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THE ORIGINS OF AN INDEPENDENT JUDICIARY IN NORTH CAROLINA, 1663–1787*

SCOTT D. GERBER**

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution."
—Alexander Hamilton, *The Federalist* No. 78 (1788)

An independent judiciary is one of the great American contributions to constitutional theory. This Article traces the origins of that idea in North Carolina, one of only a small handful of states to adopt it prior to the Federal Constitution of 1787. Although the North Carolina judiciary did not become independent until the state's first constitution in 1776, the almost continuous conflict between the executive and the assembly over control of the courts, and the political theorizing that suggested a solution to that conflict, directly influenced the nature of the judicial institution embodied in the state's original organic law. Significantly, what happened in North Carolina had profound consequences for American constitutional law: in the 1787 case of Bayard v. Singleton, *the supreme court of North Carolina became one of the first courts in the United States to exercise the power of judicial review, the ultimate expression of judicial independence. Moreover, a previously unknown non-judicial precedent for judicial review—a 1781 Objection to a court bill by Governor Thomas Burke—suggests that North Carolina was perhaps the first state to fully appreciate the connection between judicial independence and judicial review.*

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INTRODUCTION

An independent judiciary is now a familiar foundation of American constitutionalism. The Chief Justice of the United States, John G. Roberts, Jr., frequently extols the importance of that principle in practice. For example, he has insisted in all of his annual reports on the state of the federal courts that the "failure to raise judicial pay ... threatens to undermine the strength and independence of the federal judiciary."[1] He has added, "I have no choice but to highlight this issue because without fair judicial compensation we cannot preserve the quality and independence of our judiciary, which is the model for the world."[2]

1. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1 (2007), http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf [hereinafter ROBERTS, 2006 YEAR-END REPORT]; *see* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–9 (2008), http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf; CHIEF JUSTICE JOHN G. ROBERTS, JR., 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6–8 (2008), http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf; CHIEF JUSTICE JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–6 (2006), http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf.

2. ROBERTS, 2006 YEAR-END REPORT, *supra* note 1, at 8. Roberts's predecessor as Chief Justice, William H. Rehnquist, anticipated Roberts on this issue. *See id.* at 4.

Similarly, Sandra Day O'Connor has spoken and written forcefully since retiring from the U.S. Supreme Court in 2006 about the need to protect the independence of judges. On September 27, 2006, for instance, she published an op-ed in the *Wall Street Journal* entitled *The Threat to Judicial Independence*, in which she decried recent efforts to curtail the independence of the judiciary.[3] She discussed as illustrations of the threat South Dakota's *J.A.I.L. 4 Judges* initiative that would have abolished judicial immunity in the state and the attempts by some members of the U.S. Congress to strip the federal judiciary of its jurisdictional ability to hear certain constitutional claims. The next day, Justice O'Connor co-hosted and spoke at a conference named *Fair and Independent Courts: A Conference on the State of the Judiciary*.[4]

The principle of judicial independence to which both Chief Justice Roberts and Justice O'Connor refer is articulated in Article III, Section 1 of the Constitution of the United States: the federal courts constitute a separate branch of government, federal judges are afforded tenure so long as they behave well, and a federal judge's salary cannot be diminished while he or she is in office.[5] Of course, the framers who wrote Article III during the summer of 1787 were not working from whole cloth. They were well versed in the various and varied state practices of their day.[6] This Article explores the origins of an independent judiciary in North Carolina, one of only a small handful of states to have *constitutionalized* the principle of judicial independence prior to the Federal Constitution of 1787. As will be seen, what happened in North Carolina had profound consequences for both the U.S. Constitution and American constitutional law.[7]

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3. Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

4. *See generally* Sandra Day O'Connor Project on the State of the Judiciary, Georgetown University Law Center, http://www.law.georgetown.edu/judiciary/ (last visited Aug. 22, 2009).

5. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

6. *See, e.g.*, THE FEDERALIST No. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (containing Alexander Hamilton's criticism of the mandatory retirement age for judges provision of the New York Constitution of 1777).

7. Global constitutionalism likewise has been impacted by the American commitment to judicial independence. For example, Article 14 of the International Covenant on Civil and Political Rights provides:

Part I of this Article examines North Carolina's proprietary period, 1663–1728. Particular attention is afforded to the Fundamental Constitutions of Carolina of 1669, an organic law written by British philosopher John Locke that created not only a model of government for North Carolina but a social and economic system as well. At the top of this complicated arrangement were the Lords Proprietors—the owners—of North Carolina. All power, including the judicial power, resided with them, although they were permitted to delegate much of that power to government officers who served at their pleasure.

Part II explores North Carolina's five decades as a royal colony, 1728–1776. The dozens of instructions concerning the courts issued to the royal governors by the crown evidence that the crown expected to control the administration of justice in the colony. The assembly, however, had other ideas. In fact, the conflict in North Carolina between the executive and the assembly over control of the courts was among the most vitriolic of any in the British American colonies. The result, as Part II will suggest, was a justice system in almost constant crisis.

Part III addresses the North Carolina Constitution of 1776. As will be seen, North Carolina was the first state to receive a draft of John Adams's 1776 pamphlet, *Thoughts on Government*. Adams, writing in response to Thomas Paine's *Common Sense*, emphasized the importance of separation of powers in general and an independent judiciary in particular. North Carolina, unlike most of the other newly-independent states, adopted Adams's proposals. The North Carolina Constitution of 1776 thus contained all three of the central tenets of judicial independence: (1) the judiciary was to be a separate institution of government, (2) judges were to serve for life during good behavior, and (3) they were to receive adequate salaries.

This Article concludes by describing how the independence of North Carolina's judiciary made judicial review possible in the state

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> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 14, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966). For what is likely to become the most significant scholarly exegesis on the influence of American constitutional ideas, ideals, and institutions on the rest of the world, see generally GEORGE ATHAN BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE (2009).

in the 1787 case of *Bayard v. Singleton*, a development anticipated six years earlier by Governor Thomas Burke in a heretofore unknown pre-*Marbury v. Madison* non-judicial precedent for judicial review.

Before embarking on the journey through North Carolina's colonial and early state history, it is necessary to mention a methodological point. I am a lawyer and a political scientist who tries to take history seriously. I am not a historian, and historians—including Professor Gordon S. Wood, whose work inspired this project[8]—probably would approach this subject differently than I do. My focus is on the development of the *idea* of an independent judiciary. I discuss the origins of an independent *judicial* power in light of what Montesquieu famously identified as three separate types of *government* power.[9] This sometimes leads me to examine organic laws that were never put into full effect (e.g., the Fundamental Constitutions of Carolina of 1669) and to pay only indirect attention to what courts were actually doing—with the notable exception of judicial review, the ultimate expression of judicial independence. In other words, my legal and political science orientation requires me to devote considerable time to matters that some historians might view as non-judicial (or, worse yet, tangential). But, as political scientist Charles A. Kromkowski once told me, 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 various fragments that others invariably created in the past. My legal and political science orientation likewise explains my emphasis on texts, where constitutional ideas are memorialized, rather than solely on the surrounding contexts. Context does matter, however, and I devote considerable attention to it—perhaps more attention than lawyers will find familiar.[10]

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8. Gordon S. Wood, the preeminent early American historian, has been calling for a study such as this for forty years. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 624 (1969); Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293, 1304–05 (1988).

