



William Penn and the Origins of Judicial Tenure during Good Behavior

WILLIAM PENN IS, of course, best known for founding Pennsylvania as a safe haven for Quakers and for his commitment to religious tolerance in general.¹ Unexplored in the vast amount of secondary literature on this iconic figure is his role in the origins of judicial tenure during good behavior, the institutional safeguard by which a judge can be removed for serious cause only that, together with adequate and secure judicial compensation, helped make the judiciary an independent and coordinate branch of government. In fact, two influential articles on judicial tenure in New Jersey, Donald L. Kemmerer's "Judges' Good Behavior Tenure in Colonial New Jersey" and Jerome J. Nadelhaft's "Politics and the Judicial Tenure Fight in Colonial New Jersey," do not say a word about Penn, even though he was one of the early proprietors of that colony.² J. Paul Selsam likewise overlooks Penn's contributions to judicial independence in his important article about the history of judicial tenure in Pennsylvania, and Joseph H. Smith's oft-cited

¹ See, e.g., Edwin B. Bronner, *William Penn's "Holy Experiment": The Founding of Pennsylvania* (New York, 1962); Melvin B. Endy Jr., *William Penn and Early Quakerism* (Princeton, NJ, 1973); Sally Schwartz, *"A Mixed Multitude": The Struggle for Toleration in Colonial Pennsylvania* (New York, 1987).

² Donald L. Kemmerer, "Judges' Good Behavior Tenure in Colonial New Jersey," *Proceedings of the New Jersey Historical Society* 16 (1938): 18–30; Jerome J. Nadelhaft, "Politics and the Judicial Tenure Fight in Colonial New Jersey," *William and Mary Quarterly*, 3rd ser., 28 (1971): 46–63.

1976 article “An Independent Judiciary: The Colonial Background” is similarly silent about Penn’s role.³

The most celebrated guarantee of judicial tenure during good behavior is found in Article III of the US Constitution, which provides that federal judges “shall hold their Offices during good Behaviour.”⁴ The origins of Article III have traditionally been traced back to the judicial tenure provision of the 1701 English Act of Settlement. No one talks about William Penn’s contributions to the subject, despite the fact that he appears to have anticipated by two decades, in organic laws in both New Jersey and Pennsylvania, the English Act of Settlement in recognizing the importance of judicial tenure during good behavior.⁵

* * *

The framers of the US Constitution memorialized in the nation’s organic law secure tenure, adequate and stable compensation, and separate institutional status for federal judges to help ensure that they would be independent of political pressure. John Adams was largely responsible for articulating in a systematic fashion what may be fairly called the political theory of an independent judiciary.⁶ He wrote in his influential 1776 pamphlet *Thoughts on Government*:

³ J. Paul Selsam, “A History of Judicial Tenure in Pennsylvania,” *Dickinson Law Review* 38 (1934): 168–83; Joseph H. Smith, “An Independent Judiciary: The Colonial Background,” *University of Pennsylvania Law Review* 124 (1976): 1,104–56. Smith mentions Pennsylvania’s 1682 Frame of Government, but only in passing: “Some evidence shows that in the early period of this proprietary colony judicial commissions were issued during good behavior, but by the early eighteenth century tenure had become at pleasure.” *Ibid.*, 1,112–13. See also *William Penn and the Founding of Pennsylvania, 1680–1684: A Documentary History*, ed. Jean R. Soderlund et al. (Philadelphia, 1983), an otherwise useful annotated documentary history of the founding of Pennsylvania, which likewise misses the judicial tenure issue. Similarly, historian Gary B. Nash neglects it in “The Framing of Government in Pennsylvania: Ideas in Contact with Reality,” *William and Mary Quarterly*, 3rd ser., 23 (1966): 183–209.

⁴ US Const. art. III, sec. 1. The origins of Article III are presently receiving much scholarly attention. See, e.g., Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606–1787* (New York, 2011); and James E. Pfander and Daniel D. Birk, “Article III and the Scottish Judiciary,” *Harvard Law Review* 124 (2011): 1,613–87.

⁵ Some scholars are currently calling for the abolition of life tenure for federal judges. See, e.g., Roger C. Cramton and Paul D. Carrington, eds., *Reforming the Court: Term Limits for Supreme Court Justices* (Durham, NC, 2006); contrast with Sandra Day O’Connor Project on the State of the Judiciary, Georgetown University Law Center, <http://www.law.georgetown.edu/judiciary/>. I will leave to others the debate over whether judicial tenure during good behavior is good public policy for the United States in the twenty-first century. My objective in this article is to say something new about its origins.

⁶ Adams, the American founding’s most sophisticated political theorist, was not writing on a blank slate. Rather, he was tying together centuries of political theorizing about government institu-

The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law. For misbehavior, the grand inquest of the colony, the house of representatives, should impeach them before the governor and council, where they should have time and opportunity to make their defence; but, if convicted, should be removed from their offices, and subjected to such other punishment as shall be thought proper.⁷

The “good behavior” clause was challenged only once during the course of the Federal Convention of 1787. John Dickinson attempted to include “address” as a means of removing federal judges, the practice by which the legislature may request that the executive discharge a particular judge, even if the judge had done nothing wrong. He moved to place language stipulating that federal judges “may be removed by the Executive on the application by the Senate and House of Representatives” after the good behavior clause. The motion was defeated seven to one. Gouverneur Morris called the proposal a “contradiction in terms,” because it would have subjected judges otherwise serving during good behavior to removal without trial. James Wilson complained that under Dickinson’s proposal,

tions that preceded him. See Scott D. Gerber, “The Political Theory of an Independent Judiciary,” *Yale Law Journal Pocket Part* 116 (2007): 223–28; Scott D. Gerber, “The Court, the Constitution, and the History of Ideas,” *Vanderbilt Law Review* 61 (2008): 1,067–126; and Gerber, *Distinct Judicial Power*.

