds, 20 *The Documentary History of the Ratification of the Constitution* 871, 874 (cited in note 13).

<sup>16</sup> Federalist 79 (Hamilton), in *The Federalist* 531, 533 (cited in note 2).

<sup>17</sup> Prakash and Smith rightly note that the second clause of the sentence refers to the New York constitution but that hardly helps their case. See Prakash and Smith, 116 Yale L J at 119 n 178 (cited in note 1). For as we shall see, the federal Constitution essentially tracks the New York constitution in providing for tenure during good behavior and removal through a modified impeachment process that limits the sentence to removal from office and looks to criminal proceedings for any additional punishment. See note 50 and accompanying text. Hamilton’s avowal of impeachment exclusivity as to the New York constitution applies with equal force to the federal Constitution.

As for the first clause, one can surely contest Prakash and Smith’s contention that Hamilton was speaking of provisions in the federal Constitution rather than identifying impeachment as the only appropriate removal provision in an ideal constitution. But even on their crabbed reading, Hamilton’s claim of constitutional exclusivity would rule out alternative modes of removing supreme court judges not specified in the document.

<sup>18</sup> The omission was apparently deliberate. Immediately after discussing impeachment and removal, Hamilton noted the absence of any provision for removing a judge “on account of inability.” Federalist 79 (Hamilton), in *The Federalist* at 533 (cited in note 2). Rather than argue that judicial proceedings were available to test fitness for office under the good behavior standard, Hamilton argued that removal for inability could open the door to removal on the basis of “personal and party attachments and enmities.” Id. Such an argument treats impeachment and conviction as the exclusive mode of removing a judge from office and treats the constitutional specification of the standard for removal as impliedly foreclosing removal on the basis of other (omitted) considerations. By ruling out removal for inability, Hamilton’s argument confirms his view as to impeachment-and-removal exclusivity and leaves no room for the operation of the

Jurists and constitutional scholars from the Federalist and ante-bellum periods uniformly agreed with the conclusions of Brutus and Hamilton. For example, Justice James Wilson rejected the idea that the Constitution included an implicit removal provision for federal judges; his lectures on law treated conviction in the Senate as the only constitutional mode by which judges were subject to removal from office.<sup>19</sup> Similarly, in his treatise on the Constitution, William Rawle described the impeachment-and-removal power as the “only” mode of proceeding available to remove federal officers who hold a “commission granted during good behavior.”<sup>20</sup> James Kent arguably took the same position.<sup>21</sup> Joseph Story agreed, after a thorough exploration of the interplay between the impeachment-and-removal process and proceedings to impose criminal sanctions on misbehaving public officials.<sup>22</sup> While he recognized (as did Hamilton and others<sup>23</sup>) that public officials were subject to criminal sanctions for misconduct that might also expose them to impeachment, Story rejected the notion that the presiding judge in a criminal proceeding could remove the defendant public official from office.<sup>24</sup> Powers of removal were exclusively assigned to the Senate. (Story recognized that the execution of a criminal sentence might disable the official from performing official duties, thus creating the possibility that an Article III judge may draw a salary while in prison.)

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common law as a mode of removing judicial officers holding good-behavior tenure under Article III. Compare Matthew Bacon, 3 *A New Abridgement of the Law* 735–36, 742 (Luke White 6th ed 1793) (noting that, at common law, where an office, such as a judicial position, required “Skill or Science,” it could only be granted to those of “Skill, Knowledge, and Ability” to exercise the same; observing that judges may remove an officer, appointed to serve courts, for lack of ability).

<sup>19</sup> See James D. Andrews, ed, 1 *The Works of James Wilson* 410 (Callaghan 1896). After quoting the good behavior provision of Article III, Wilson denied that the judges of the federal courts were subject to removal, as in England, on address of the two houses of Congress. He explained that “[t]hey may be removed, however, as they ought to be, on conviction of high crimes and misdemeanors.” *Id.* Wilson thus directly connected the good behavior provisions of Article III with the impeachment provisions in earlier Articles. During the course of his discussion, Wilson did not mention the possibility of removal through judicial proceedings and concluded that judges in the United States stand on a firmer footing of independence than judges in England, where removal on address without conviction of crimes or misdemeanors was possible. See *id.*

<sup>20</sup> William Rawle, *A View of the Constitution of the United States* 208 (H.C. Carey & I. Lea 1825).

<sup>21</sup> See James Kent, 1 *Commentaries on American Law* 276–77 (O. Halsted 1826) (discussing judicial independence and identifying impeachment and removal as the process for removing judges from office).

<sup>22</sup> See Story, 2 *Commentaries on the Constitution* § 784 at 253–54 (cited in note 2).

<sup>23</sup> See, for example, Federalist 65 (Hamilton), in *The Federalist* 439, 442–43 (cited in note 2) (noting that an official could face criminal proceedings in the federal courts following his conviction in the Senate and removal from office).

<sup>24</sup> See Story, 2 *Commentaries on the Constitution* § 784 at 253–54 (cited in note 2) (“In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment.”).

Prakash and Smith attempt to counter this founding-era and antebellum commentary by arguing that a criminal statute adopted in 1790 should be read as contemplating a criminal sanction of removal from judicial office for judges convicted of bribery.<sup>25</sup> But although they rightly credit the statute as an early explication of the relationship between the criminal process and the impeachment process, they misread the language and turn the statute's likely meaning on its head. As Prakash and Smith note, the statute provides that judges convicted of accepting a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States."<sup>26</sup> But far from effecting the removal of a convicted federal judge from *current* office, the statute operates to bar a convicted judge from holding *future* offices.

To see the statute's application only to future offices, consider that its language almost exactly tracks the disqualification language in the impeachment sentencing provision of Article I of the Constitution,<sup>27</sup> except that the statute omits the Constitution's reference to removal of the convicted judge from current office.<sup>28</sup> By speaking to disqualification, the statute suggests that Congress viewed itself as authorized to impose a mandatory sanction of future disqualification from office for certain offenses. But by omitting any reference to removal, the statute stops well short of suggesting that Congress meant to authorize the imposition of a judicial sentence of removal from current office.<sup>29</sup>

In the face of extensive evidence in support of the orthodox view, Prakash and Smith fail to identify a single important (or obscure) participant in the ratification debate who publicly espoused their view that judicial determinations of misbehavior provided an alternative mode of removing judges under the federal Constitution. Instead of flesh-and-blood members of the founding generation, Prakash and

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<sup>25</sup> See Prakash and Smith, 116 Yale L J at 122 (cited in note 1).

<sup>26</sup> See *id.*, quoting An Act for the Punishment of certain Crimes against the United States § 21, 1 Stat 112, 117 (1790).