9. M. DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

10. For discussions by historians of the methodological differences between historians, academic lawyers, and political scientists who write about the Constitution, see generally Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL. HIST. 6 (2008); Peter S. Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341 (1989).

I. PROPRIETARY PERIOD, 1663–1728

If fortune had smiled more brightly upon her, North Carolina, rather than Virginia, would have been the first of the permanent British colonies in America. In 1584 Queen Elizabeth I issued a charter to Sir Walter Raleigh to establish a colony in America.[11] The charter conferred upon Raleigh and his heirs and assigns "full authoritie, libertie and power" to colonize America.[12] Expressly included in the queen's grant of authority was the "power and authoritie to correct, punish, pardon, gouerne, and rule" the colony according to "such statutes, lawes and ordinances" as Raleigh and his heirs and assigns deemed necessary for the "better government" of the colony.[13] However, Raleigh was to govern "as neere as conueniently may be" in accordance with the laws of England, and he was prohibited from acting in any way contrary to the interests of the crown.[14]

Raleigh made five attempts to settle America. The earliest landed on Roanoke Island in 1585—the first English colony in America.[15] The settlers experienced danger, starvation, and death. Some returned to England for supplies. The colony could not be saved.[16] Raleigh dispatched a second group to Roanoke Island, with the same unfortunate results. This attempt became known as the "Lost Colony," because no one was able to discover what happened to it.[17] Raleigh's subsequent efforts to colonize America were equally unsuccessful. His benefactor, Queen Elizabeth, died in 1603. Her successor, King James I, was convinced that Raleigh had conspired to

11. *See, e.g.*, HUGH T. LEFLER & WILLIAM S. POWELL, COLONIAL NORTH CAROLINA: A HISTORY 5–6 (1973). In 1578 the queen granted Sir Humphrey Gilbert, Raleigh's half-brother, a charter that allowed him six years to establish a colony in the New World. *Id.* Gilbert's efforts were unsuccessful: he never reached what is now the United States. *Id.* For the Charter to Sir Humphrey Gilbert of 1578, see Charter of Sir Humphrey Gilbert (June 11, 1578), *in* 1 THE COLONIAL RECORDS OF NORTH CAROLINA 5–10 (Mattie Erma Edwards Parker ed., 1963) [hereinafter COLONIAL RECORDS II]. The charter conferred upon Gilbert extensive rights of ownership and trade in America, and authorized him to govern as he saw fit, provided he did so as near as practicable with the laws of England. *Id.*

12. Charter of Sir Walter Raleigh (Mar. 25, 1584), *in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1379, 1379 (Benjamin Perley Poore ed., Washington, D.C., Government Printing Office 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. It mirrored that of Gilbert in almost all material respects, with the notable exception that Raleigh's charter covered a smaller territory (Newfoundland was excluded).

13. *Id.* at 1381.

14. *Id.* at 1379.

15. *See, e.g.*, LEFLER & POWELL, *supra* note 11, at 5–28.

16. *Id.*

17. *Id.*

try to prevent his ascension to the throne. Raleigh was convicted of treason. He lost not only his freedom but all his rights to colonize America.[18]

A. *Charter of Carolina of 1663*[19]

King James I died in 1625 and was succeeded by Charles I. King Charles I reigned until 1649, when he was beheaded and England came under the control of Parliament and the Cromwells.[20] The interregnum came to an end in 1660 when Charles II ascended to the throne. King Charles II owed an enormous debt to those of his friends who helped restore the monarchy.[21] He rewarded eight of them with a grant of land that included what is now North and South Carolina.[22] The eight men were described in the Charter of Carolina of 1663 as

> our right trusty, and right well beloved cousins and counsellors, Edward Earl of Clarendon, our high chancellor of England, and George Duke of Albemarle, master of our horse and captain general of all our forces, our right trusty and well beloved William Lord Craven, John Lord Berkley, our right trusty and well beloved counsellor, Anthony Lord Ashley, chancellor of our exchequer, Sir George Carteret, knight and baronet, vice chamberlain of our household, and our trusty and well beloved Sir William Berkley, knight, and Sir John Colleton, knight and baronet.[23]

These eight men, and their heirs and assigns, were identified by the charter as "the true and absolute Lords Proprietors" of Carolina.[24] They were to "have, use, exercise, and enjoy" the colony "in as ample a manner as any bishop of Durham in our kingdom of England."[25]

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18. *Id.*

19. In 1629 King Charles I granted to his attorney general, Sir Robert Heath, rights to colonize "Carolana" (the king named the territory after himself). *Id.* at 30–33. Heath proved unable to do so, and the grant was voided in 1663 by King Charles II. *Id.* For the Charter to Sir Robert Heath of 1629, see Charter of Sir Robert Heath (Oct. 30, 1629), *in* 1 COLONIAL RECORDS II, *supra* note 11, at 64, 64–73.

20. *See, e.g.*, LEFLER & POWELL, *supra* note 11, at 32.

21. *Id.*

22. *Id.* For more on how the eight men were conferred proprietorship of Carolina, see 3 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 182–91 (1937). For the Charter of Carolina of 1663, see Charter of Carolina of 1663 (Mar. 24, 1663), *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 12, at 1382, 1382–90. Several of its most distinctive features were anticipated by the Heath charter.

23. Charter of Carolina of 1663, *supra* note 22, at 1382.

24. *Id.* at 1383.