⁷ John Adams, *Thoughts on Government* (1776), in *The Works of John Adams*, ed. Charles Francis Adams, 10 vols. (Boston, 1850–56), 4:193, 198–99. Adams was in Europe on a diplomatic mission during the Federal Convention of 1787, but, as Zoltan Haraszti concludes in his landmark study of Adams’s bibliographic influences, Adams “exerted an enormous influence on the debates of the Federal Convention.” Zoltan Haraszti, *John Adams and the Prophets of Progress* (Cambridge, MA, 1952), 31. Nowhere was Adams’s influence greater than on Article III. See Gerber, *Distinct Judicial Power*. *Thoughts on Government* was not Adams’s first discussion of judicial independence, but it was his most systematic and his most influential. Adams had been writing about the need for an independent judiciary since at least January and February of 1773, when he engaged in a series of exchanges on the matter in the Boston press with William Brattle, a Tory. See *Papers of John Adams*, ed. Robert J. Taylor et al., 15 vols. (Cambridge, MA, 1977), 1:252–309.

"Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." Edmund Randolph opposed it "as weakening too much the independence of Judges."⁸

The debate over the ratification of the US Constitution found Federalists and Anti-Federalists in rare agreement about the necessity of life tenure for judicial independence. Alexander Hamilton, writing as "Publius" in "Federalist No. 78," insisted:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit of judges which must be essential to the faithful performance of so arduous a duty.⁹

James Madison agreed. He wrote in "Federalist No. 51" that "the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them."¹⁰ Robert Yates, a leading Anti-Federalist writing under the pseudonym "Brutus," likewise considered tenure during good behavior "a proper provision," while Melancton Smith, writing as "The Federal Farmer," maintained, "it is well provided, that the judges shall hold their offices during good behaviour."¹¹

Scholars of American constitutional history frequently trace the origins of the good behavior clause of Article III to the 1701 English Act of

⁸ In *The Records of the Federal Convention of 1787*, ed. Max Farrand, 4 vols. (New Haven, CT, 1911), 2:428–29.

⁹ Alexander Hamilton, "Federalist No. 78," in *The Federalist Papers: Alexander Hamilton, James Madison, John Jay*, ed. Clinton Rossiter (New York, 1961), 469.

¹⁰ James Madison, "Federalist No. 51," in *Federalist Papers*, 321.

¹¹ Brutus, "XV" (Mar. 20, 1788), in *The Antifederalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York, 1986), 305; Federal Farmer, "The Judiciary" (Jan. 18, 1788), in *Letters from The Federal Farmer to the Republican*, ed. Walter Hartwell Bennett (Tuscaloosa, AL, 1978), 99. It is impossible to know for certain whether Melancton Smith was "The Federal Farmer" and Robert Yates was "Brutus," but the majority of historians who have studied the question currently believe this to be the case. See, e.g., Robert H. Webking, "Melancton Smith and the *Letters from the Federal Farmer*," *William and Mary Quarterly*, 3rd ser., 44 (1987): 510. In any event, as Pauline Maier notes in her recent book on the ratification debates, "the influence of serial essays on the Constitution turned far more on what they said than on who wrote them." Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York, 2010), 82.

Settlement.¹² The Act of Settlement was intended to secure Protestant succession to the English throne and to help ensure a parliamentary system of government, but its significance to the history of American constitutionalism is found in the judicial tenure provision, which provided statutory form to a practice that had been put into effect, albeit temporarily, by the English Civil War of 1642–51.¹³ Although the 1701 act provides for tenure during good behavior, it permits removal by address—rather than solely by impeachment—a practice that one legal historian colorfully calls a “safety-valve” theory of judicial independence.¹⁴

Scholars’ concentration on the English Act of Settlement is perfectly understandable for at least two significant reasons. First, the 1701 act represents the “greatest landmark” in a history of the tenure of English judges that is so complicated that even Frederic W. Maitland, the preeminent authority on English legal history, misunderstood it.¹⁵ Second, and perhaps most important, the 1701 act, and the relative security of tenure that it brought to the English judiciary, played a dramatic role in the prerevolutionary debates about the imperial constitution and the rights of the colonists under it. Indeed, in January and February of 1773 John Adams framed his celebrated opposition to proposed payment of the salaries of the judges of Massachusetts Bay by the English crown in these terms.¹⁶ And while a number of scholars recognize that, prior to 1701, there were interesting developments with respect to judicial tenure in both England and America, most tend to recite the 1701 Act of Settlement without

¹² See, e.g., Paul D. Carrington and Roger C. Cramton, “Original Sin and Judicial Independence: Providing Accountability for Justices,” *William and Mary Law Review* 50 (2009): 1,112; David P. Currie, “Separating Judicial Power,” *Law and Contemporary Problems* 61 (1998): 7–10.

¹³ 12 & 13 William III, c. 2 (Eng.). For a useful history of the 1701 English Act of Settlement that focuses on the judicial tenure provision, see C. H. McIlwain, “The Tenure of English Judges,” *American Political Science Review* 7 (1913): 217–29. See generally David Lemmings, “The Independence of the Judiciary in Eighteenth-Century England,” in *The Life of the Law: Proceedings of the Tenth British Legal History Conference, Oxford 1991*, ed. Peter Birks (London, 1993), 125; and Martin Shapiro, “Judicial Independence: The English Experience,” *North Carolina Law Review* 55 (1977): 577–652.

¹⁴ Barbara Aronstein Black, “Massachusetts and the Judges: Judicial Independence in Perspective,” *Law and History Review* 3 (1985): 162. The pertinent part of the 1701 act provides: “Judges Commissions be made *quamdiu se bene gesserint* and their salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them.”