<sup>27</sup> See note 2 (explaining that the Constitution mandates removal from office upon conviction of an impeachable offense but gives the Senate discretion to impose a sentence of "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States").

<sup>28</sup> But see 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, 1647-53 (1994) (reviewing early enactments and arguing that "the most sensible reading of these early statutes indicates that the penalty of disqualification necessarily included removal when applied to a sitting officer").

<sup>29</sup> The Decision of 1789 provides a contrast. In the Decision, Congress adopted statutory language that seemingly assumes that the Constitution vests in the President a power to remove executive branch officials from office without any involvement on the part of the Senate (despite the Senate role in providing advice and consent on the appointment). See generally, Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L Rev 1021 (2006). The Act of 1790 can be similarly read to assume that the Constitution has assigned the removal power to the Senate, acting as a court to try all impeachments.

Smith base their argument almost entirely on their understanding of the relationship between impeachment and good-behavior tenure in seventeenth century England (a subject taken up below). Thus, instead of quotes from members of the founding generation, we hear that Prakash and Smith “believe” that certain state constitutions with legislative removal provisions alone would have permitted adjudication of judicial misbehavior in the ordinary courts, even though the constitutions themselves said nothing to that effect.<sup>30</sup> We learn that the “Continental Congress must have thought” that good-behavior tenure had nothing to do with impeachment because it qualified the tenure of the judges of the Northwest Territory without setting forth an impeachment mechanism to secure their removal.<sup>31</sup> Finally, and most revealingly, we learn that the view of impeachment as the exclusive mode for removing federal judges “could not have been prevalent” during the post-ratification era because tenure during good behavior retained its common law meaning as “tenure terminable upon a judicial finding of misbehavior.”<sup>32</sup> Prakash and Smith thus ignore the views that jurists and constitutional scholars actually expressed during and after the ratification period, and project their own view as to what “must have been” the understanding of the day. This substitution of what “must have been understood” for what was actually said will not do as a form of historical inquiry or argument.

## II. ENGLISH CONSTITUTIONAL HISTORY: EXCLUSIVITY UNDER THE ACT OF SETTLEMENT

Prakash and Smith lead up to their discussion of the framing by exploring the common law history of impeachment as a parliamentary tool in the English constitutional struggles of the seventeenth century. Their history reveals, I think correctly, that impeachment served a function quite different from judicial proceedings to terminate official tenure during good behavior. Impeachment was directed at a broad group of government officers, a group that included judges (such as

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<sup>30</sup> See Prakash and Smith, 116 Yale L J at 113 (cited in note 1) (“Given the background understandings of how good-behavior tenure would be adjudicated . . . these constitutions likely incorporated the ordinary understanding that good behavior would be determined in the ordinary courts.”).

<sup>31</sup> *Id.* Of course, the Northwest Ordinance also failed to specify that judges serving during good behavior were subject to removal through *scire facias* proceedings in the general court of the territory. See note 36. Ultimately, then, the omission of a removal mechanism proves little. Just as Prakash and Smith assume that the general court could exercise common law authority to conduct such a removal proceeding absent specific congressional authority, one could equally well assume that the legislative assembly in the Northwest Territory could claim common law legislative power to conduct impeachment proceedings. Such inferences can cut both ways.

<sup>32</sup> *Id.* at 128.

Chancellor Bacon<sup>33</sup>) but was certainly not limited to them. Moreover, impeachment could result in a broad range of penalties, including capital punishment, and did not specifically target removal from office, although that was among the available sanctions.<sup>34</sup> Prakash and Smith succeed in showing that these proceedings were quite different, both in origin and in remedy, from common law proceedings to remove a misbehaving officer. The Crown could (by issuing letters patent) create offices with tenure during good behavior, and such offices were commonly viewed as conveying life tenure on the incumbent.<sup>35</sup> Nonetheless, officials holding office during good behavior were subject to removal for misbehavior and for failure to execute the office, through one or more common law proceedings, such as a *scire facias* action.<sup>36</sup>

But one can accept this seventeenth century understanding of the distinction between impeachment and judicial proceedings to oust for misbehavior without also accepting the claim that judicial proceedings persisted through the next century and were incorporated into the Constitution of the United States. In fact, a decisive change took place in the terms of office-holding for the judges of the superior courts of England. The Act of Settlement, adopted in 1701 as a cornerstone of constitutional monarchy, provided that the judges of the three superior courts of the common law—King’s Bench, Common Pleas, and Exchequer—were to hold their offices during good behavior.<sup>37</sup> It further provided that these judges were subject to removal upon parliamentary address—essentially a joint resolution of the Commons and Lords—

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<sup>33</sup> For an account of Bacon’s impeachment for accepting bribes as Lord Chancellor, see Catherine Drinker Bowen, *Francis Bacon: The Temper of a Man* 187–204 (Little, Brown 1963).

<sup>34</sup> Prakash and Smith, 116 Yale L J at 110 (cited in note 1) (“[I]mpeachment and good-behavior tenure were entirely different concepts.”).

<sup>35</sup> Id at 90 (noting that the grant of tenure could be qualified by language limiting the grant to a term of years during good behavior and could even be descendible until misbehavior occurred).

<sup>36</sup> Id at 94 (describing an attempt by Charles I to oust Sir John Walter, Chief Baron of the Exchequer). The *scire facias* action “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.” Id (quotation marks and citations omitted).

<sup>37</sup> Act of Settlement, 1701, 12 & 13 Will 3, ch 2. Prakash and Smith fight the natural implication that the specified mode of removal was exclusive of judicial proceedings. Thus, Prakash and Smith contend that the drafters of the Act would have had no reason to specify a good-behavior tenure had they meant to address the only means of removal. See Prakash and Smith, 116 Yale L J at 98 (cited in note 1). But this argument ignores the obvious possibility that good behavior sets forth the standard that Parliament was to apply in determining whether to address the Crown in connection with the proposed removal of a judge from office, just as the Constitution charges Congress with assessing judicial behavior under the impeachment-and-removal provisions. Indeed, C.H. McIlwain reports that proceedings to remove judges on address in Parliament featured trial-type proceedings and due process protections for the accused. See C.H. McIlwain, *The Tenure of English Judges*, 7 Am Polit Sci Rev 217, 227 (1913) (noting that judges in removal proceedings had the right to “be heard, [to] employ counsel, [and to have] the laws of evidence . . . strictly observed”).

and royal assent. While the Act of Settlement did not in terms declare that parliamentary address provided the sole mechanism for the removal of superior court judges, it was widely (though not uniformly) so interpreted by English legal historians who opined on the matter.<sup>38</sup> Predictably, when it came time to initiate proceedings to remove a superior court judge in 1830, Parliament relied on the address mechanism.<sup>39</sup>