25. *Id.*

This meant that the Lords Proprietors possessed broad feudal powers to profit from the colony and bore the considerable responsibility of managing and protecting it in the interests of England.[26] They were conferred "full and absolute power ... for the good and happy government of the said province," including the power of "enacting ... laws" (the legislative power), to "duly execute [the laws] upon all people within the said province" (the executive power), and to impose "penalties, imprisonment or any other punishment" (the judicial power).[27]

The Lords Proprietors were permitted to delegate their governmental powers to "deputies, lieutenants, judges, justices, magistrates, officers and members" of their choosing.[28] As extensive as the Lords Proprietors' powers were, the 1663 charter included a number of provisions designed to guard against the abuse of those powers. For example, all laws were supposed to be enacted with the "advice, assent and approbation of the freemen of the said province, or of the greater part of them, or of their delegates or deputies."[29] (This said, the charter specified that the Lords Proprietors did not need to obtain the freemen's "advice, assent, or approbation" if it was not "convenient" to call an assembly.) Laws likewise were required to be "consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our kingdom of England."[30] Prospective colonists were to be guaranteed "all liberties, franchises and priviledges of this our kingdom of England ... and may freely and quietly have, possess and enjoy, as our liege people born within the same, without the least molestation, vexation, trouble or grievance."[31] Religious toleration was to be afforded to those "Who really in their Judgments, and for Conscience sake" could not conform to the ritual and beliefs of the established Church of England.[32]

26. LEFLER & POWELL, *supra* note 11, at 33.
27. Charter of Carolina of 1663, *supra* note 22, at 1384.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 1389.

B. A Declaration and Proposals of the Lords Proprietors of Carolina of 1663

On August 25, 1663, the Lords Proprietors issued A Declaration and Proposals intended to encourage people to settle in Carolina.[33] Settlers were promised one hundred acres of land and immunity from export taxes, among other financial incentives. They also were guaranteed the right to make laws, subject to the "advise" and consent of a governor and council "commissionate[d]" by the Lords Proprietors.[34] These laws were required to be ratified by the Lords Proprietors and, as always, consistent with the laws of England.[35] Nothing was stated in the Declaration and Proposals about the judiciary. Although approved by the Lords Proprietors, the Declaration and Proposals was never put into effect.

C. Concessions and Agreements of the Lords Proprietors of the Province of Carolina of 1665

The Concessions and Agreements of the Lords Proprietors of the Province of Carolina of 1665 was a more detailed attempt by the Lords Proprietors to encourage the "setling and planting" of the province.[36] It contained many of the same guarantees—those concerning grants of real property and the exporting of goods, for example—but it was much more specific about the province's form of government. The most unusual feature of the organic law was almost certainly the county-based nature of the enumerated government. The Concessions and Agreements specified that each of the three identified counties—Clarendine, Albemarle, and "the County which latter is to bee to the southward or westward of Cape Romania"—were to be administered by separate governors, councils, and general assemblies.[37] The Lords Proprietors were to appoint the respective governors, and then the respective governors were to select the respective councils and other government officials. All government officials, including the governors, were to serve during the Lords Proprietors' "pleasure."[38] The limitation on tenure of government

33. *See* A Declaration and Proposals to All that Will Plant in Carolina (Aug. 25, 1663), *in* 1 THE COLONIAL RECORDS OF NORTH CAROLINA 43, 43–46 (William L. Saunders ed., P.M. Hale 1993) (1886) [hereinafter COLONIAL RECORDS I].

34. *Id.* at 44–45.

35. *Id.* at 45.

36. *See* Concessions and Agreements of the Lords Proprietors of Carolina (Jan. 7, 1665), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 75, 75–93.

37. *Id.* at 79.

38. *Id.*

officials was repeated in the 1667 "Instructions for Our Governor of the County of Albemarle in the Province of Carolina."[39]

The freemen of each county were to choose delegates to the respective general assemblies. The general assembly in each county was to "joyne with" the governor and council "for the makeing of such Lawes Ordinances and Constitutions as shalbe necessary for the present good and welfare of the" particular county.[40] Laws were required to be "consonant to reason and as near as may be conveniently agreeable" to the laws of England, and were subject to approval or disapproval by the Lords Proprietors.[41]

Each general assembly also was to join with each governor and council to create and staff "all Courts for their respective Countyes."[42] Judges were to receive "salleryes," but their salaries could be diminished "for breach of their severall and respective dutyes and Trusts."[43] Judges, like other government officials, were to serve at the "pleasure" of the Lords Proprietors.[44] Clearly, the judiciary was not independent under the 1665 Concessions and Agreements. Instead, Carolina remained organized along feudal lines to benefit the Lords Proprietors, as the Concessions and Agreements made plain when it specified that the governors, councils, and general assemblies were to "erect within ye said Countyes such and soe many Baronyes and Manors with their necessary Courts, jurisdiccons freedomes and priviledges as to them shall seeme convenient."[45]

D. *Charter of Carolina of 1665*

The Lords Proprietors discovered that a valuable northern portion of what they thought was part of their proprietorship was outside of it. They appealed to King Charles II to confer the land in question to them, and in 1665 an amendment was made to the Charter of Carolina in which the king was "graciously pleased to enlarge our said grant unto them."[46] (The northern boundary was extended to what is now the approximate North Carolina–Virginia

39. *See* Instructions for Our Governor of the County of Albemarle in the Province of Carolina (1667), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 165, 166 ("All choyce of Officers, made by you shalbe for noe longer time than during our pleasure.").

40. Concessions and Agreements of the Lords Proprietors of Carolina, *supra* note 36, at 81.

41. *Id.* at 82.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Charter of Carolina of 1665 (June 30, 1665), *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 12, at 1390, 1390.

border.)[47] The remainder of the Charter of Carolina of 1665 was an almost exact duplicate of the 1663 charter.

E. *Fundamental Constitutions of Carolina of 1669*

In order to attract settlers to Carolina, the Lords Proprietors ruled with a relatively light hand during the first few years of the province's existence. However, they soon began to fear the prospect of Carolina becoming too democratic. They thereby devised an entirely new frame of government for—in the words of The Fundamental Constitutions of Carolina of 1669—"the better settlement of the government of said place" and to "avoid erecting a numerous democracy."[48] John Locke, the British political philosopher whose ideas on government would later influence both the Declaration of Independence of 1776 and the U.S. Constitution of 1787, is said to have drafted the Fundamental Constitutions.[49] Locke wrote the Fundamental Constitutions at the request of the Earl of Shaftesbury, his friend and patron and one of the eight Lords Proprietors of Carolina.[50]

The Fundamental Constitutions, or the "Grand Model" as it also was called, made clear that the Lords Proprietors intended to exercise the feudal powers conferred upon them in the Carolina charters of 1663 and 1665 to an even greater extent than they had done under the Concessions and Agreements: the Fundamental Constitutions "provided not only a scheme of government but a social and economic system as well."[51] The Fundamental Constitutions divided

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47. LEFLER & POWELL, *supra* note 11, at 33.

48. For the Fundamental Constitutions of Carolina of 1669, see Fundamental Constitutions of Carolina (Mar. 1, 1669), *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 12, at 1397, 1397–1408.

49. SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 19–79 (1995). Historians disagree about Locke's role in drafting the Fundamental Constitutions. *See* 1 COLONIAL RECORDS II, *supra* note 11, at 128 (editor's note). They also disagree about Locke's influence on the Declaration of Independence and the U.S. Constitution. *See* GERBER, *supra*, at 19–79.