¹⁵ See McIlwain, “Tenure of English Judges,” 217–18 (“Few subjects so important in English legal or constitutional history have been treated more vaguely than this. In one well-known constitutional history it is said that ‘until 1701 the judges held office at the royal will,’ and even Maitland says that judges of the Stuart period ‘all along . . . held their offices *durante bene placito*.’ Both of these statements are very wide of the mark.”). See also Smith, “Independent Judiciary,” 1,110.

¹⁶ See *Papers of John Adams*, 1:252–309.

affording much attention to what came before it.¹⁷ But as this article will now chronicle, William Penn appears to have anticipated by two decades, in organic laws in both New Jersey and Pennsylvania, the English Act of Settlement on the importance of judicial tenure during good behavior.

* * *

In 1664 King Charles II bestowed New Jersey upon his brother James, Duke of York, who in turn awarded it in 1664/65 to two of his friends, Lord John Berkeley and Sir George Carteret, as tenants in common. The province was named in honor of Carteret, who had been governor of Jersey Island in the English Channel. Although William Penn is best known as the founder of Pennsylvania, his connection to the New World began in New Jersey, as he was among a group of prominent Quakers who in 1676/77 purchased the province of West New Jersey, which had been partitioned from East New Jersey a few months earlier.¹⁸ In 1682 Penn also became one of the proprietors of East New Jersey.¹⁹ It was in East New Jersey where Penn's involvement with judicial tenure during good behavior was initially demonstrated.

There were, of course, organic laws—charters and constitutions—for New Jersey from the beginning, but the Fundamental Constitutions for the Province of East New-Jersey of 1683 is of most immediate interest. This particular organic law envisioned a government that consisted of a governor, who would serve for life, and a “great Council, to consist of the Four and Twenty Proprietors, or their Proxies in their Absence, and One Hundred Forty four to be chosen by the Freemen of the Province.”²⁰ The

¹⁷ Barbara Aronstein Black, for one, mentions that, in or about 1690, Increase Mather, as an agent for the colony of Massachusetts Bay, recommended to British officials that tenure for Massachusetts justices of the peace be “*quamdiu se bene gesserint*” (i.e., during good behavior). See Black, “Massachusetts and the Judges,” 136n136.

¹⁸ See, e.g., John E. Pomfret, *Colonial New Jersey: A History* (New York, 1973), 304 (“William Penn's biographers have tended to neglect his important involvement in the founding of West New Jersey, thus missing the dawn of his interest in America as well as a significant aspect of New Jersey and Quaker history.”), 31, 40. The formal petition did not occur until 1680, although the two halves operated separately beginning in 1676. See Grant of 1680, reprinted in, among other places, *Sources and Documents of United States Constitutions*, ed. William F. Swindler, 9 vols. (Dobbs Ferry, NY, 1973), 6:409–13. For the general history of New Jersey during the proprietary period, see John E. Pomfret, *The Province of West New Jersey, 1609–1702* (Princeton, NJ, 1956); and John E. Pomfret, *The Province of East New Jersey, 1609–1702* (Princeton, NJ, 1962).

¹⁹ See, e.g., Pomfret, *Province of East New Jersey*, 137.

²⁰ The Fundamental Constitutions for the Province of East New-Jersey of 1683 is reprinted in, among other places, *Fundamental Laws and Constitutions of New Jersey, 1664–1964*, ed. Julian P. Boyd (Princeton, NJ, 1964), 109–25.

representatives of the freemen served for three years. Twelve of the proprietors, or their proxies, were required to assent before any bill became a law.

The governor was assisted in the performance of his executive responsibilities by a “common Council, consisting of the Four and Twenty Proprietors, or their Proxies, and Twelve of the Freemen.” The freemen who sat on the common council were chosen by the great council and served one-year terms. The common council sat in three standing committees.

With respect to the judiciary, Article VIII of the Fundamental Constitutions provided that the power of appointing judges resided with the governor and the common council. Judicial terms appeared to be for life during good behavior: “upon any Malversation or Accusation, they shall be liable to the Examination and Censure of the great Council, and if condemn’d by them, the Governor and Common Council must Name others in their place.” This was a far cry from the way judges were treated under New Jersey’s first organic law, the Concessions and Agreement of the Lords Proprietors of the Province of New-Jersey of 1664/65, which instructed the governor to “punish” judges and other government officials who “swerv[ed] from the laws” or acted “contrary to their trust” and authorized him “to nominate and commissionate” judges and “all other civil officers” to terms at his “pleasure.”²¹

William Penn was not solely responsible for the Fundamental Constitutions of 1683,²² and pursuant to Article X, the governor, “in Conjunction with four Proprietors,” sat as an appeals court, and the organic law made no mention of judicial compensation. Moreover, the Fundamental Constitutions was never put into effect. Penn and the other proprietors had agreed that it would not become operational until accepted by the general assembly, and the general assembly instead declared its continuing allegiance to the Concessions and Agreements of 1664/65.²³ In short, Penn’s contribution to judicial independence in New Jersey should not be overstated. This said, constitutional development occurs in fits and starts, rather than in one fell swoop, and it is difficult to deny the significance of the gesture made in East New Jersey in 1683—modest

²¹ The Concessions and Agreement of the Lords Proprietors of the Province of New-Jersey of 1664/65 is reprinted in, among other places, *ibid.*, 51–66.

²² *Ibid.*, 18.

²³ *Ibid.*, 17–19.

though it was—to secure judicial independence with the guarantee of judicial tenure during good behavior.

