

HEINONLINE

Citation: 116 Yale L.J. 159 2006-2007

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 3 15:29:20 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0044-0094](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0044-0094)

SAIKRISHNA PRAKASH AND STEVEN D. SMITH

Reply: (Mis)Understanding Good-Behavior Tenure

Conventional wisdom regards impeachment as the only means of removing federal judges, so that the good-behavior tenure provision of Article III must be understood as an awkward cross-reference to the impeachment provisions of Article II. In *How To Remove a Federal Judge*,¹ we argue that the conventional wisdom is mistaken, at least as a matter of original meaning. At the Founding, “good Behaviour” was a term of art referring to a generic tenure that could be granted to anybody with respect to any item that might be held (e.g., jobs, licenses, land). The phrase meant that the holder could be deprived of the item only through a judicial proceeding establishing misbehavior. For centuries, this process of judging whether someone with good-behavior tenure had misbehaved occurred in ordinary trials outside of the impeachment process. Given this background, if impeachment was to serve as the sole means of judging misbehavior, a constitution would have to expressly provide as much precisely because it was an unusual departure from prior practice. Our Constitution lacks any hint that it makes impeachment the sole means of judging misbehavior, leading us to conclude that the Constitution, as originally understood, permitted removal of misbehaving judges by means other than impeachment, i.e., the traditional judicial process of ordinary trials.

In his response to our article, Professor Martin Redish ably defends the orthodox view. He contends that we are mistaken on two levels—on the clause-oriented level of what “good Behaviour” meant (or means²) and also on the

-
1. Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 YALE L.J. 72 (2006).
 2. Redish endorses “textualism.” Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 142 (2006). But he also questions originalism and expresses especially strong reservations about the “original meaning” approach, *see id.* at 146-48, which is often taken to be essentially the same thing as “textualism,” *see, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 116 (2005); Vasani Kasavan & Michael Stokes Paulsen, *The*

more “holistic” level of the overall constitutional design. That design, Redish believes, includes an unyielding commitment to judicial independence incompatible with the removal of judges except via impeachment.

We are honored that Redish has carefully scrutinized our article³ – and also heartened. If our position is mistaken, a scholar of his stature and undoubted expertise in this field would surely be able to point out its errors. While Redish does indeed raise important objections, we believe our interpretation survives his objections; it remains demonstrably the most plausible reading of what “good Behaviour” meant at the Founding.

I. THE INTERPRETIVE SIGNIFICANCE OF JUDICIAL INDEPENDENCE

We begin with Redish’s “holistic” argument, in part because Redish himself regards it as more important,⁴ but also because he invokes this concern to justify imposing an exceedingly high burden of proof with respect to our claim about the meaning of good behavior. Redish’s argument is straightforward: judicial independence is a vital, even paramount commitment in our constitutional scheme, so that any interpretation that would seriously jeopardize judicial independence (as Redish thinks our interpretation would) is presumptively unacceptable.

Redish’s argument is misconceived, we think, for two reasons. In the first place, he overstates the extent to which the original meaning of good-behavior tenure would undermine judicial independence. Second, Redish’s “holistic” argument is lopsided and hence unpersuasive.

A. Removal for Misbehavior Does Not Jeopardize Judicial Independence

In our article, we argue that if the original meaning of the “good Behaviour” provision were embraced, then Congress could enact statutes using its necessary and proper authority⁵ permitting the removal of judges for

Interpretive Force of the Constitution’s Secret Drafting History, 91 GEO. L.J. 1113, 1134-48 (2003). We are somewhat unsure, therefore, to what extent Redish actually means to dispute our interpretation as an interpretation of original meaning.

3. In fact, our original article benefited from Redish’s very helpful comments on an earlier draft.
4. Redish, *supra* note 2, at 141.
5. Redish doubts our assertion that the Necessary and Proper Clause grants Congress the authority to create means by which judges could be removed for misbehavior in the ordinary courts. *Id.* at 145. We think our article shows that good-behavior tenure clearly does not protect misbehaving judges. That is to say, someone who misbehaves no longer has the

misbehavior. Redish argues that such statutes would be “devastating” to, and would “effectively gut[,]” judicial independence.⁶ We think this is hyperbole.