Meanwhile, judicial proceedings to terminate the tenure of superior court judges, serving during good behavior, fell into desuetude. Prakash and Smith cite a number of cases from the post-Act of Settlement period in which proceedings were brought before the courts to terminate the good-behavior tenure of judicial officers. But in every case, the officers involved were inferior officers of court, such as recorders, clerks, bailiffs, and the like.<sup>40</sup> None of these officers were enti-

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<sup>38</sup> Prakash and Smith acknowledge that English jurists viewed the Act of Settlement as an exclusive mode of judicial removal, and then seek to discredit the only source they cite by offering a textual analysis of the terms of the Act. See Prakash and Smith, 116 Yale L J at 98 & n 97 (cited in note 1) (“The clause introducing the address option begins with “but,” suggesting that it was an exception from the normal rule.”). But the support among English legal scholars for Act of Settlement exclusivity was much broader than Prakash and Smith appear to recognize. See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 270 (Macmillan 1915) (Liberty Fund reprint ed 1982) (“The judges are not in strictness irremovable; they can be removed from office on an address of the two Houses; they have been made by Parliament independent of every power in the State except the Houses of Parliament.”); Sir Norman Chester, *The English Administrative System: 1780–1870* 5 (Clarendon 1981) (describing the Act of Settlement as conferring tenure during good behavior on superior court judges and as providing that “they could be removed only by Parliament”); Joseph Chitty, Jr., *A Treatise on the Law of the Prerogatives of the Crown* 82–83 (Butterworth and Son 1820) (Garland reprint ed 1978) (noting that the grant of tenure during good behavior in the Act of Settlement gave the judges an estate for life “as their good behavior is presumed by law, and of such good behavior, it seems, Parliament only can judge”); Sir William R. Anson, 2 *The Law and Custom of the Constitution* 204 (Clarendon 1892) (acknowledging the existence of judicial removal proceedings for those holding commissions during good behavior but concluding that judicial officers holding under the Act of Settlement “can only be removed on address of the two Houses”); Richard Wooddeson, 1 *Lectures on the Law of England* 73 (Richards and Co 2d ed 1834) (intimating that the conduct of superior court judges, holding tenure during good behavior under the Act of Settlement, “seems properly enquirable only in parliament”). For the contrary view, see Shartel, 28 Mich L Rev at 882–83 & n 33 (cited in note 3) (collecting authorities). Blackstone’s comments were less definitive; he simply repeated the words of the Act without expressing a view as to the exclusivity of parliamentary address as a form of removal. See William Blackstone, 1 *Commentaries on the Laws of England* \*267 (Chicago 1979). But he did not articulate the Prakash and Smith view that common law proceedings for judicial misbehavior must have been understood to have survived the specification of good-behavior tenure in the Act of Settlement.

<sup>39</sup> See Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 Am J Comp L 459, 476 n 75 (2006) (describing the 1830 removal as the “first and only use” by parliament of its power to remove judicial officers by address).

<sup>40</sup> See Prakash and Smith, 116 Yale L J at 96–99 (cited in note 1), citing *Rex v Warren*, 98 Eng Rep 1135 (KB 1767) (addressing the meaning of tenure during good behavior as it affected parish clerks); *Rex v Wells*, 98 Eng Rep 41 (KB 1767) (court recorders); *Queen v Banes*, 90 Eng Rep 1183 (KB 1707) (court clerks); *Domina Regina v Bailiffs of Ipswich*, 91 Eng Rep 378 (KB 1706) (court recorders); *Harcourt v Fox*, 89 Eng Rep 680 (KB 1692) (clerks of the peace).

tled to Act of Settlement tenure, and none were subject to removal under the Act upon parliamentary address. The mode of removal applied in their cases tells us very little about the availability of judicial proceedings to terminate a misbehaving superior court judge. Indeed, Prakash and Smith cite no case from the seventeenth, eighteenth, or nineteenth centuries in which English courts sat in judgment of the behavior of a superior court judge.<sup>41</sup>

### III. STATE CONSTITUTIONS: GOOD BEHAVIOR AND REMOVAL BY THE ASSEMBLY

Prakash and Smith deal with the constitutions of the newly independent states in much the same way that they dismiss the exclusivity of the Act of Settlement. They argue that impeachment and good-behavior tenure “were entirely different concepts” and that the inclusion in state constitutions of impeachment as a mode of punishing and removing officers (including judges) would not have been understood to have ruled out reliance on judicial modes of proceeding for removal as well.<sup>42</sup> But the claim suffers from two serious problems: it fails to take account of the changing nature of impeachment proceedings and fails to recognize that the removal modes set forth in constitutions for officers with constitutional tenures were viewed as exclusive.

Impeachment originated as a criminal proceeding at a time when parliament exercised judicial powers, but was evolving into a proceeding focused upon the removal of misbehaving officers that it was to become in the federal Constitution.<sup>43</sup> In keeping with this evolving function, the framers of the new state constitutions had begun to blur the distinction between impeachment and other kinds of legislative proceedings to remove civil officers, such as the method of joint ad-

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Prakash and Smith cite one case involving an English judge, see Prakash and Smith, 116 Yale L J at 102 (cited in note 1), citing *Ex parte Ramshay*, 118 Eng Rep 65 (QB 1852), but it occurred in 1852, well after the Constitution’s drafting, and dealt with the removal of a county court judge who did not enjoy tenure during good behavior under the Act of Settlement.

<sup>41</sup> To be sure, Prakash and Smith note that some superior court judges holding office during good behavior in the seventeenth century made *demands* for trial to block their removal from office by Stuart kings. See Prakash and Smith, 116 Yale L J at 94–95 (cited in note 1) (describing two such efforts at resistance). But while those demands reflect an understanding that judicial determination was available, they pre-dated the Act of Settlement and provide no support for the claim that judicial proceedings to remove superior court judges survived the switch to removal by way of parliamentary address.

<sup>42</sup> Prakash and Smith, 116 Yale L J at 110 (cited in note 1).