The same may be said about Pennsylvania, the colony with which William Penn is most closely associated. In fact, Penn quickly became preoccupied with Pennsylvania, which was awarded to him by King Charles II in 1680/81 as repayment for a debt the king owed to Penn's father.²⁴ Penn arrived in Pennsylvania in 1682 to serve as governor, bringing with him the province's first Frame of Government, which he had written.²⁵ The 1682 Frame of Government mandated that the government of Pennsylvania was to consist of three bodies: a governor (Penn and his heirs or assigns), a provincial council, and an assembly. The latter two bodies were selected by the freemen. Members of the seventy-two-person council served for one- to three-year terms; members of the two-hundred-person assembly served for one year.²⁶ The legislative power was lodged in the governor, the council, and the assembly, with the latter passing or rejecting bills "prepared and proposed" by the governor and the council. The executive power resided with the governor and the council. For example, Article VIII provided "That the Governor and provincial Council shall take care, that all laws, statutes and ordinances, which shall at any time be made within the said province, be duly and diligently executed."

The 1682 Frame of Government contained a hint of an independent judiciary.²⁷ More specifically, Article XVII specified that the judicial power was to be conferred upon a separate institution—"standing courts

²⁴ See, e.g., Charles M. Andrews, *The Colonial Period of American History*, 3 vols. (New Haven, CT, 1937), 3:278–81.

²⁵ William Markham, Penn's cousin, had served as governor in Penn's stead for the first year of the province's existence and had been instructed by Penn to, among other tasks, erect courts. See, e.g., Frank M. Eastman, *Courts and Lawyers of Pennsylvania: A History*, 3 vols. (New York, 1922), 1:72. The 1682 Frame of Government is reprinted in Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*, 2nd ed., 2 vols. (Washington, DC, 1878), 2:1,518–27.

²⁶ The assembly for the first year consisted of all the freemen of the province.

²⁷ There were hints of judicial independence in almost all of the colonies. For example, Johan Printz, the third governor during Delaware's Swedish period, requested in 1647 that his superiors in Europe send him a secretary who could "attend to the judicial business." Quoted in Leon deValinger Jr., "The Development of Local Government in Delaware, 1638–1682" (master's thesis, University of Delaware, 1935), 6. Of course these were only modest gestures—Pennsylvania's were more generous than most—and colonial judiciaries remained far from independent. Among the Declaration of Independence's list of grievances against King George III was that "he has made judges dependent upon his will alone for the tenure of their offices and the amount of their salaries." Declaration of Independence para. 11 (US 1776).

of justice”—established by the governor and the council. The appointment process was the reverse of that later enumerated in the US Constitution of 1787: the council nominated judges and the governor confirmed or rejected them. The freemen nominated justices of the peace and the governor confirmed or rejected them. Tenure was for a one-year term only. However, an apparent contradiction was provided in the very next article: if expediency required it, Penn (he was mentioned specifically by name in Article XVIII, unlike in Article XVII) could appoint judges and justices of the peace “for so long time as every such person shall well behave himself in the office.”

In March of 1683 the council, dominated by Penn’s wealthy friends, and the assembly, composed of a more disparate array of freemen, convened.²⁸ The members of the council and assembly were reduced from seventy-two to eighteen and from two hundred to thirty-six, respectively. In a sign of the political discord to come, the assembly did not fully approve of the 1682 Frame of Government. Instead, it drafted and adopted, with Penn’s cooperation, a second Frame of Government. The 1683 document reiterated that the government of Pennsylvania was to consist of three bodies: a governor (Penn and his heirs or assigns), the provincial council, and the assembly.²⁹ The judiciary was not mentioned as a separate institution of government.

Penn argued successfully for the power to veto legislation, insisting that the charter of 1680/81 had conferred this privilege upon him. But he agreed not to take significant legislative action without the “advice and consent” of the council. The assembly, determined to gain for itself the power to initiate legislation, was temporarily satisfied with the “Privilege of conferring” with the governor and the council on lawmaking.³⁰

The most significant change with respect to the judiciary was found in Article XVI, which provided life tenure for judges during good behavior. As noted above, the 1682 Frame of Government was inconsistent on this point. Justices of the peace continued to serve for one-year terms. Article XXVIII of what was called “Laws Agreed Upon in England, &c” made clear that judges could not be members of other institutions of government, stating, “no such person shall enjoy more than one public office, at one time.” This provision was adopted along with the 1682 Frame of

²⁸ The first assembly to ever convene in Pennsylvania met in Chester in December 1682.

²⁹ The 1683 Frame of Government is reprinted in *Federal and State Constitutions*, 2:1,527–31.

³⁰ Joseph E. Illick, *Colonial Pennsylvania: A History* (New York, 1976), 38–39.

Government and seems to have remained in force under the 1683 frame.

Political practice, however, differed markedly from constitutional mandate. Five of the nine judges of the first court session conducted in Pennsylvania were also members of the provincial council. For the second session, this ratio had increased to seven of ten.³¹ Moreover, Penn and the council exercised both original and appellate jurisdiction in judicial matters, sat as a court of admiralty, tried makers of bad money, and presided over a witch trial and an impeachment trial.³² Revealingly, the impeachment trial concerned Nicholas More, the first chief justice of Pennsylvania and a member of the assembly. When asked to appear before the impeachment tribunal, More replied, “in what capacity?”³³ Relatedly, the council records reveal that two-year commissions were conferred upon More and other judges, which conflicts with the life-tenure provision of the active constitution.³⁴

Penn returned to England in 1684 to make his case to the crown that the “lower counties” of Pennsylvania (today, Delaware) belonged to him rather than to Lord Baltimore, the proprietor of Maryland. Penn remained in England for the next decade and a half—through the turmoil surrounding the reign of his close friend James II, the Glorious Revolution and ascendancy to the throne of William and Mary, and the

³¹ See George P. Donohoo, *Pennsylvania: A History* (New York, 1926), 171.