As we explained, any removal procedure authorized by Congress would have to be conducted in a court with all of the traditional judicial safeguards—rights to receive proper notice, to have the assistance of counsel, to examine and cross-examine witnesses, to argue both factual and legal points, to be deemed innocent of misbehavior until proven guilty. In the event of an unfavorable outcome, a judge would have the opportunity to appeal—all the way to the United States Supreme Court, if necessary. And if Congress were to define misbehavior in a way inconsistent with the original understanding—by making trivial derelictions removable offenses, for example—a court would be obligated to invalidate such a provision.

Indeed, 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 remarked⁷) can as a practical matter mean whatever Congress wants it to mean, and without any possibility of appeal.⁸ In an action for misbehavior, by contrast, a judge could be removed only through a procedure conducted by a court and complying with “due process of law,” and

protections of a tenure premised on good behavior. The only remaining question is whether Congress can provide for the removal of misbehaving judges. Congress, using the Necessary and Proper Clause, enacts all manner of legislation affecting the number, the jurisdiction, and the procedures of the federal courts. We think the Clause likewise permits Congress to establish the terms of offices it creates. Indeed, Congress does this all the time with respect to executive offices and judicial offices—establishing their salary, jurisdiction, location, etc. See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. (forthcoming 2006). Hence, should Congress determine that misbehaving judges shall be ousted via a judicial process, it merely would be using its necessary and proper authority to establish judicial tenures wholly consistent with the standard found in the Constitution.

In doubting our claim, we believe that Redish has the greater difficulty because he has to explain how it is that Congress can establish the jurisdiction, pay, procedures, etc., of federal courts and executives but cannot establish the terms of office for federal judges. Redish’s doubts reflect an untenable and niggardly view of Congress’s powers over the federal offices it creates.

6. Redish, *supra* note 2, at 156-57.
7. As a member of the House of Representatives, Ford declared that “an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment.” Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Stafford Trial*, 69 U. CHI. L. REV. 2057, 2096 (2002) (book review) (alteration in original).
8. See *Nixon v. United States*, 506 U.S. 224 (1993) (concluding that challenges to an impeachment trial were a nonjusticiable political question).

with the possibility of appeal to a higher tribunal not immersed in the conflict and emotions of the trial.

Noting (correctly) that the meaning of “good Behaviour” is imprecise, Redish appears to worry that Congress might authorize removal of judges merely for making legal rulings that someone else—Congress or the President, perhaps—opposes.⁹ But although the precise meaning of misbehavior (like that of most other provisions in the Constitution) would indeed be the subject of dispute, it seems clear that the standard could not plausibly be interpreted in the way Redish fears. Indeed, had disagreement on judgments been enough to remove judges, the Crown could have removed judges willy-nilly. Of course, this never happened, precisely because issuing a judgment that the Crown disagreed with was not a form of misbehavior. Such a construction would in effect convert good-behavior tenure into tenure during pleasure: the President or some other party with standing could seek to have a judge removed merely because she did not like the way the judge had ruled in cases. As our article explains, the essential point of giving good-behavior tenure was to ensure that a judge did *not* hold the office at the pleasure of the Crown or anybody else. Hence, whatever else one might say about our claims, it is perfectly clear that Congress cannot provide that judges will be ousted merely because Congress (or the President) disagrees with their judgments.

Having said this, we cheerfully admit that judges could be removed for reaching their judgments by improper means. A judge who decided cases based on bribes she received or by peering at a crystal ball would be guilty of misbehavior because such means of resolving cases were not permissible or acceptable. This would be no different than a forester of the Crown who might be ousted from office for misbehavior because the forester concluded that setting multiple fires around the perimeter would serve to safeguard the forest. Although Congress cannot provide that judges should be removed for deciding a case incorrectly, it surely can provide for the removal of judges who decide cases through fortune-telling and séances. Judges who use these methodologies are guilty of misbehavior.

Though Redish’s fears are exaggerated, he is right that our interpretation, by recognizing a means of removal in addition to impeachment, would to some degree reduce judicial independence from what it would be if impeachment were the exclusive method of removal (just as the possibility of removal by *impeachment* reduces judicial independence from what it would be if judges could not be removed at all). But this observation merely points to the deeper problem with Redish’s “holistic” argument.