50. *See* JOHN SPENCER BASSETT, THE CONSTITUTIONAL BEGINNINGS OF NORTH CAROLINA (1663–1729) 36 (Baltimore, John Hopkins Press 1894). Colonial historian Charles M. Andrews maintained in *The Colonial Period of American History* that there was "very little that is strictly new in the Fundamental Constitutions." 3 ANDREWS, *supra* note 22, at 213. Locke adapted various provisions of English institutions and law to a frontier palatinate, borrowed a number of ideas from James Harrington's 1656 book *The Commonwealth of Oceana* (e.g., that ownership of land was the foundation of society), and incorporated principles current at the time (e.g., religious toleration). *Id.*

51. LEFLER & POWELL, *supra* note 11, at 46; *see also* 1 COLONIAL RECORDS II, *supra* note 11, at 128 (editor's note) ("This plan was quite different from that provided in the Concessions and Agreement, which, having been intended to attract settlers, allowed

society into seven ranks.[52] The Lords Proprietors were at the top, and there always were to be eight of them. Each of the Lords Proprietors was to have a seignory, or twelve-thousand acres, in every county of the province. The eldest of the Lords Proprietors was to be the Palatine and head the government. The Palatine and the other Lords Proprietors were to constitute the Palatine's Court, the chief tribunal of the province. All executive functions of the government were to be grouped into seven offices, and a Lord Proprietor was to be placed in each office. Each of these officers, together with six associates for each, was to form a court with supreme jurisdiction over the function or functions of the particular office (e.g., admiralty, treasury). All of these courts were to be integrated into a Grand Council, over which the Palatine presided. The Grand Council also was to consist of the other seven Lords Proprietors and the forty-two councillors from the seven courts. If a controversy developed between or among the various courts, the Grand Council was to resolve it. The Grand Council further was to enjoy an ad interim ordinance-making power and the power to initiate legislation.[53]

There were to be two ranks of heredity nobility, landgraves and caciques.[54] Each county was required to have one landgrave with four baronies and two caciques. The lord of each barony was empowered to hold a court leet, a court of record with jurisdiction over petty criminal offenses and minor civil matters.[55]

The Lords Proprietors and the heredity nobility were to own two-fifths of the land of each county. The other three-fifths was to be held by freemen in relatively small allotments. The freemen were to pay annual quit-rents to the Lords Proprietors. If a freeman owned from three- to twelve-thousand acres of land, he was entitled to ask that his estate be erected into a manor. The lord of the manor enjoyed the same privileges that a landgrave enjoyed over his baronies, but he was not to be considered a heredity nobleman.[56]

The smaller landowning freemen constituted the majority of the people of the province. They were permitted to vote for delegates to

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the colonists a large degree of control over their government. The new plan gave the people little part in government.").

52. The discussion that follows in this section draws from BASSETT, *supra* note 50, at 37–40.

53. *Id.* at 37.

54. *Id.* at 37–38. "Landgrave" was a term taken from the border counties of northern England, while "cacique" was the Spanish name for Indian chief. *See* 3 ANDREWS, *supra* note 22, at 215.

55. BASSETT, *supra* note 50, at 38.

56. *Id.*

the provincial Parliament and were sometimes allowed to hold lesser government offices.[57]

The Lords Proprietors, landgraves, caciques, and freemen (through their delegates) were to meet in a biennial Parliament. All ranks of society sat together in one body, but if one of the Lords Proprietors objected to a measure, the Parliament divided into four estates and adjourned to different rooms to vote on the measure in question. If one room voted against the measure, it was defeated. All laws that were to be voted on were required to have been prepared in the Grand Council and, if approved in the Parliament, to be endorsed by the Palatine and three additional Lords Proprietors.[58]

The leetmen were to be below the freemen. They were tenants of the seigniories, baronies, or manors and were to possess certain legal rights and duties towards their lord. A leetman was to be under the legal jurisdiction of his lord's court and could not appeal a decision of that court to a higher court. Freemen, by contrast, could appeal the decisions of lower courts, and noblemen were provided the right to be tried in a proprietor's court instead of a lower court.[59] The rank of leetman—like every other rank enumerated in the Fundamental Constitutions—was to be hereditary.[60]

Slave was to be the lowest rank in the Fundamental Constitutions.[61] A master had absolute authority over his slave, with the exception that he could not bind his slave's soul. The Anglican Church was to be the official church of the province, although toleration was to be afforded to those "of different opinions concerning matters of religion."[62] Certain other individual rights, such as trial by jury and protection against double jeopardy, also were guaranteed to freemen.[63]

Given how detailed the Fundamental Constitutions was about the organization of the courts, it should not be surprising to learn that only one statute has been uncovered to date that concerns the courts during the years the Fundamental Constitutions was in effect.[64] That 1670 statute specified that "there be thirty pounds of Tobacco levyed

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57. *Id.*
58. *Id.* at 38–39.
59. *Id.* at 39.
60. *Id.*
61. *Id.*
62. Fundamental Constitutions of Carolina of 1669, *supra* note 48, at 1406.
63. BASSETT, *supra* note 50, at 39.
64. *See* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1669–1751, at 133–36, 151–55 (John D. Cushing ed., 1977) (reprinting the laws ratified by the Lords Proprietors during the time the Fundamental Constitutions was in effect).

upon every Action that comes into Courte from him that is cast" in order to "defray" the "necessary charge of the Governor and Councell in time of Courte."[65] The Lords Proprietors did issue several instructions to their governors and councils concerning the courts. In 1670 Governor Peter Carteret was instructed "by and with the consent of the Councell to establish such Courts and soe many as you shall for the present think fitt for the administration of Justice till our Grand Modell of Government cann come to be putt in execution."[66] The governor and five deputies of the respective Lords Proprietors were "to represent the Pallatines Court and exercise the same Jurisdictions and powers that by our fundamentall Constitutions and forme of Government to that Court doth appertaine."[67] A 1676 set of instructions from the Lords Proprietors to Governor John Jenkins and his council directed that "you are to take spetiall care that Justice be duly administered and the wayes to attaine it may neither be tedious, troublesome nor chargeable for men of prudence and of estates have noe reason to venture themselves in any place where liberty and property are not well secured."[68] The instructions also declared that

> you are to promote and propose in the Assembly the makinge of such Lawes as may best secure the antient and native rights of Englishmen, and in particular the tryall of all Criminall Causes and matters of fact by a jury of 12. sufficient freeholders accordinge to the 69th Article in the fundamentall Constitutions.[69]

By far the most detailed set of instructions concerning the courts issued during the proprietary period were those to Governor Philip Ludwell in 1691.[70] (The instructions also suggested that the

65. Acts of the Albemarle County General Assembly (Jan. 20, 1670), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 183, 185–86. It is not entirely clear that "Courte" meant litigation, but this appears to have been the case.