<sup>43</sup> See Wooddeson, 2 *Lectures on the Law of England* at 355–59 (cited in note 38) (tracing the development of the Parliament’s impeachment power and noting that the process resulted in the application of the nation’s criminal laws to high government officials); C.H. McIlwain, *The High Court of Parliament and Its Supremacy* 186–88 (Yale 1910) (noting the judicial origins of many Parliamentary traditions and including impeachment among Parliament’s judicial functions).

dress that was sometimes borrowed from the English Act of Settlement. This blurring of lines reflected a growing perception, embodied in the federal Constitution's prohibition of bills of attainder and ex post facto laws, that the separation of powers called for courts of justice, not legislative bodies, to hear criminal proceedings.<sup>44</sup> As a consequence, some state constitutions anticipated the federal Constitution in limiting the penalties available upon conviction of an impeachable offense to removal and disqualification from office;<sup>45</sup> others reshaped impeachment to prevent the legislature from imposing other forms of criminal punishment on misbehaving officers. Unlike its criminal precursor in seventeenth century England, impeachment in America was coming to be seen as a removal device to check official misbehavior.<sup>46</sup>

Even as they occasionally transformed impeachment into a proceeding more focused on removal from office than its seventeenth century precursor had been, the framers of the state constitutions apparently understood the importance of setting forth all proper means of removal for officers whose terms in office were specified in the constitution. Just as English lawyers of the day concluded that common law tools of removal did not apply to superior court judges whose tenure and mode of removal were specified in the Act of Settlement, the common law would not obviously survive as a mode of checking judicial misbehavior in constitutions that specified both a particular term in office and a formal mode of removal. The careful lawyers who drafted state constitutions understood that the modes of removal specified for constitutional officers were exclusive.<sup>47</sup>

One can see both the changing nature of impeachment and the principle of exclusivity reflected in the Delaware Constitution. The drafters of the Delaware Constitution affirmed that officers of the

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<sup>44</sup> On the rejection of legislative adjudication in the early Republic, see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 *Nw U L Rev* 899, 937–45 (1997).

<sup>45</sup> See, for example, NY Const of 1777 Art XXXIII (superseded 1821) (limiting the impeachment penalty to “removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this State”), reprinted in Ben Perley Poore, ed, *2 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1328, 1337 (GPO 2d ed 1878) (“Poore’s”).

<sup>46</sup> See Prakash and Smith, 116 *Yale L J* at 114–15 (cited in note 1) (acknowledging this development in the early use of impeachment).

<sup>47</sup> Of the eleven new constitutions drafted in the wake of independence (Connecticut and Rhode Island made do with amendments to their charters), two included express provisions for removal through judicial proceedings. See Del Const of 1776 Art XXIII (superseded 1792) (providing judicial tenure during good behavior and declaring that judges “shall be removed for misbehavior, on conviction in a court of law, and may be removed” on address of the general assembly), reprinted in 1 Poore’s 273, 276–77 (cited in note 45); Md Const of 1776 Art XL (superseded 1851) (providing for removal “only for misbehaviour, on conviction in a Court of law”), reprinted in 1 Poore’s 817, 826 (cited in note 45).

state were subject to removal “on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly.”<sup>48</sup> This provision clearly treats impeachment as a tool of removal from office, quite in contrast to the Prakash and Smith view. Moreover, by carefully listing all approved forms of removal, the drafters apparently sought to ward off the possibility that an *expressio unius* argument would foreclose use of an omitted form. Delaware’s constitutional lawyers did not view judicial proceedings for removal as implicit in the constitution’s earlier grants of tenure during good behavior;<sup>49</sup> instead, judicial proceedings were modes of removal (like impeachment) that were applicable to constitutional officers only to the extent specified in the constitution. In both respects, Delaware’s constitution provides solid evidence *against* the Prakash and Smith thesis.

Once we recognize that constitutional modes of removal were seen as exclusive and that impeachment was viewed as one mode of removing officers for misbehavior, we can now evaluate the remaining state constitutions. The New York Constitution of 1777 did virtually the same thing that the federal Constitution was to do ten years later: it conferred tenure on judges during good behavior and subjected the judges to removal from office only by impeachment.<sup>50</sup> It also limited the authority of the impeachment court by foreclosing any sanction other than removal from office and disqualification from future service; other sanctions for misconduct were left to criminal proceedings.<sup>51</sup> Thus, impeachment in New York operated more like removal upon address under the Act of Settlement than like traditional impeachment proceedings in seventeenth century England (except that impeachment preserved a formal right to trial, something that may have been unavailable in removal proceedings on joint address<sup>52</sup>). Much the same approach was adopted in Massachusetts and South Carolina, where good-behavior tenure was conferred and removal

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<sup>48</sup> Del Const of 1776 Art XXIII (superseded 1792), reprinted in 1 Poore’s 273, 277 (cited in note 45).

<sup>49</sup> See *id* Art XII (providing tenure during good behavior for the judges of the supreme court, court of admiralty, and court of common pleas).

<sup>50</sup> NY Const of 1777 Art XXIV (superseded 1821) (describing good-behavior tenure for superior court judges), Arts XXXII, XXXIII (creating a court to try impeachments of officials for “mal and corrupt conduct in their respective offices”), reprinted in 2 Poore’s 1328, 1336, 1337 (cited in note 45).

<sup>51</sup> *Id* Art XXXIII.

<sup>52</sup> English authorities were divided on the right to trial before Parliament under the Act of Settlement, but when judges were subjected to removal proceedings by joint address, the Parliament afforded them rights to counsel and to mount a defense against the charges lodged against them. See, for example, note 37.

through joint legislative address was authorized.<sup>53</sup> In each of these cases, the legislative assembly was empowered to assess judges' conduct and remove them from office and no other explicit mechanism for removal was provided.

Indeed, if we examine all of the new state constitutions, we can see a pattern of reliance on legislative modes of removing judges for misbehavior.<sup>54</sup> Eleven states promulgated new constitutions and seven of those states conferred tenure on judges during good behavior. All seven of those states provided for the removal of the judges by legislative action. In two states of the seven, New York and Virginia, the legislature was to act through the impeachment process. In three states, the legislature was to act by joint address. Two states, Delaware and North Carolina, provided for removal by legislative process and by judicial proceeding (thus underscoring, as noted above, that a secure place for the courts in removal proceedings required a specification to that effect).<sup>55</sup>

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<sup>53</sup> For the approach in Massachusetts, see Mass Const of 1780 Ch 3, Art I (providing judges with tenure during good behavior, subject to removal by the governor on "address of both houses of the legislature"), reprinted in 1 Poore's 956, 968 (cited in note 45). This approach conformed in its essential points to that which the constitution's leading draftsman, John Adams, had earlier advocated. See John Adams, *Thoughts on Government* (1776), in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 107, 109–10 (Chicago 1987) (advocating judicial tenure during good behavior and removal by impeachment). For South Carolina, see SC Const of 1778 Art XXVII (superseded 1790) (conferring tenure during good behavior on judicial officers, subject to removal by joint address of the assembly), reprinted in 2 Poore's 1620, 1625 (cited in note 45). Given the fact that both Massachusetts and South Carolina placed their removal procedures by joint address in the same provision that conferred tenure during good behavior, one does not quite know what to make of the Prakash and Smith claim that tenure and removal provisions in these constitutions were kept "quite a distance from" one another. See Prakash and Smith, 116 Yale L J at 113 (cited in note 1). In New York, judges were subject to impeachment, but in both Massachusetts and South Carolina, the constitutions provided for removal on joint address, not on impeachment, and the "distance" between the provisions was quite irrelevant. South Carolina made it plain that impeachment did not apply to judges, both by adding judges to the impeachment court and by stating that impeachment applied only to those who were not amenable to another removal proceeding. See SC Const of 1778 Art XXIII (superseded 1790), reprinted in 2 Poore's 1620, 1624–25 (cited in note 45). Judges in South Carolina, of course, were amenable to removal upon address.