9. Redish, *supra* note 2, at 145.

B. One-Dimensional Holism

Imagine a “holistic” argument we might make against Redish’s own interpretation of the good-behavior provision. Rather than appealing to judicial independence, we could appeal to the value of accountability. Founding-generation Americans, we might say, were deeply committed to the idea that government officials should be accountable for their actions. The Revolutionary War had been fought, after all, because Americans found it intolerable to be ruled by an unaccountable King and by a Parliament that was not answerable to them. (“No taxation without representation!”) Consequently, a central concern of the delegates who met in Philadelphia—an obsession, almost—was how to fashion a government that would be accountable. And there was more than just talk. The delegates built a commitment to accountability into the Constitution in a whole variety of ways—in methods of selecting government officials, in an array of provisions defining the length of tenure for different offices, and in a system of checks and balances by which one branch’s officials could hold another branch’s officials accountable for their actions.

Article III’s explicit conditioning of judicial tenure on “good Behaviour” is one crucial part of this program, a part designed to ensure some judicial accountability. But Redish, by effectively reading that provision out of the Constitution as an independent constraint on judges—and thus leaving the largely unusable impeachment process as the sole constraint—deals a “devastating” blow that “effectively guts”¹⁰ the Constitution’s plan to ensure accountability, at least in the judicial branch.

We *could* make this “holistic” argument against Redish’s (and the prevailing) construction. The argument has as much support in the constitutional history and text as does Redish’s parallel argument based on the commitment to judicial independence. Indeed, the argument we could make may have *more* support, we submit, because the Framers’ concern about accountability seems much more pervasive in their deliberations—and more manifest in the Constitution itself—than does their concern to ensure judicial independence.

But we do not make this argument because, like Redish’s argument, we believe it to be fundamentally misconceived. The Framers were concerned about accountability, to be sure—but they were also concerned about judicial independence and a whole host of other values. These values did, and do, compete with each other to some extent. So the Framers devised a system that

10. *Id.* at 156-57.

inevitably involved balancing and tradeoffs among competing values and commitments. They could have adopted a system designed to maximize accountability (by making all officials, including judges, subject to annual reelection, perhaps), or they could have adopted a system that would maximize judicial independence (by not making judges impeachable at all). But, in fact, the Framers were sensible enough to do neither of these things.¹¹

Consequently, appealing to one among many competing values and commitments in a “holistic” way and then construing a provision to further *that* value is no way to respect the constitutional design. If we want to be genuinely holistic, we must look at the particular tradeoffs the Framers made, as embodied in the various constitutional provisions, and do our best to figure out what those particular provisions meant.¹²

II. WHAT GOOD BEHAVIOR MEANT

This is what we try to do in our article with respect to good behavior. We thus examine a wide range of evidence, from both England and America, over the two centuries preceding adoption of the Constitution. This evidence, we submit, uniformly supports the interpretation we offer.

11. Redish suggests that because good-behavior tenure had historically been secured in the effort to give officials *more* independence than at-pleasure appointments had provided, it is wrong and ironic to read Article III's good-behavior provision so as to *reduce* judicial independence. *Id.* at 148-49. We think this suggestion is doubly mistaken. In the first place, Article III's good-behavior provision does *not* reduce judicial independence. Without that provision the Constitution would be silent about the length of judges' tenure (as it is with respect to, for example, that of most other “civil Officers”), and there is no reason to be confident that judges any more than other officers would enjoy even the presumptive life tenure that they currently have thanks to the good-behavior provision.

But even setting aside this point, Redish's observation provides no justification for reading the phrase to provide for *more* independence than good behavior implied. Suppose we decide to visit Professor Redish and thus ask our travel agent in San Diego for a plane ticket to Chicago. If the agent instead supplies us with tickets to New York, we will hardly be appeased if the agent explains, “Well, your purpose was obviously to travel *eastward*, so I respected that purpose and helped you out by sending you *even farther* eastward than you requested.”

12. Another way of making the point is that to understand the original Constitution's actual design, one must understand the original meaning of its provisions. Redish, we submit, has it backwards when he decides what commitments the Constitution has prior to understanding what its provisions mean. This approach involves speculating what the overarching design was (or ought to be) and then (mis)reading the provisions to fit the imagined design. Rather than being constitutional isolationists, as Redish claims, we claim the mantle of holism. We only reject that perversion of holism that is untethered from and unconstrained by constitutional text.

For the most part, Redish does not address the specific evidence we muster, but instead argues that this evidence does not *compel* acceptance of our interpretation¹³ and that it does not satisfy an exceedingly high standard of proof imposed because of the commitment to judicial independence. We have addressed that latter objection in the preceding Part. However, Redish does raise some specific objections to our historical argument. Here we consider, very briefly, the most important of these objections.