66. Instructions to the Governor and Council of Albemarle County Concerning the Fundamental Constitutions of Carolina (1670), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 181, 182.

67. *Id.* at 181. The 1679 instructions to "Precident" Hearvey, *see* Instructions to John Hearvey the Governor of the County of Albemarle (Feb. 5, 1679), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 235, 235, and the 1681 instructions to Governor Wilkinson, *see* Instructions to Henry Wilkinson Concerning the Government of Albemarle County (1681), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 333, 333, repeated these two instructions to Governor Carteret.

68. Instructions to the Governor of Albemarle County (1676), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 230, 230–31.

69. *Id.* at 231.

70. *See* Instructions to Philip Ludwell Concerning the Government of Carolina (Nov. 8, 1691), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 373, 373–80. Ludwell had been

Fundamental Constitutions was to be put in full effect.) Ludwell, by and with the consent of three or more council members, was to appoint a chief judge and four justices "for the tryall of causes in any of the Countys that have fifty freeholders qualifyed to serve on Juryes."[71] Residents of counties that did not qualify to have a county court were to have their matters adjudicated in the next closest county that had a county court.[72] The residents could serve on juries in the neighboring county.[73] The governor and council were "to hear and determine of Writs of Error from the Inferior County Courts and to be the Court of chancery."[74] The governor and council likewise were "to heare and determine all Causes Criminall," although they also were authorized to commission "other persons" to serve in their stead.[75] All such judicial officers were to serve "dureing pleasure only."[76]

Several statutes were enacted during the years the Lords Proprietors ruled without the benefit of a formal constitution.[77] In

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instructed in 1689 to consider establishing a special court to address "the late disturbances and the Imprisonment of Mr [Seth] Sothell," the former governor of the province. Instructions to Philip Ludwell Concerning the Government of North Carolina (Dec. 5, 1689), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 362, 362.

71. Instructions to Philip Ludwell Concerning the Government of Carolina (Nov. 8, 1691), *supra* note 70, at 375.

72. *Id.*

73. *Id.*

74. *Id.* at 376.

75. *Id.*

76. *Id.* The 1694 commission to Governor John Archdale likewise directed that all government officials were to serve "during yor pleasure and yt pleasure of vs ye Lords proprietors." Commission to Appoint John Archdale as Governor of North Carolina and South Carolina (Aug. 31, 1694), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 389, 390.

77. A 1701 report criticized the proprietary governments, of which Carolina was one, for failing to permit appeals to the crown in council. *See* Observations Relating to the Proprietary Governments in America (1701), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 540, 540. A 1714 report criticized the proprietary courts for being staffed by judges unlearned in the law. *See* Proposal to the Board of Trade of Great Britain Concerning the Government of the American Colonies (Oct. 18, 1714), *in* 2 COLONIAL RECORDS I, *supra* note 33, at 154, 157; *see also* Report by Martin Bladen Concerning General Conditions in the American Colonies (July 5, 1726), *in* 2 COLONIAL RECORDS I, *supra* note 33, at 626, 632 (identifying the same problem in a 1726 report). North Carolina fared better than South Carolina. A 1720 report to the Lords Proprietors stated that at least North Carolina had some semblance of an appellate process (to the governor and council), whereas in South Carolina, "the lives and fortunes of his Majesty's subjects in that whole province were subject to the arbitrary judgement of a single Person [Nicholas Trott] without any appeal but to himself." Report by Joseph Boone and John Barnwell Concerning the North Carolina Boundaries (Nov. 23, 1720), *in* 2 COLONIAL RECORDS I, *supra* note 33, at 394, 396; *see* Report by the Board of Trade of Great Britain Concerning General Conditions in North Carolina (Sept. 8, 1721), *in* 2 COLONIAL RECORDS I, *supra* note 33, at 418, 419 (expressing the same opinion in a 1721 report).

1701, for example, they approved a bill defining how the court of admiralty was to be run and the fees to be paid to an admiralty judge (e.g., one pound for every final decree).[78] A 1709 instruction to Governor Edward Tynte directed the governor to appoint replacement judges, in the event a sitting judge died or was removed.[79] The Lords Proprietors reserved the right to reject the governor's selection.[80]

The year 1715 was a high-water mark during the proprietary period for legislation concerning the courts. "An Act for Qualification of Public Officers" made clear that all public officers, including judges, were to be "Commissionated" by the Lords Proprietors, while "An Act relating to the Justices Court of Pleas" specified that not more than one of the Lords Proprietors' deputies could serve as a judge or justice on the general court at any given time, nor could more than one serve on the precinct courts.[81] "An Act to Direct the Method to be observed in the Examination & Committment of Criminals" specified that no person within the province could be imprisoned "until Examination thereof be first had before some Magistrate."[82] "An Act concerning Appeals & Writts of Error" addressed technical matters regarding how to perfect an appeal, although it also made clear that the executive branch—"the Council or Lords Props. Deputys"—remained the high court of the province.[83] "An Act for the Tryal of Small and Means Causes" established a typical justice of the peace system for minor disputes, including the "Forty Shillings or under" amount in controversy requirement in civil cases.[84] It also provided that justices of the peace

78. An Act for the Better Regulating the Proceedings of the Court of Admiralty in Carolina and the Fees for the Same (Mar. 1, 1701), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 156, 156–62.

79. Instructions to Edward Tynte Concerning the Government of Carolina (Mar. 24, 1709), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 705, 705.

80. *See id.* A similar instruction was issued to Governor Edward Hyde in 1712. Instructions to Edward Hyde Concerning the Government of North Carolina (Jan. 24, 1712), *in* 1 COLONIAL RECORDS I, *supra* note 33, at 844, 845.

81. An Act for Qualification of Public Officers (1715), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 15, 15; An Act Relating to the Justices Court of Pleas, & to Prevent the Commissioners & other Interior Officers of the Said Courts Pleading as Attorneys (1715), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 16, 16–17.

82. An Act to Direct the Method to be Observed in the Examination & Committment of Criminals (1715), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 19, 19.