<sup>54</sup> Officers serving in the military were not subject to impeachment at all, but were subject to the oversight of their commanders (and ultimately, the commander-in-chief) and to punishment for misconduct before courts martial. Commenting on the federal Constitution, Joseph Story confirmed the inapplicability of impeachment proceedings to military officers, noting that they were made responsible through the chain of command and courts martial. See Story, 2 *Commentaries on the Constitution* § 790 at 258–59 (cited in note 2). As a consequence, there would have been nothing anomalous in the decision of the framers of a state constitution to make no constitutional provision for the removal of military officers. See Prakash and Smith, 116 Yale L J at 112–13 & n 163 (cited in note 1) (discussing the failure of Georgia's constitution to specify a constitutional mode of removal for members of the military).

<sup>55</sup> For Delaware's provision, see the text accompanying note 48. The North Carolina constitution referred to the possibility of criminal proceedings against judges, but did not expressly

Even among the states that limited judicial service to a term of years, rather than conferring tenure during good behavior, constitutions relied on legislative modes of removal for judicial misbehavior.<sup>56</sup> Thus, in New Jersey, the constitution set forth a seven-year term in office for superior court judges and further provided that judges were “liable to be dismissed, when adjudged guilty of misbehavior, by the Council, on an impeachment of the Assembly.”<sup>57</sup> Prakash and Smith recognize that the New Jersey example undermines their claim that there existed a “disconnect between impeachment and good-behavior” as the basis for terminating judicial tenure.<sup>58</sup> After all, the New Jersey Constitution explicitly linked impeachment and removal to a finding of judicial misbehavior. But the New Jersey Constitution does more than provide an isolated missing link; it helps to explain why the other state constitutions felt no need to specify judicial misbehavior as the standard for removal from office in an impeachment (or other legislative) proceeding. In New York and Virginia, judicial tenure continued during good behavior, not for a term of years. In such states, the constitutional provision for impeachment and removal of judges from office could have been drafted on the assumption that the good behavior standard would apply without any need to specify that standard in the impeachment provision. Only in New Jersey, where the judges served for a term of years, was it necessary to state a standard of proper behavior in the impeachment provision.

#### IV. THE FEDERAL CONSTITUTION AND IMPEACHMENT EXCLUSIVITY

Heading into the federal convention, then, the framers of the Constitution had lived through a revolution in the terms of judicial tenure, from the service at royal pleasure that dominated colonial arrangements<sup>59</sup> to service during good behavior in many of the new state

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make them removable through such proceedings. See NC Const of 1776 Art XIII (superseded 1868) (conferring tenure during good behavior on the judges of the supreme courts of law, equity, and admiralty), Art XXIII (declaring that state officers, “offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State”), reprinted in 2 Poore’s 1409, 1412, 1413 (cited in note 45).

<sup>56</sup> Pennsylvania set forth seven-year terms in office for the judges of the superior courts, and provided for removal by legislative address. See Pa Const of 1776 § 23 (superseded 1790), reprinted in 2 Poore’s 1540, 1545 (cited in note 45).

<sup>57</sup> NJ Const of 1776 ¶ XII (superseded 1844), reprinted in 2 Poore’s 1310, 1312 (cited in note 45).

<sup>58</sup> See Prakash and Smith, 116 Yale L J at 112, 114 (cited in note 1) (concluding that the constitution nonetheless “may very well have permitted ordinary courts to adjudicate allegations of misbehavior”).

<sup>59</sup> See Barbara Aronstein Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 L & Hist Rev 101, 108–09 (1985) (describing, although qualifying, the degree of judicial independence in the colonies).

constitutions. They had, moreover, witnessed the widespread adoption of legislative modes of removing judges from office, including both the joint address and the evolving impeachment proceeding. While a small minority allowed their courts to hear removal proceedings, most states made no mention of such proceedings in their constitutions but provided instead for the legislative assembly to check judicial misbehavior. Of the available forms of legislative oversight, impeachment could have been viewed as providing greater security for judges than joint address because it clearly required a trial and an adjudication of misconduct under the laws of the land.<sup>60</sup> And that, of course, was the mode of removal that the (relatively conservative) framers chose. There was, contrary to Prakash and Smith, no disconnect between impeachment and the good behavior standard for judicial tenure. Indeed, the Constitution's provision for removal from office upon conviction of "misdemeanors" (among other more serious offenses) bears a close linguistic connection to the termination of judicial tenure for "misbehavior."<sup>61</sup>

A brief review of the work of the Philadelphia convention confirms that the framers deliberately chose impeachment over joint legislative address as the proper mode of removing judges from office for misbehavior. Late in August, the convention realized that it had failed to make a suitable provision for the removal of Supreme Court justices. At the point during which the discussions unfolded, the draft Constitution had assigned the task of adjudicating impeachments to the Supreme Court itself, in the exercise of its original jurisdiction, an assignment that was obviously unsuited to the adjudication of misbehavior claims against the justices of that very court.<sup>62</sup> On August 22,

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<sup>60</sup> On the applicability of the common law of crimes to impeachments in England, see Wooddeson, 2 *Lectures on the Law of England* at 364–65, 370 (cited in note 38) (noting that in trying impeachments, the upper house applies "the same rules of evidence, the same legal notions of crimes and punishments" as do the inferior courts in criminal prosecutions). With the rejection of a common law of crimes in the United States, impeachment proceedings here focus on violations of the criminal code.

<sup>61</sup> The words misbehavior and misdemeanor were often used as synonyms in discussions of judicial or other official misconduct. See Prakash and Smith, 116 *Yale L J* at 97 & n 90 (cited in note 1) (citing the argument of counsel in *Harcourt v Fox*, 89 *Eng Rep* 680 (KB 1692), to the effect that tenure during good behavior was forfeited through the commission of a "misdemeanor in any office"); Bacon, 3 *A New Abridgement of the Law* at 733 (cited in note 18) ("It is said that, at Common Law, all Officers of Justice had Estates in their respective Offices during Life, and could not be removed but for Misdemeanors."). See also 9 *The Oxford English Dictionary* 859 (Clarendon 2d ed 1989) (defining "misdemean" as "[t]o misbehave, misconduct oneself").