³² See William H. Loyd, *The Early Courts of Pennsylvania* (1910; repr., Littleton, CO, 1986), 63 (“The exercise of judicial functions by the governor and council was strictly in accordance with the custom in other proprietary and royal provinces, and that judicial and executive functions were found incompatible in Pennsylvania so early in its history is a clear indication of the rapid growth of a democratic and progressive spirit in that province.”). Penn’s 1680/81 charter did not confer upon him jurisdiction in admiralty matters, but he nevertheless sometimes acted in those concerns, including by convening a special session of the assembly in 1700 to enact laws punishing piracy and enforcing the laws of navigation and trade. The 1680/81 charter is reprinted in *Federal and State Constitutions*, 2:1,509–15.

³³ Quoted in Samuel W. Pennypacker, *Pennsylvania Colonial Cases: The Administration of Law in Pennsylvania prior to A.D. 1700 as Shown in the Cases Decided and in Court Proceedings* (Philadelphia, 1892), 27–29, 32–38, 39–48.

³⁴ *Minutes of the Provincial Council of Pennsylvania, From the Organization to the Termination of the Proprietary Government*, 10 vols. (Harrisburg, PA, 1852), 1:120–21. The fact that Penn and his councillors refused to convict More of the assembly’s charges that More had abused his judicial office evidences the tension between the executive and the assembly over control of Pennsylvania’s courts. See, e.g., Eastman, *Courts and Lawyers of Pennsylvania*, 1:127–35. Another illustration of the conflict between the executive and the assembly over the judicial power is when John White, a one-time speaker of the assembly, insisted that the legislators “were the supreme Judges of this Government.” Quoted in G. S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809* (Newark, NJ, 1994), 36. See also Lawrence Lewis Jr., “The Courts of Pennsylvania in the Seventeenth Century,” *Report of the First Annual Meeting of the Pennsylvania Bar Association* 1 (1895): 393.

imperial reorganization of the 1690s. The situation became so bleak for Penn that in 1692 King William and Queen Mary revoked his right to govern Pennsylvania and made the royal governor of New York the governor of Pennsylvania as well. Penn was restored to his proprietorship in 1694 after William and Mary were convinced they could trust him.³⁵

Pennsylvania was governed chaotically during Penn's long absence. Once Penn's problems in England were resolved, he reappointed his cousin William Markham deputy governor of the province. Markham quickly yielded to pressure from an increasingly restless assembly, led by its powerful speaker, David Lloyd, and agreed in 1696 to a new constitution. Penn never formally approved this new constitution, but he never questioned it.³⁶

Under the 1696 Frame of Government—also known as the Markham Frame—more power was conferred upon the assembly, most notably the power to “prepare and propose to the Governor and Council all such bills as they or the major part of them, shall, at any time, see needful to be passed into laws.”³⁷ This power previously had resided with the governor and the council. No mention was made of the judiciary's appointment, tenure of office, or compensation.

Penn returned to Pennsylvania in late 1699. While pleased to see that the province had prospered economically during his lengthy absence, he was dismayed to find himself confronted with a political elite who appeared little concerned with his proprietary rights. He quickly learned that he would have limited opportunity to try to protect his interests while in Pennsylvania itself; a bill had emerged in Parliament calling for the unification of the charter and proprietary colonies. Penn felt compelled to return to England to defend his claim to Pennsylvania. At a minimum, he wanted to ensure that he received a fair price for his lands.³⁸

Before Penn left for England, he was forced to address the assembly's demand for a new frame of government. The assembly, the institution of Pennsylvania's government closest to the people, was not satisfied with the structure of government in the province. In 1701, Penn wrote a new frame of government, called the Charter of Privileges, which made the assembly the lawmaking body of the province, with the council exercising

³⁵ See, e.g., Illick, *Colonial Pennsylvania*, 43–46.

³⁶ See, e.g., Isaac Sharpless, *Two Centuries of Pennsylvania History* (Philadelphia, 1911), 82.

³⁷ The 1696 Frame of Government is reprinted in *Federal and State Constitutions*, 2:1,531–36.

³⁸ See, e.g., Illick, *Colonial Pennsylvania* 63–80.

only an advisory role.³⁹ The 1701 charter was otherwise remarkably silent about the structure of government—and, like the 1696 Frame of Government before it, it made no mention of the judiciary's appointment, tenure of office, or compensation. In fact, with the exception of a brief reference to the power of the judges of the county courts to recommend to the governor three persons "to serve for Clerk of the Peace for the said County," the charter said nothing about the judiciary.

The 1701 charter's silence on the judicial power did not mean that Pennsylvanians were unconcerned about the matter. The debate over judicial independence was perhaps more vigorous in Pennsylvania than in any colony aside from Massachusetts and New York. Penn's early endorsement of judicial tenure during good behavior informed the most significant of the debates. Speaker David Lloyd, who believed judges should be afforded life tenure to avoid undue influence by the executive, spent much of the first decade of the eighteenth century sparring over control of the courts with Deputy Governor John Evans, who maintained that judges should have permanent salaries so as to avoid undue influence by the legislature.⁴⁰ Their dispute colored the battle over the Judiciary Act of 1706, in particular; page after page of the provincial minutes were filled with point and counterpoint between the two strong-willed men. On one occasion, Lloyd invoked the abandoned 1682 Frame of Government as precedent for his position, while Evans alluded to the practice of both Pennsylvania itself and the other colonies in British America to support his view.⁴¹ The stalemate forced Evans to issue an ordinance in 1706/07, pursuant to the proprietor's authority in the 1680/81 charter, reestablishing the courts in the province.

The issue of judicial tenure during good behavior received renewed attention with the debate over the proposed Judiciary Act of 1759 specifying judicial tenure during good behavior—albeit subject to removal by address of the assembly—and annual salaries for judges. Benjamin Franklin, the most celebrated Pennsylvanian of them all, argued for the bill as a member of the assembly's committee on grievances. As David Lloyd had done before him, Franklin invoked an earlier constitution—the 1682 Frame of Government written by William Penn—for support:

³⁹ The 1701 Charter of Privileges is reprinted in *Federal and State Constitutions*, 2:1,536–40.