83. An Act Concerning Appeals & Writts of Error (1715), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 24, 24–26.

84. An Act for the Tryal of Small & Means Causes (1715), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 27, 27.

were to be paid specified sums for performing specific functions (e.g., fifteen pence for each warrant).[85]

A 1722 statute enumerated the fees that other judges and government officials were permitted to charge for services rendered (e.g., the chief justice could charge three shillings for issuing a writ).[86] The Act also authorized the chief justice to decide any matter that previously could have been decided by two justices of the peace.[87] "An Act, for settling the Precinct Courts and Courthouses" revealed the extent of the non-judicial powers of the justices of the peace: they were "required and impowered" to purchase land, including via eminent domain, for the building of precinct courthouses.[88] (Justices of the peace previously held court in private residences.) They also were conferred the power to tax to raise the monies needed to buy the land and build the courthouses.[89]

A 1723 statute changed the practice employed under the Fundamental Constitutions of conferring upon the governor the power to appoint "all Officers" of the government—including judges—to more of a shared power with the council.[90] The statute also specified that no person could be appointed an officer of the government until he had resided in the province for at least three years.[91] A 1726 instruction from the crown, rather than from the Lords Proprietors—a sign of royal control to come—ordered the suspension of the execution of judgments pending appeal to the crown in council, unless the appellee furnished "good & Sufficient Security."[92]

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85. *Id.* at 27–28.

86. *See* An Act Concerning Fees and Officers (1722), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 193, 193–97.

87. *Id.*

88. An Act, for Settling the Precinct Courts and Courthouses (1722), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 100, 100–02.

89. *Id.*

90. An Additional Act to an Act Intituled an Act for Qualification of Publick Officers (1723), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 212, 212.

91. *See id.* Other laws are sometimes listed by title only, including some that relate to the courts. For example, the title to a 1727 statute is "An Act for Enlarging and Confirming the Power of the Precinct Courts, and to Prevent Actions and Indictments, of Small Value, Being Brought in the General Court," but there is no text accompanying the title. *See* An Act for Enlarging and Confirming the Power of the Precinct Courts, and to Prevent Actions and Indictments, of Small Value, Being Brought in the General Court (1727), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 111, 111.

92. Instructions to the American Governors Concerning Appeals to the King from Inhabitants of the American Colonies (July 28, 1726), *in* 2 COLONIAL RECORDS I, *supra* note 33, at 637, 637.

II. ROYAL PERIOD, 1729–1776

At least five editions of the Fundamental Constitutions were issued between 1669 and 1698.[93] As a leading authority on the subject aptly observed more than a century ago, the myriad of editions "failed to give to the people that idea of permanency which is so necessary to any constitution."[94] By the time the Fundamental Constitutions was abandoned by the Lords Proprietors after 1700, "violence and confusion were commonplace" in the province.[95] The government of North (and South) Carolina[96] proceeded in a haphazard fashion until 1729, when the Lords Proprietors sold their shares of Carolina to King George II.[97] North Carolina thereby became a royal colony, although no new charter was issued. Instead, the transition was codified by statute.[98]

A. *Governor George Burrington*

George Burrington was the first royal governor of North Carolina. He previously had served as governor under the Lords Proprietors, but his prior experience as chief executive of the province did not insulate him from a series of nasty fights with the general assembly over a variety of matters, including several that

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93. LEFLER & POWELL, *supra* note 11, at 47. The various editions are reprinted in 1 COLONIAL RECORDS I, *supra* note 33, at 187, 187–206.

94. BASSETT, *supra* note 50, at 35. Not only were there multiple editions of the Fundamental Constitutions, but the edition supposedly in effect at any particular time was not followed to the letter. *See* 3 ANDREWS, *supra* note 22, at 220 ("Apparently [the Lords Proprietors] realized very early that the scheme was too ponderous for an infant colony and were willing temporarily to go along under much simpler working arrangements, until the population should have sufficiently increased to provide material for landgraves and caciques and for the very cumbrous system of council and courts."); *see also* Instructions to the Governor and Council of Albemarle County Concerning the Fundamental Constitutions of Carolina, *supra* note 66, at 181 ("Wee having agreed upon the Modell of Government herewith sent you Signed and Sealed by us to be the fundamentall Constitutions and forme of Government of our Province of Carolina for ever And not being able at present to putt it fully in practise by reason of the want of Landgraves and Cassiques and a sufficient number of People However intending to come as nigh it as we cann in the present state of affairs in all the Collony of our said Province."); Instructions to John Hearvey the Governor of the County of Albemarle, *supra* note 67, at 235 (same); Instructions to Henry Wilkinson Concerning the Government of Albemarle County, *supra* note 67, at 333 (same).

95. LEFLER & POWELL, *supra* note 11, at 47.

96. In 1691, the Carolina county of Albemarle became known as "North Carolina." 3 ANDREWS, *supra* note 22, at 247.

97. *Id.* at 246. One of the Lords Proprietors refused to sell his share of the soil, which created logistical problems for the crown for years. *Id.*

98. An Act for Establishing an Agreement with Seven of the Lords Proprietors of Carolina, for the Surrender of Their Title and Interest in that Province to His Majesty (1729), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 32, 32–47.

concerned the courts. King George II's January 15, 1730, commission to Burrington was similar to those issued to other royal governors in colonial America at the time.[99] He was named the crown's "Captain General and Governor in Chief" of North Carolina during the king's "Will & pleasure."[100] He was authorized to suspend members of the council if there was "just cause for so doing"[101] and to "sumon and call," with the advice and consent of the council, general assemblies of freeholders.[102] He also was given, with the advice and consent of the council and general assembly, "full power & authority" to enact laws "as near as agreeable to the Laws & Statutes" of Great Britain,[103] he could veto laws he deemed prejudicial to the crown, and he could "adjourn prorogue & dissolve" the legislature.[104] He was afforded full power over the military, and he could pardon and remit offenses and fines.[105]

With respect to the courts, Burrington's commission likewise mirrored those of other royal governors. His commission provided:

> And We do by these presents give & grant unto you the said George Burrington full power & authority with the advice & consent of our said Council to erect & constitute & establish such & so many Courts of Judicature & Public Justice within our said Province & Territory you & they shall think fit & necessary for the hearing & determining of all causes as well Criminal as Civil according to law & equity & for awarding of execution thereupon with all reasonable & necessary powers & authorityes fees & privileges belonging thereunto . . . And We do hereby authorize and empower you to constitute & appoint Judges & in cases requisite Commissrs of Oyer & Terminer Justices of the Peace & other necessary Officers & Ministers in our said Province for the better administration of Justice & putting the Laws in execution.[106]

The instructions that accompanied Burrington's commission also were similar to those issued to other royal governors at the time, including with regard to the courts.[107] Burrington was instructed to

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99. *See* Commission to Appoint George Burrington as Governor of North Carolina (Jan. 15, 1730), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 66, 66–73.

100. *Id.* at 66, 73.

101. *Id.* at 67.

102. *Id.* at 68.

103. *Id.*

104. *Id.* at 69.

105. *Id.* at 70.

106. *Id.* at 69–70.