<sup>62</sup> For the text of the Committee of Detail draft of the Constitution, specifying that the Supreme Court was to exercise original jurisdiction in "cases of impeachment," see Max Farrand, ed, 2 *The Records of the Federal Convention of 1787* 186 (Yale 1966). It would have been obvious to the framers that the Court was an improper court for the trial of impeachments of the Court's own members. Thus, in New York, while the court of impeachment included a blend of council

John Rutledge reported that his committee of five supported trial of the justices in the Senate on impeachment by the House, but no action was taken on the committee's report.<sup>63</sup> Five days later, John Dickinson moved to amend the judicial article to provide for removal of judges by the executive on joint address of the legislature.<sup>64</sup> Gouverneur Morris opposed the motion, arguing that it was "a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial."<sup>65</sup> Rutledge, who had earlier proposed to make the judges triable by impeachment in the Senate, concurred with Morris that joint address was an insufficient protection of judicial independence, as did James Wilson and Edmund Randolph.<sup>66</sup> In the end, the convention rejected Dickinson's proposal to adopt removal by joint address in a lopsided seven-to-one vote.<sup>67</sup> Over the next two weeks, the draft Constitution was amended to transfer all impeachment trials to the Senate and to include judges among those subject to removal by that mechanism, as suggested by Rutledge's earlier proposal.<sup>68</sup> Impeachment was thus apparently chosen because it provided greater security for judicial tenure and ensured a trial-type proceeding at which the judge could mount a defense against claims of misbehavior.

The framers' decision to place the trial of judicial (and other) impeachments in the Senate provides strong evidence *against* the Prakash and Smith thesis. For one thing, the debate that informed the framers' choice flatly contradicts the claim that impeachment proceedings were viewed as unconnected to determinations of judicial

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members and high court judges, the judges were made ineligible in cases involving their own impeachment. Similarly, Virginia assigned the trial of impeachments to the general court but transferred the trial of general court judges to the court of appeals.

<sup>63</sup> See id at 367, 376. At the time of the Rutledge report, the draft Constitution had assigned the power of impeachment to the House, but had provided for the Supreme Court to exercise "original jurisdiction" over the trial of "cases of impeachment." See id at 186 (reproducing the August 6 report of the Committee of Detail). By providing for trial of judges in the Senate, Rutledge's proposal thus sought to preserve the Court's original jurisdiction over the trials of impeachments in general, but to transfer trials of the Court's own justices to the Senate to avoid an obvious conflict. In its September 12 report, the Committee of Style proposed to amend the draft, eliminating the Court's role and giving the Senate sole power to try impeachments. See id at 592.

<sup>64</sup> See id at 428.

<sup>65</sup> Id. Morris's recognition that trials were available through impeachment proceedings calls into doubt the assumption that his reference to trial of misbehavior claims necessarily contemplated a common law proceeding before the courts. See also Prakash and Smith, 116 Yale L J at 114, 118 (cited in note 1) (characterizing an earlier comment by Morris in this way).

<sup>66</sup> See Farrand, ed, 2 *Records of the Federal Convention* at 428-29 (cited in note 62).

<sup>67</sup> See id at 423, 429.

<sup>68</sup> See id at 592. The report of the Committee of Style placed sole power to try all impeachments in the Senate and expressly limited the punishment on impeachment to removal from office. Previous drafts had located the limitation on punishment in the judicial article, along with the grant of original impeachment jurisdiction. See id at 186-87.

good behavior. To the contrary, Gouverneur Morris and others explicitly defended the use of a trial-type proceeding as the most proper mode of determining whether a judge had violated the good behavior standard, and the framers' eventual choice of impeachment guaranteed a trial in the Senate. (Note that the Constitution expressly requires a trial of impeachment, not just a vote to remove.<sup>69</sup>) For another thing, the exchange between the framers provides some evidence that they did not share the Prakash and Smith view that judicial proceedings to determine judicial misconduct were implicit in the grant of tenure during good behavior. The record does not reveal that any delegate argued that trial-type proceedings to determine judicial good behavior were presumptively available in the federal courts by way of *scire facias* proceedings (thereby rendering an explicit provision for the trial and removal of judges unnecessary). Finally, the framers' deliberate decision to transfer the trial of impeachments from the Supreme Court to the Senate provides good reason to question the claim that they meant to preserve a judicial forum for the determination of judicial misconduct. It would be awkward at best for the Court to sit in judgment of its own members, whether the proceeding was a trial of an impeachment or a civil proceeding to terminate judicial tenure for misconduct.<sup>70</sup>

Despite the framers' choice of impeachment as the sole constitutionally specified mode of removing federal judges and other civil officers from office, Prakash and Smith correctly observe that the Constitution contemplates the removal of civil officers by other means than impeachment and conviction. Thus, the President has the power to appoint and remove heads of departments and other officers of the executive branch of government.<sup>71</sup> These presidentially appointed department heads and superior officers may, in turn, be given power to hire and fire their own subordinates. As a result, virtually all executive officers of the federal government are subject to removal from office both through the impeachment process and through the exercise of normal supervisory oversight and control by their superior officers. Just as the President can demand the resignation of cabinet officials, so too can such officials remove subordinates from office in accor-

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<sup>69</sup> See note 2 (noting the Senate's sole power to "try" impeachments).

<sup>70</sup> Thus, in New York, the state constitution provided for superior court judges to sit with the Senate as a court to try impeachments, but made a special provision that any judge subject to impeachment was not to serve on the court of impeachments (or otherwise exercise judicial office) until after an acquittal. See NY Const of 1777 Art XXXII (superseded 1821), reprinted in 2 Poore's 1328, 1337 (cited in note 45). See also note 82.

<sup>71</sup> See US Const Art II, § 2, cl 2. Under this provision, the Court has upheld the power of the federal courts to appoint inferior judicial officials and inferior officers of other branches of government. See *Morrison v Olson*, 487 US 654, 675-77 (1988) (upholding the power of Congress to assign to a court of law the power to appoint a special prosecutor, an executive branch official).

dance with the statutory terms of employment that have been specified for the office in question.

Prakash and Smith argue by analogy that the existence of a nonimpeachment form of removal in the executive branch also suggests the possible existence of a nonimpeachment mode of removal for officers of the judicial branch. Professor Shartel made a similar (although more limited) claim many years ago. Shartel argued that Congress can invest the Supreme Court with the power to appoint the judges of lower federal courts; the Court would act as a “court of law” in exercising the power to appoint inferior officers within the meaning of Article II.<sup>72</sup> Shartel further argued that Congress could provide the federal judiciary with authority to exercise supervisory control over the work of such inferior judicial officers, including the power to remove them from office on a showing that they had breached the good behavior terms of their tenure. Like Prakash and Smith, Shartel suggested the use of *scire facias* proceedings as an appropriate tool for ousting inferior court judges for misbehavior.<sup>73</sup>

The suggestion that the Court was implicitly invested with the power to remove lower court judges rests on a number of controversial moves. First, Shartel argues that Article III judges should be seen as inferior officers within the meaning of Article II,<sup>74</sup> and thus amenable to appointment under a hypothetical statute that would transfer the appointment power from the President to the Supreme Court.<sup>75</sup> Although the constitutional text admits the possibility, the nation’s experience has been to the contrary; federal judges (both Supreme and inferior) have always been appointed by the President and confirmed by the Senate. Second, Shartel argues that the Court may supervise inferior judges and that these powers of supervision may encompass judicial proceedings to remove them from office.<sup>76</sup> Such an argument rests in part on the claim that judicial proceedings would vest ultimate control of the removal decision in the Supreme Court itself and would thus pose little threat to judicial independence and the separation of powers.<sup>77</sup> However plausible, this structural argu-

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<sup>72</sup> See Shartel, 28 Mich L Rev at 492 (cited in note 3).