⁴⁰ See, e.g., *Minutes of the Provincial Council of Pennsylvania*, 2:273, 275, 277, 283, 291, 298, 304, 305, 313, 314, 321, 322–23, 325, 336–37, 340, 351, 352. The assembly also wanted judges removable by address of the assembly.

⁴¹ *Ibid.*, 304, 298, 283.

By Virtue of the said Royal Charter, the Proprietaries are invested with a Power of “doing every Thing which unto a compleat Establishment of Justice, unto Courts and Tribunals, Forms of Judicature, and Manner of Proceedings do belong.” It was certainly the Import and Design of this Grant, that the Courts of Judicature should be formed, and the Judges and Officers thereof hold their Commissions in a Manner not repugnant, but agreeable, to the Laws and Customs of England; that thereby they might remain free from the Influence of Persons in Power, the rights of the People might be preserved, and their Properties effectually secured. That the Grantee William Penn, understanding the said Grant *in this Light*, did, by his original Frame of Government, covenant and grant with the People, That the Judges, and other Officers should hold their Commissions during their good Behavior, and no longer.⁴²

Franklin went on to point out that, notwithstanding the necessity of judicial tenure during good behavior in order to better protect the people’s liberties, the governors of Pennsylvania had been appointing judges to terms “to be held during their Will and Pleasure.”⁴³

The Judiciary Act of 1759 was passed in September of that year, but was disallowed by the crown in council in 1760.⁴⁴ Between the repeal in 1760 and 1776, when Pennsylvania’s first state constitution went into effect, a number of pamphlets were published that called for an independent judiciary. The most powerful argument was almost certainly *A Letter to the People of Pennsylvania* (1760), penned by Joseph Galloway, an anti-Proprietary member of the assembly and the principal draftsman of the 1759 judiciary bill. Galloway opened his pamphlet with the standard Lockean account of the chief purpose of government: “to secure persons and properties of mankind from private injuries and domestic

⁴² Benjamin Franklin, “Pennsylvania Assembly Committee: Report on Grievances” (Feb. 22, 1757), in *The Papers of Benjamin Franklin*, ed. Leonard W. Labaree et al. (New Haven, CT, 1959–), 7:141. A decade later, Franklin would again make known his thoughts on the importance of an independent judiciary:

Judges should be free from all influence; and therefore, whenever Government here will grant commissions to able and honest Judges during good behaviour, the Assemblies will settle permanent and ample salaries on them during their commissions: But at present they have no other means of getting rid of an ignorant or an unjust Judge (and some of scandalous characters have, they say, been sometimes sent them) but by starving him out.

Benjamin Franklin, “Causes of the American Discontents before 1768” (printed in *London Chronicle*, Jan. 5–7, 1768), in *Papers of Benjamin Franklin*, 15:9. *The Papers of Benjamin Franklin* are available online at <http://franklinpapers.org/franklin/>.

⁴³ Benjamin Franklin, “Report on Grievances,” in *Papers of Benjamin Franklin*, 15:141.

⁴⁴ *The Statutes at Large of Pennsylvania from 1682–1801*, ed. William Stanley Ray (Harrisburg, PA, 1898), 5:465.

oppression.” He then proceeded to devote sixteen pages to convincing his readers of the importance of an independent judiciary in Pennsylvania. Galloway maintained that the impartiality of the judicial branch was necessary for the protection of personal and property rights: “the men who are to settle the contests between prerogative and liberty, who are to ascertain the bounds of sovereign power and to determine the rights of the subject, ought certainly to be perfectly free from the influence of either.” He opined that love of promotion was a likely influence on the current Pennsylvania judiciary and that men who would accept tenure at the pleasure of the executive were servile in nature and ultimately dependent on the executive. He provided numerous examples of how the same was true in England before English judges were afforded lifetime tenure during good behavior. He insisted that what was appropriate for judges in England was equally appropriate for judges in Pennsylvania: “From whence it follows that this right of the people to have their judges indifferent men and independent of the crown is not of a late date but part of the ancient constitution of your government and inseparably inherent in the persons of every freeborn *Englishman*.” He concluded his letter with the following warning:

Be assured, if a privilege thus justly founded, so often ratified and confirmed, if an impartial and independent administration of justice is once wrested from your hands, neither the money in your pockets, nor the clothes on your backs, nor your inheritances, nor even your persons can remain long safe from violation. You will become slaves indeed, in no respect different from the sooty *Africans*, whose persons and properties are subject to the disposal of their tyrannical masters.⁴⁵

John Dickinson, the so-called penman of the American Revolution, concurred in one of his acclaimed *Letters from a Farmer in Pennsylvania*:

As to the “administration of justice”—the judges ought, in a well regulated state, to be equally independent of the executive and legislative powers. Thus in *England*, judges hold their commissions from the crown “*during good behavior*,” and have salaries, suitable to their dignity, *settled* on them by parliament. The purity of the courts of law since this establishment, is a proof of the wisdom with which it was made. But in these colonies, how fruitless has been every attempt to have the judges appointed “*during good*

⁴⁵ Joseph Galloway, “A Letter to the People of Pennsylvania, &c,” in *Pamphlets of the American Revolution, 1750–1776*, ed. Bernard Bailyn (Cambridge, MA, 1965), 1:256, 257, 259, 266–67, 272.

behavior”? Yet whoever considers the matter will soon perceive, that *such commissions* are beyond all comparison more necessary in these colonies, than they are in *England*.⁴⁶