107. *See* Instructions to George Burrington Concerning the Government of North Carolina (Dec. 14, 1730), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 90, 102–06.

ensure the speedy, "equal & impartial administration of justice" in the colony, to provide for a court of exchequer to protect the crown's revenue, and to file a periodic report with the Board of Trade detailing the state of the colony's court system.[108] He was not permitted to "erect any Court or Office of Judicature not before erected or established nor dissolve any Court or Office already erected or established without our special order," or to "displace" any of the "Judges Justices" or other government officers "without good and sufficient cause."[109] In order to protect against "arbitrary removals of the Judges & Justices of the Peace," the governor likewise was prohibited from expressing "any limitation of time" in judicial commissions.[110] He was to "take care no Court of Judicature be adjourned but upon good grounds" and that all court (and council) proceedings be conducted upon a public record.[111] He was instructed to take "special care," with the advice and consent of the council, to regulate "all salaries and fees . . . within the bounds of moderation."[112] The governor and council were to serve as the court of appeals for the colony, provided any controversy appealed to them was valued at more than one hundred pounds. Further appeals were to be permitted to the crown in council for civil matters valued in excess of three hundred pounds and for criminal matters involving fines of more than one hundred pounds.[113]

But it was Instruction 8 that was to cause the most interesting dispute regarding judicial matters during Burrington's four-year stint as governor:

> And in the choice and nomination of the Members of our said Council as also of the chief officers Judges Assistants, Justices and Sheriffs You are always to take care that they be men of good life and well affected to our Government and of good estates and abilities and not necessitous persons.[114]

The controversy—one that fills a surprising number of pages in volume three of *The Colonial Records of North Carolina*—centered around the significance of the comma between "Judges Assistants" and "Justices." Given that, to my modern eyes at least, punctuation

108. *Id.* at 91.

109. *Id.* at 102. When the governor was absent from the colony, and no lieutenant governor had been appointed, no judge or justice of the peace could be removed from office "without the consent of at least seven of the Council." *Id.* at 99.

110. *Id.* at 102.

111. *Id.* at 104.

112. *Id.* at 103.

113. *Id.*

114. *Id.* at 92.

(and capitalization) seemed to be used arbitrarily and capriciously by our ancestors in the seventeenth and eighteenth centuries, it was odd to discover the political leaders of North Carolina fighting over a comma. A May 21, 1731, letter from John Baptista Ashe, speaker of the North Carolina general assembly, and Governor Burrington's reply the following day, illustrate the nature of the dispute. Speaker Ashe wrote in pertinent part:

> What we observed was that all the inference which could be made from His Majestie's 8th Instruction was, that Assistants were or might be, not saying what Assistants that perhaps they might not be intended Assistants to the Chief Justice, but supposing they were, we argued that no inference could be made from thence of their power so as to define it neither can we think our doubt, whether by Assistants, there is meant Assistants to the Chief Justice is so extraordinary as you represent it. And indeed we do not perfectly understand your Excellency when you say the Instructions couple Judges, Assistants Justices &c the word Assistants stand severed from the rest by commas as do the titles of the other Officers one from the other and by it are intended distinct Officers for had it been only as an epithet or adjective to be affixed either to Judge or Justices then in the Instruction would have been used the word Assistant, not Assistants, and it would not by the Comma have been severed from its proper substantive .... That there have been Assistants in the General Court we deny not but we cannot grant that Assistants have a Judicial Power equal to associate Judges, the very word seems to imply the contrary .... The word Assistant was generally taken when apply'd to an Officer of a Court we said it was to inform and advise, without having any judicial Power .... We shall only add as seeming to support our opinion the practice formerly in South Carolina where (we are well informed) the Chief Justice was wont to have the sole Judicial power in the supream Court.[115]

Governor Burrington replied:

> You say the 8th Instruction does inferr there should be Assistants, but then you seem at a strange loss what they should be, and go on to observe what perhaps it might not intend, and you add that their Power is not defined and from thence you are making out your argument that they have no Power, for

115. Letter from John Baptista Ashe to George Burrington Concerning a Dispute between the Governor and His Council (May 21, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 168, 169–70.

> that is what you are contending for and at last you are drove to the refuge of a comma .... If the Instructions ... do not define the Power of Assistants it no ways restrains them, and then it must be taken according to their usual Power and as the Chief Justice is usually called (by way of Eminence) the Judge so the other Justices of the General Court are usually called Assistants or Assistant Judges, and there are no other persons in the Government but they who are so called so that I cannot imagine why all this cloud of Difficulties is raised to find out who, or what is meant by Assistants, or to what purpose it is unless purely to perplex the matter to argue what the word might or could mean, and their Power might be easily known from the constant usage here, if the enquiry was fairly made instead of running divisions and multiplying arguments upon it. And as the General Court here hath constantly consisted of the Chief Justice and Assistants, I am persuaded the allowing the Chief Justice to be sole Judge of the Court now would be establishing a new sort of a General Court and destroying the old form and so is directly against my 45th Instruction .... Indeed you give me one example from South Carolina but you would have done well to have remembered that the complaint against that Judge unregarded by the Proprietors was one of the principal reasons the People gave to justify their taking up armes and throwing off the Lords Government .... And here I shall leave it having I think said sufficient to convince you that your Paper is very triffling and only a Quibble upon words.[116]

Why was there so much time and energy devoted to debating the meaning and placement of a comma? The answer is almost certainly because a number of government officials—including Speaker Ashe—wanted to limit the governor's power, and one way to do that was to permit him to appoint as few judges as possible. Governor Burrington carried the day, though. On July 27, 1731, John Palin was commissioned chief justice of North Carolina and, this is the important point, four other men were appointed "assistant Justices of the General Court of this Province."[117] However, the appointment of Palin as chief justice revealed another, and even more bitter, dispute between the governor and the general assembly over control of the courts.

116. Letter from George Burrington to John Baptista Ashe Concerning a Dispute between the Governor and His Council (May 22, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 168, 172–73.

117. Minutes of the North Carolina Governor's Council (July 27, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 250, 251.

William Smith, rather than John Palin, was actually the first chief justice commissioned during the Burrington administration.[118] He was to serve "During our Royall Will and Pleasure."[119] The chief justice was

> to do perform and execute all acts matters and things whatsoever which in our said Province to the Office of a Chief Justice in any wise belong or appertain and in as large and ample manner to all intents and purposes as any Justice of any of the Courts of Westminster or any of the English Plantations in America may or ought to perform and execute.[120]

More to the point, while Smith's commission may have opened with the traditional recitation of the crown's "Trust and Confidence in the care prudence fidelity loyalty and integrity" of the appointee, the relationship between the governor and the chief justice quickly deteriorated, to put it mildly.[121] The dispute was traceable, at least in part, to the previous discussion about whether the governor could appoint "assistant justices" or simply assistants *to* the chief justice. The chief justice was of the latter view.[122] But regardless of the source of the dispute, it was nasty one. For example, in his July 1, 1731, report to the Board of Trade, Governor Burrington referred to Chief Justice Smith as a "Weak Rash Young Man, Drunk from Morning till Night."[123] Burrington's September 4, 1731, report was equally tough. The governor called the chief justice a "busy Shallow wretch" and accused the chief justice of "Spreading many false and Scandalous storys" about him and trying to "procure" his removal as governor.[124] Burrington also called Smith "a very idle drunken young man [who]

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118. Commission to Appoint William Smith as Chief Justice of North Carolina (Apr. 1, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 136, 136.