<sup>73</sup> See id at 882–83.

<sup>74</sup> See id at 499–500.

<sup>75</sup> See id at 488–90 (“[I]t is suggested that district and circuit judges be appointed by the Chief Justice of the United States with the approval of the Supreme Court. . . . The one point intended to be stressed is the need for judicial control over appointments to inferior judgeships.”).

<sup>76</sup> See id at 730–38, 882–91.

<sup>77</sup> See id at 902 n 87, 907 (drawing on the separation of powers doctrine to question the power of one branch of government to remove officers in another branch without express constitutional authorization). See also Prakash and Smith, 116 Yale L J at 133 n 228 (cited in note 1) (“[In the procedures discussed,] [t]he President could not remove justices; only courts could do

ment runs up against the fact of constitutional tenure, which, as we have seen, rules out any removal proceedings (including intrabranch proceedings) not specified in the Constitution.

Article I helps to confirm this regime of exclusivity. Article I prescribes the terms of members of the House and Senate; § 5 formally specifies the mechanism by which members of the House and Senate are to be excluded and expelled from their seats. As for exclusion, the Constitution provides that each House shall be the judge of the “Elections, Returns, and Qualifications” of its own members,<sup>78</sup> and thus empowers each chamber of Congress to exclude elected members where they lack the qualifications specified in the Constitution.<sup>79</sup> Article I, § 5 also gives each chamber of Congress the power to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>80</sup> Interpreting these provisions, the Court has ruled that sitting members of Congress, like federal judges, remain subject to criminal indictment and conviction, but that the sole power of removing members of Congress for misconduct lies with each chamber.<sup>81</sup> For our purposes, the significance of these Article I provisions lies in the fact that the Constitution did not leave intrabranch removal to the process of interpretation or implication but set forth those provisions explicitly, at least for members of Congress whose terms were specified in the document.

Against this backdrop, the failure of the Constitution to set forth similar intrabranch removal proceedings for Article III judges (whose tenure the document specifies) provides a strong basis for rejecting an implied judicial power to remove federal judges. Unlike Article I, Article III does not vest the Court with the power to expel a sitting justice or other Article III judge. Indeed, it was partly the recognition that the Court was not a proper forum for impeachment charges involving its own justices that led the framers to eliminate the Court’s original jurisdiction as a court for the trial of impeachments and to transfer that trial authority to the Senate.<sup>82</sup> Federal judges thus occupy

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that. And such judicial removals could only occur after a fair trial on the question of whether judges had misbehaved.”)

<sup>78</sup> US Const Art I, § 5, cl 1.

<sup>79</sup> The Court has ruled that this power of exclusion applies only where the house of Congress finds that the member lacks the requisite constitutional qualifications for office. See *Powell v McCormack*, 395 US 486, 522 (1969).

<sup>80</sup> US Const Art I, § 5, cl 2.

<sup>81</sup> See *Burton v United States*, 202 US 344, 366–69 (1906) (holding that members of the Senate may be prosecuted criminally and suggesting in dicta that they may be removed from office only through action of the Senate).

<sup>82</sup> See Farrand, ed, *2 Records of the Federal Convention* at 337, 367–68 (cited in note 62) (describing the appointment of a committee to recommend a mode to try the justices on impeachments and noting the committee’s proposal for trial in the Senate). The framers’ rejection

the same position as the President and Vice President of the United States: the Constitution specifies their tenure and subjects them to removal through the impeachment process, but fails to specify any alternative mechanism. This omission, when coupled with the fact that Article I deals expressly with intrabranch removal proceedings, would seemingly foreclose the exercise of an implied power of supervisory removal authority within Article III.<sup>83</sup>

Given the absence of any constitutional reference to the Court's role in the removal of federal judges, it is not quite clear how Congress could assign the Court jurisdiction over such a proceeding by statute.<sup>84</sup> The Committee of Detail's draft Constitution had assigned trials of impeachments to the Court's original jurisdiction. But the transfer of that trial function to the Senate, coupled with its elimination from the Court's original jurisdiction, casts serious doubt on the Court's ability to entertain a judicial removal proceeding as an original matter. *Scire facias* proceedings to forfeit judicial office due to misconduct do not fit easily within the Court's original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and those involving states as parties.<sup>85</sup> One might try to sidestep this objection, either by arguing that the original jurisdiction point in *Marbury v Madison*<sup>86</sup> was wrongly decided,<sup>87</sup> or by suggesting that the

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of a role for the Court in adjudicating misconduct claims against the justices reflected the well-established maxim "no man can be the judge of his own cause." See *Dr Bonham's Case*, 77 Eng Rep 646, 652 (CP 1610) (holding that a licensing body with a financial stake in the outcome of its decision could not decide whether or not a doctor had the right to practice medicine in London). See also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L Rev 393, 403 & n 43 (1996) (citing Locke, Montesquieu, Harrington, Nedham, Sadler, and various secondary sources). The framers heartily endorsed this principle. See *id.* at 413 & n 99 (discussing the importance of the rule of law as a justification for separation of powers and citing Madison and Wilson). Consider the representative view of Hamilton that "[n]o man ought certainly to be a judge in his own cause, or in any cause in . . . which he has the least interest or bias." Federalist 80 (Hamilton), in *The Federalist* 534, 538 (cited in note 2). Indeed, the framers insisted on a relatively strict version of the separation of powers as to the federal judiciary (especially the Supreme Court). Thus, the framers rejected such institutions as a Council of Revision, a Privy Council, and a provision authorizing formal advisory opinions—all to shield Supreme Court justices from political involvement and possible bias. See Pushaw, 81 Cornell L Rev at 431–32 & n 172 (citing Hamilton and Wilson). Likewise, judges could not simultaneously hold seats in Congress. *Id.* at 419 n 124.

<sup>83</sup> See Shartel, 28 Mich L Rev at 897 n 73 (cited in note 3) (agreeing that impeachment may be "the only available method for removing the President, the Vice-President and justices of the Supreme Court").