Nothing changed, as the heirs of William Penn (who had died in England in 1718) strongly objected to the good behavior provision on the grounds that it both interfered with their charter rights and would allow ineffective judges to remain in office.⁴⁷

* * *

Thanks in large part to the hard work of state archivists and historical societies in compiling colonial and early state law records, we are in the midst of a golden age of scholarship about early American law.⁴⁸ In the apt words of Princeton University’s Stanley N. Katz, there now exists “a Colonial Legal History.”⁴⁹ Of course, this does not mean that there will not be differences of opinion about the meaning of the historical record. Some historians, for example, might object to the emphasis in this article on organic laws that were never put into full effect—especially the Fundamental Constitutions for the Province of East New-Jersey of 1683 and the 1682 Pennsylvania Frame of Government. But even rejected frames of government take a place in the overall treasure of human thought and contribute to the development of political institutions. Indeed, many of the classic works of political philosophy—from Aristotle’s *Politics* to Montesquieu’s *The Spirit of the Laws*—are theoretical discourses about how political institutions should be set up.⁵⁰ Just as an architect needs the idea for a new building before it can be constructed and used by others, constitutional framers must formulate the idea for a new type of political institution before they establish it. Not surprisingly, the latter process takes time and will be costly to effect within any political landscape, developing through fits and starts, and from var-

⁴⁶ John Dickinson, “Letter IX,” in *Letters from a Farmer in Pennsylvania* (1768), reprinted in *Empire and Nation*, ed. Forrest McDonald, 2nd ed. (Indianapolis, IN, 1999), 50–53.

⁴⁷ Loyd, *Early Courts of Pennsylvania*, 98.

⁴⁸ See Scott D. Gerber, “Bringing Ideas Back In: A Brief Historiography of American Colonial Law,” *American Journal of Legal History* 51 (2011): 359–74.

⁴⁹ Stanley N. Katz, “Introduction to Forum: Explaining the Law in Early American History,” *William and Mary Quarterly*, 3rd ser., 49 (1993): 6.

⁵⁰ See Aristotle, *The “Politics” of Aristotle*, trans. Peter L. Phillips Simpson (Chapel Hill, NC, 1997); M. de Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler et al. (New York, 1989).

ious fragments that others invariably created in the past. Put more concretely, the 1683 Pennsylvania Frame of Government, the organic law that quickly superseded the 1682 frame, also provided life tenure for judges during good behavior, and the 1683 frame remained in effect in Pennsylvania for more than a decade. William Penn clearly understood how important judicial independence was, memorializing as he did in the 1683 Pennsylvania Frame of Government the idea of judicial tenure during good behavior embodied in the 1682 Pennsylvania frame and in the 1683 East New-Jersey Fundamental Constitutions.⁵¹

Other scholars might object to this article's reading of the text of both the Fundamental Constitutions for the Province of East New-Jersey of 1683 and the 1682 Pennsylvania Frame of Government. With respect to the 1683 organic law of East New-Jersey, it could be argued that the provision at issue—"upon any Malversation or Accusation, they shall be liable to the Examination and Censure of the great Council, and if condemn'd by them, the Governor and Common Council must Name others in their place"—is about the standard for removing a judge who misbehaves rather than about judicial terms of office. Turning to the organic law of Pennsylvania, it could be argued that Article XVIII of the 1682 Frame of Government was purely a one-shot deal; the province at this early point in its history needed judicial offices filled quickly, and also needed some stability in the offices. Penn was therefore going to hand-pick this first round of judges, and he would choose only those worthy of life tenure. But when any of the offices came vacant in the future, the next incumbent, per Article XVII, would have a one-year term. The full text of Article XVIII provided:

But forasmuch as the present condition of the province requires some immediate settlement, and admits not of so quick a revolution of officers; and to the end the said Province may, with all convenient speed, be well ordered and settled, I, *William Penn*, do therefore think fit to nominate and appoint such persons for judges, treasurers, masters of the rolls, sher-

⁵¹ It was, of course, in Penn's self-interest that judges be dependent on him. But Penn was not alone among governors in early America in recognizing the significance of an independent judiciary. For example, in 1781 North Carolina governor Thomas Burke objected to a court bill that would have given him too much power over the judiciary. See "Questions and Propositions by the Governor" (July 25, 1781), in *The State Records of North Carolina*, ed. Walter Clark, 26 vols. (1886–1907; repr., Wilmington, NC, 1993), 19:855, 862–63; and Scott D. Gerber, "Unburied Treasure: Governor Thomas Burke and the Origins of Judicial Review," *Historically Speaking* 8 (2007): 29–30.

iffs, justices of the peace, and coroners, as are most fitly qualified for those employments; to whom I shall make and grant commissions for the said offices, respectively, to hold to them, to whom the same shall be granted, for so long as every such person shall well behave himself in the office, or place, to him respectively granted, and no longer. And upon the decease or displacing of any of the said officers, the succeeding officer, or officers, shall be chosen, as aforesaid.

The problem with this type of text-based argument is that it overlooks two important facts. In New Jersey, the removal standard in the 1683 organic law was consistent with a system in which judges served for life during good behavior, and it was also much less punitive toward the judges than the 1664/65 law that preceded it (an organic law under which judges did not serve for life during good behavior). Furthermore, in Pennsylvania, two of that province's strongest proponents of judicial tenure during good behavior—David Lloyd and Benjamin Franklin—read Article XVIII in the broader fashion suggested by this article: as precedent for judicial tenure during good behavior. Moreover, an overly legalistic, text-centered reading of Article XVIII of the 1682 Pennsylvania Frame of Government would neglect the structuralist significance of Article XXVIII of the Laws Agreed Upon in England, &c: the codification of the separation of powers idea forbidding judges from serving in other institutions of government. As scholars have chronicled elsewhere, the emerging prohibition against plural officeholding in early America went hand in hand with the rise of judicial independence.⁵²

In short, monolithic explanations for historical events—especially linear ones—should be resisted.⁵³ In fact, judges served for seven-year terms under both the New Jersey Constitution of 1776 and the Pennsylvania Constitution of 1776.⁵⁴ The purpose of the present article is not to argue that William Penn is solely responsible for the most famous of all institutional

⁵² See Gerber, *Distinct Judicial Power*, 84–85, 89n7; and Ellen E. Brennan, *Plural Office-Holding in Massachusetts, 1760–1780: Its Relation to the "Separation" of Departments of Government* (Chapel Hill, NC, 1945).