A. Originalism

Perhaps Redish's most conspicuous objection is to our originalist methodology. Our argument operates, he correctly points out, on undefended and controversial originalist assumptions.

The last thing we wanted, in this article at least, was to become embroiled in the well-worn controversy over originalism versus nonoriginalism. Hence we do something entirely conventional—we adopt a widely respected and practiced (though, to be sure, contested) methodology without first defending it—the same thing, by the way, that Redish does in making claims about good behavior. An additional reason for not defending our choice is that we ourselves do not necessarily agree entirely on the issues raised by originalism.¹⁴ A final reason is pragmatic—we would never get to our main topic if we sought to adequately defend our methodology.

Our assumption, as stated in the article, is that an explication of the original meaning of “good Behaviour” will be of interest to both originalists and nonoriginalists. Even nonoriginalists presumably would not want to proceed on a mistaken understanding of the original meaning (as the conventional interpretation of “good Behaviour” has).

13. Redish, *supra* note 2, at 141 (“Close analysis . . . reveals that their historical arguments by no means inexorably lead to the constitutional conclusion they reach.”).

14. One of us has consistently adhered to an originalist methodology in published work. See, e.g., Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 980 (2004); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Professors Are Wrong for America*, 107 COLUM. L. REV. (forthcoming 2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)) (defending originalism). The other, while sometimes describing himself as an “originalist wannabe,” has criticized originalism, see Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL’Y 391, 391 (1996), and in the area of his principal expertise has advocated a historically sensitive but nonoriginalist approach, see Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

As we acknowledge in the final paragraph of our article, nonoriginalists are entirely free to disregard the Constitution's original meaning and champion impeachment as the exclusive method of removing judges.¹⁵ But nothing in Redish's response establishes that originalists are uniquely burdened by the possibility that others will reject their methodology. Every theory of interpretation is contested and controversial. And every claim of meaning that is built on any of those theories is susceptible to the rejoinder that if one rejects the theory of interpretation, the claimed meaning loses much of its significance.

B. The Significance of Silence

In his response, Redish correctly notes that not much was explicitly said by delegates to the Philadelphia Convention that would confirm our interpretation;¹⁶ indeed, very little was said about the meaning of "good Behaviour" at all. He implies that this virtual silence on the subject undermines our interpretation.

Again, this suggestion seems to reflect Redish's assumption, based on the "holistic" argument already considered, that our interpretation is contrary to the constitutional scheme and hence subject to a heavy burden of proof. On the merits, however, Redish's inference seems implausible. If without much discussion lawmakers employ a term of art that has been used for decades and even centuries, the natural inference, as the Supreme Court has recognized,¹⁷ is that they intend to use the term in its well-established sense. This inference might be made either on the assumption that the lawmakers consciously know of the entrenched meaning and intend to adopt it or on the (perhaps more

15. It is hardly clear, however, that taking subsequent developments and current concerns into account would strengthen the case for unqualified judicial independence. Arguably, the Framers' (qualified) commitment to judicial independence and judicial review reflected a somewhat innocent assumption that judges would be nothing more than a sort of distinterested and dispassionate "voice of the law." See Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUD. 419 (2005). For better or worse, later history has shown the fallacy of this assumption and hence has underscored, arguably, the need for judicial *accountability*.

16. Redish, *supra* note 2, at 149 & n.41.

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

realistic) assumption that even if they have not recently familiarized themselves with the technical meaning, they are content to incorporate it by reference.¹⁸

Either way, the relative silence of the Framers with respect to the “good Behaviour” provision suggests that they harbored no intention to deviate from what that term had long been understood to mean. Nor was there anything in the text to suggest to ratifiers, or readers generally, that any such deviation was contemplated.

It is instructive, moreover, that the Constitution was book-ended by statutes that powerfully support the traditional understanding. First, the Northwest Ordinance of 1787 granted good-behavior tenure to territorial judges. This grant of good-behavior tenure could not have been a reference to impeachment because there was no impeachment mechanism, either in the Ordinance or in the Articles of Confederation.¹⁹ Given the traditional meaning of good behavior, the Ordinance evidently made these judges removable for misbehavior in the ordinary courts.