<sup>84</sup> But see Prakash and Smith, 116 Yale L J at 128–33 (cited in note 1) ("[T]he Constitution enables Congress to grant judges the ability to remove their fellow judges in disciplinary proceedings."); Shartel, 28 Mich L Rev at 897 n 73 (cited in note 3) ("[P]erhaps Congress could confer statutory authority on the Supreme Court as a whole to remove its own offending or disabled members.").

<sup>85</sup> See US Const Art III, § 2.

<sup>86</sup> 5 US (1 Cranch) 137 (1803).

Court may exercise certain supervisory powers as part of its judicial power, without exercising either a trial-type original jurisdiction or appellate jurisdiction.<sup>87</sup> But Prakash and Smith do not attempt to develop such an argument (and its attempted development would be complicated by the common law right to trial by jury in *scire facias* proceedings to forfeit an office for misbehavior<sup>89</sup>).

Prakash and Smith respond by observing that Congress can assign removal proceedings aimed at Supreme Court justices to the jurisdiction of an inferior federal court.<sup>90</sup> But such a proposal seems wholly at odds with the structural argument that Shartel offers in support of the right of superior courts to remove inferior officers from office. While the Constitution might conceivably be read as allowing the Court itself to exercise supervisory removal authority over inferior officials, it would turn this principle on its head to allow an inferior court to exercise supervisory removal authority over the judges of a superior tribunal or body.

Viewed from the perspective of the Madisonian compromise, moreover, the notion that the Constitution contemplates the lower federal courts as tribunals for the adjudication of proceedings to remove federal judges appears even more dubious. The Madisonian

<sup>87</sup> See *id.* at 176–79 (holding that Congress may not constitutionally expand the scope of the Court’s original jurisdiction). For a general discussion, see Pfander, 101 Colum L Rev 1515 (cited in note 11) (defending Marshall’s conclusion that Article III specifies and limits the scope of the Court’s original jurisdiction).

<sup>88</sup> Certain kinds of supervisory authority, including mandamus and habeas proceedings, may not implicate the Article III prohibition against an expansion of the Court’s original jurisdiction, at least insofar as they focus on the review of inferior tribunals. See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 Tex L Rev 1433, 1487–93 (2000). But one would have an extremely difficult time characterizing an original proceeding to forfeit judicial office as the kind of supervisory proceeding that seeks, within the meaning of the Court’s precedents, to “revise and correct,” *Marbury*, 5 US (1 Cranch) at 175, the decisions of an inferior tribunal. For an example of how to read “revision and correction,” see *Ex parte Bollman*, 8 US (4 Cranch) 75, 99–101 (1807) (concluding that an “original” petition for habeas corpus might nonetheless be treated as an exercise of the Court’s appellate jurisdiction to the extent that it sought to revise and correct the work of a lower court).

<sup>89</sup> On the common law right to trial by jury in *scire facias* proceedings, see Shartel, 28 Mich L Rev at 891 n 59 (cited in note 3).

<sup>90</sup> See Prakash and Smith, 116 Yale L J at 128–31 (cited in note 1) (suggesting criminal proceedings and civil forfeiture proceedings in the lower federal courts as eligible modes for removing federal judges). Federal criminal courts would clearly have jurisdiction to entertain criminal proceedings against a sitting Supreme Court justice. But the law has long been settled that such criminal proceedings differ from proceedings to oust a constitutional officer from office. Thus, a Senator may be subjected to criminal sanctions that have the effect of disabling him from service in the Senate but the criminal court may not impose the sanction of removal from the Senate. See note 81. Similarly, federal judges continue to draw their salary, even following a conviction and imprisonment, until they have been impeached and removed from office. See *Nixon v United States*, 506 US 224, 226 (1993) (“Because [federal district court judge] Nixon refused to resign from his office . . . he continued to collect his judicial salary while serving out his prison sentence.”).

compromise empowers but does not require Congress to create lower federal courts; Congress could have chosen to rely upon state courts as inferior federal tribunals instead.<sup>91</sup> In suggesting lower courts as a forum for judicial removal proceedings, Prakash and Smith ask us to imagine that the framers meant to allow Congress to assign such proceedings to the state courts. Such a structural arrangement would have struck the framers as incongruous; many regarded the state courts with suspicion either because state court judges lacked life tenure or because they were too attached to the interests of their particular state. Sure enough, conflicts and jealousies soon arose. In *Martin v Hunter's Lessee*,<sup>92</sup> for example, Virginia courts contended that the Constitution barred the Supreme Court from reviewing state court decisions.<sup>93</sup> On the Prakash and Smith view, the federal judges who overturned the decision of the Virginia courts were subject to removal proceedings before those very state courts.

If the framers had meant to subject federal judges to such proceedings, they doubtless would have made some explicit provision. Since they failed to do so, we can conclude that federal judges enjoy immunity from removal otherwise than through the impeachment-and-removal process set forth in the Constitution.

#### CONCLUSION

Prakash and Smith revive Shartel's argument for nonimpeachment removal of federal judges at an apparently promising time. Challenges to judicial tenure have enjoyed something of a vogue in recent years,<sup>94</sup> and the Prakash-Smith-Shartel thesis will doubtless attract broad attention. But the seventeenth century world that Prakash and Smith conjure up in their attempt to reclaim the common law background of the good behavior provisions of Article III of the Constitution differs markedly from that in which the framers lived. Theirs was a world in which the removal of superior court judges had largely been vested in legislative assemblies, acting either by impeachment proceedings or by joint address. Removal after an impeachment trial in the Senate was the option the framers chose in the Constitution, the

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<sup>91</sup> For accounts of the Madisonian compromise, see generally James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw U L Rev 191 (2006) (contending that Congress may constitute inferior tribunals within the meaning of Article I of the Constitution by appointing state courts to hear matters within the federal judicial power); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 Va L Rev 1957 (1993) (same). I am indebted to Bob Pushaw for raising this question.

<sup>92</sup> 14 US (1 Wheat) 304 (1816).

<sup>93</sup> See *id.* at 305–06.

<sup>94</sup> See generally, for example, Roger C. Cramton and Paul D. Carrington, eds, *Reforming the Court: Term Limits for Supreme Court Justices* (Carolina Academic 2006).

one that they described in their writings about what they had done, and the one that constitutional lawyers discussed during the first several decades of the nation's constitutional experience. Prakash and Smith base their revisionist approach on the claim that they have seen the framers' world more clearly than the framers saw it themselves. We should be skeptical of such a claim, and slow to adopt a reading of the Constitution that would overthrow two hundred years of constitutional tradition. Removing federal judges has long been viewed as a task for the Senate alone, on impeachment by the House, and in the end Prakash and Smith give us little reason to question that view.