⁵³ See generally Gene Wise, *American Historical Explanations: A Strategy for Grounded Inquiry*, 2nd ed. (Minneapolis, MN, 1980).

⁵⁴ The New Jersey Constitution of 1776 is reprinted in, among other places, *Fundamental Laws and Constitutions of New Jersey*, 155–63. The Pennsylvania Constitution of 1776 is reprinted in, among other places, *Federal and State Constitutions*, 2:1,540–48. Judges served during good behavior under the Pennsylvania Constitution of 1790, but they remained removable by address. The Pennsylvania Constitution of 1790 is reprinted in, among other places, *Federal and State Constitutions*, 2:1,548–57.

solutions to the political theory of an independent judiciary, but simply to point out Penn's previously overlooked contribution to the subject.⁵⁵

It is necessary to close by suggesting why Penn appears to have endorsed life tenure for judges in the organic laws of the two colonies in which he had a proprietary interest. The most likely explanation is Penn's longstanding commitment to individual liberty. For example, Penn concluded a lengthy preface to Pennsylvania's 1682 Frame of Government with a concise statement of his vision of the purpose of government. It is a vision that rings throughout the history of American constitutionalism:

we have (with reverence to God, and good conscience to men) to the best of our skill, contrived and composed the *frame* and *laws* of government, to the great end of all government, viz: *To support power in reverence with the people, and to secure the people from the abuse of power*; that they may be free by their just obedience, and the magistrates honourable, for their just administration: for liberty without obedience is confusion, and obedience without liberty is slavery. To carry this evenness is partly owing to the constitution, and partly to the magistracy: where either of these fail, government will be subject to convulsions; but where both are wanting, it must be totally subverted; then where both meet, the government is likely to endure.

Penn's dedication to individual liberty was likewise evident in New Jersey. Julian P. Boyd and Bernard Bailyn have concluded that, due in large part to Penn's efforts, New Jersey's commitment to individual rights was manifested earlier than that of any other of the original thirteen states.⁵⁶ Both point to the Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey of 1676/77.⁵⁷ Boyd was particularly taken by the "eloquent affirmations of human rights" in that organic law, the articulation of which he credited primarily to Penn.⁵⁸

⁵⁵ I am certainly not arguing that Penn came up with the idea of life tenure for judges during good behavior. As a well-educated English elite, Penn was surely aware that English judges sometimes were commissioned *quamdiu se bene gesserint* during the English Civil War. Benjamin Franklin's defense of Pennsylvania's 1759 judiciary act indicated that he thought Penn was aware of it. I thank Gordon Wood for mentioning this point to me.

⁵⁶ See Boyd's introduction to *Fundamental Laws and Constitutions of New Jersey*, 12; and Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA, 1967), 195–96.

⁵⁷ The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey of 1676/77 is reprinted in, among other places, *Fundamental Laws and Constitutions of New Jersey*, 71–104.

⁵⁸ See also Richard S. Field, *The Provincial Courts of New Jersey, with Sketches of the Bench and Bar* (New York, 1878), 27 ("A more beautiful fabric of free government was never reared. It should be for ever embalmed in the memory of Jerseyemen."). Boyd acknowledges that some scholars

With the notable exception of religious freedom—the liberty Penn most famously embraced—the said “fundamentals” guaranteed by the West New-Jersey Concessions and Agreements all concerned fair judicial process: the right to trial by jury in criminal and civil cases; a defendant’s right to be apprised of the charges against him; the right to be protected from false witnesses; and the right to attend the trials of others. The trials themselves were “heard and decided by the verdict of judgment of twelve honest men of the neighborhood.” Jurors were assisted by “three justices or commissioners,” but the jurors themselves were imbued with the decision-making authority. The judicial power therefore appeared surprisingly independent: a characteristic, as this article has endeavored to demonstrate, Penn later tried to repeat in other organic laws for New Jersey and Pennsylvania by providing for judicial tenure during good behavior.

The framers of the US Constitution repeated it too, and for the same reason that Penn did: a commitment to liberty.⁵⁹ And while John Adams is properly awarded prominence of place for articulating, in his 1776 pamphlet *Thoughts on Government*, the political theory of an independent judiciary that the framers later inscribed into Article III,⁶⁰ we can better understand why they would do so after exploring Penn’s ideas on the subject: ideas that were memorialized in several organic laws in seventeenth-century New Jersey and Pennsylvania.

Ohio Northern University

SCOTT D. GERBER

dispute whether Penn should receive the entire credit for drafting the document (*Fundamental Laws and Constitutions of New Jersey*, 17). See generally John E. Pomfret, “The Problem of the West Jersey Concessions of 1676/7,” *William and Mary Quarterly*, 3rd ser., 5 (1948): 95–105 (discussing Edward Byllynge’s contribution); and Nash, “Framing of Government in Pennsylvania,” 193 (emphasizing Penn far more than Byllynge and concluding that there is “little doubt” that Penn’s ideas about individual rights were at the heart of the Concessions and Agreements).

⁵⁹ See Gerber, *Distinct Judicial Power*.

⁶⁰ See, e.g., Gerber, “Political Theory of an Independent Judiciary.”