More significantly, almost immediately after the new government became operative, Congress adopted the Crimes Act of 1790, which made judges removable from office upon conviction for bribery—without impeachment. This statute presupposed the traditional interpretation of good-behavior tenure and is wholly incompatible with the conventional view defended by Redish.²⁰ And, of course, there are state constitutions and private grants of good-behavior tenure that reflect the traditional interpretation and that likewise surround the Constitution.²¹

We understand that the meaning of a phrase can change over time. But in the absence of any evidence of usage confirming that change, we doubt that the Constitution not only constituted a new government, but also ushered in a novel meaning for “good Behaviour” tenure. In the end, the paucity of

18. Cf. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 127-33 (2004) (suggesting that although the Framers of the Eighth Amendment may have been uncertain about the meaning of “cruel and unusual punishment,” they intended the phrase to mean whatever it had meant in earlier English usage).

19. See Prakash & Smith, *supra* note 1, at 113-14.

20. We discuss the significance of the Crimes Act in our article. *Id.* at 122 & n.189, 123, 130, 134. Though he says nothing about the Crimes Act, Redish argues that the impeachment of Justice Samuel Chase during the Jefferson Administration undermines our interpretation. We discuss the Chase impeachment as well. *Id.* at 123-26. What is most important for present purposes, though, is that the Crimes Act of 1790 is far better evidence of the original meaning than the Chase episode that occurred after a decade (and a political convulsion) had passed.

21. See *id.* at 105-09, 112-18.

Founding-era debate regarding a known term of art is an argument strongly favoring the traditional understanding of the term.

C. What Is the Alternative?

In any case, an obvious and ominous question hangs over Redish's discussion: if the good-behavior provision did not carry its long-established meaning, then what did the provision mean? Redish finds the question difficult and puzzling²² (though the embarrassment arises, we note, only if one assumes that the provision did not mean what it had historically always meant). He gingerly suggests that the clause was probably "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."²³

We submit that if this is the alternative to the historically grounded reading we defend, then our reading appears even more attractive. Redish suggests that but for the good-behavior clause, there would have been a conflict between Article II's provision allowing judges to be impeached and the life tenure ostensibly conferred by Article III. This suggestion is multiply misconceived.

In the first place, no special provision was needed to make it clear that executive officers were impeachable, so it is not obvious why the Constitution would need a special provision supposedly underscoring that judges could be impeached. Judges, like executive officers, are simply included in the impeachable category of "all civil Officers of the United States." More importantly, and contrary to Redish's assumption, there is nothing in Article III other than the good-behavior provision to indicate that judges even enjoy presumptive life tenure. It is the good-behavior provision that grants a form of life tenure to judges, and it is that provision that likewise provides that judges have no protection when they have misbehaved. So, once again, the good-behavior provision could hardly have been added to cure a (nonexistent) conflict with Article II's impeachment provision.

Even more obviously, if the drafters had been worried about a possible perceived conflict, they could have dealt with the concern much more easily and clearly. They might have simply written, in Article III, that judges are appointed for life but "subject to impeachment." Or they might have written,

22. Redish, *supra* note 2, at 140 ("[T]he 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.").

23. *Id.* at 155.

REPLY

in Article II, Section 4, that impeachment is available for “civil officers including judges.” It is hard to understand why, rather than adopting one of these simpler and more straightforward measures, the drafters would instead have addressed the ostensible conflict obliquely and by employing a term of art that historically had had nothing to do with impeachment, and that on its face makes judicial tenure defeasible based on a standard manifestly different from the “high Crimes and Misdemeanors” standard for impeachment.

CONCLUSION

There is no sound reason to suppose that the Founders gratuitously employed a long-established term of art in an idiosyncratic way without explanation or clarification and with the obvious potential for grave misunderstandings. The only reason to suppose as much is if one possesses a resolute commitment to salvage a construction that, though manifestly at odds with both the constitutional text and the relevant history, has become entrenched in some quarters.

In this respect, Professor Redish surely speaks for quite a few scholars who treasure judicial independence and are ever-vigilant in defending the federal judiciary against perceived threats. This protective attitude no doubt stems from a sense that the judiciary has done a creditable job of upholding the Constitution. The attitude might also reflect an underappreciated similarity that judges and academics share: both are beneficiaries of tenure during good behavior.

For these or other reasons, at the end of the day the constitutional community may prefer that judges should be removable only through impeachment, and accordingly may choose to understand the good-behavior provision to mean simply “life tenure.” But this construction is not compelled by—it is rather a repudiation of—the original meaning of tenure during good behavior.