119. *Id.*

120. *Id.*

121. *Id.* Other powerful members of the government likewise thought poorly of Chief Justice Smith. *See, e.g.*, Letter from Rice, Montgomery, and Ashe to the Board of Trade (Nov. 17, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 375, 376 ("The Chief Justice is a Person against whom the whole Province (as it were) has exclaimed for his unjust, illegal and Fraudulent Practices.").

122. *See* Letter from William Smith et al. to Governor Burrington (May 18, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 236, 237; Letter from Governor Burrington to the Duke of Newcastle (July 2, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 142, 150.

123. Letter from George Burrington to the Board of Trade of Great Britain (July 1, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 140, 141.

124. Letter from George Burrington to the Board of Trade of Great Britain (Sept. 4, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 202, 203.

would frequently weep over his cups and was horribly given to fibbing."[125]

Matters went from bad to worse when William Little was commissioned chief justice of North Carolina in 1732.[126] Indeed, on July 17, 1733, Little was taken into custody by the general assembly and held to answer charges of "Pervertion of Justice, Oppression and Extortion."[127] Governor Burrington objected strongly to the assembly's action, calling it a "Calumny invented by wicked men."[128] Burrington himself was sometimes criticized for allegedly inserting himself into judicial matters in which he had a personal interest.[129] He responded that he had intervened only to "restrain[] Profligate, lawless men, from unruly Actions."[130] The governor and general assembly also quarreled over how much money to pay the chief justice.[131] Finally, Burrington was accused of "erecting new Judicatures, without royal Licence," when he divided North Carolina into additional precincts.[132] He denied it, and said that "I believe no man (Mr Rice and Mr Ashe excepted) will say that when a new Precinct is erected the appointing a Precinct Court therein as in other Precincts, is erecting a new sort of Judicature."[133]

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125. Letter from George Burrington to the Board of Trade of Great Britain (Nov. 14, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 370, 370.

126. *See* Commission to Appoint William Little as Chief Justice of North Carolina (Oct. 18, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 492, 492–93. Admiralty Judge Edmund Porter also was poorly regarded. *See* Minutes of the North Carolina Governor's Council (Jan. 21, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 409, 409 ("That the Council upon a very full Examination of his Vile behaviour as Judge of the Court of Admiralty given their oppinion that he deserve a Sespension from the Office.").

127. Resolution of the Lower House of the General Assembly (July 17, 1733), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 603, 604.

128. Letter from Governor Burrington to the General Assembly (Nov. 8, 1733), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 613, 615.

129. *See* Letter from Rice, Montgomery, and Ashe to the Duke of Newcastle (Sept. 16, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 356, 359.

130. Report by George Burrington Concerning General Conditions in North Carolina (Jan. 1, 1733), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 429, 429.

131. *Compare* Minutes of the Upper House of the North Carolina General Assembly (May 15, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 277, 278 (general assembly voting to pay the chief justice one hundred pounds), *with* Minutes of the Upper House of the North Carolina General Assembly (May 17, 1731), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 283, 283 (showing the governor called that amount "trifling" and requested eight hundred pounds instead).

132. Objections of Rice and Ashe (1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 440, 441.

133. Governor Burrington's Paper in Relation to the Erecting of Precincts (Dec. 26, 1732), *in* 3 COLONIAL RECORDS I, *supra* note 33, at 442, 448.

B. Governor Gabriel Johnston

Gabriel Johnston served as royal governor of North Carolina from 1734–1752.[134] A number of statutes were enacted during Johnston's governorship that concerned the courts. A 1736 statute enumerated the fees judges, justices of the peace, and other government officials were to receive for performing specific functions (e.g., one pound for the chief justice for every special session of the court of common pleas he attended).[135] It replaced the 1722 statute. A 1741 "Act, for the Tryal of Small and mean Causes" tracked the 1715 justices of the peace statute, with the notable exception that the 1741 law authorized appeals "to the next County Court," where a jury trial was to be had.[136]

A 1746 law established circuit courts and other courts of justice.[137] Almost certainly the most important judiciary act passed during North Carolina's years as a royal colony, it was enacted in recognition of the obvious fact that the province was too large for the existing justice system. County courts were established with jurisdiction over civil matters valued between forty shillings and twenty pounds and those involving orphans, and most criminal misdemeanors.[138] At least three justices of the peace were to staff each county court, which was to meet quarterly.[139] (Justices of the peace also were empowered, as they were in England, to keep the peace, literally, when "out of Court.") A General Court—previously called the "Supreme and Principal Court of Pleas"—was established as well, and it was empowered to conduct a "Tryal *de Novo*" in any appeal from a county court.[140] The General Court had original jurisdiction over civil matters involving five pounds or more. It was to meet twice a year in "Newbern" and was to consist of the chief justice and three associate

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134. *See, e.g.*, LEFLER & POWELL, *supra* note 11, at 88, 210.

135. *See* Bill by the North Carolina General Assembly Concerning Fees for Public Officials (Oct. 9, 1736), *in* 4 COLONIAL RECORDS I, *supra* note 33, at 189, 191–99.

136. Act, for the Tryal of Small and Mean Causes (Apr. 4, 1741), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 145, 145–47.

137. An Act, to Fix a Place for the Seat of Government, and for Keeping Public Offices; for Appointing Circuit Courts, and Defraying the Expence Thereof; and also for Establishing the Courts of Justice, and Regulating the Proceedings Therein (Dec. 5, 1746), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 224, 224. The act replaced, among other acts, "An Act, for Appointing Circuit Courts, and for Enlarging the Power of the County Courts." *Id.* The title to that act was all that was available for examination. *See* An Act, for Appointing Circuit Courts, and for Enlarging the Power of the County Courts (Mar. 6, 1738), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 91, 91.

138. An Act, to Fix a Place for the Seat of Government, *supra* note 137, at 224.

139. *Id.*

140. *Id.* at 228, 238.

justices commissioned by the governor.[141] The "Associates shall be vested with the same Power and Authority, as Associate Justices in England usually have."[142] The chief justice was to be paid two hundred pounds a year for his circuit riding responsibilities. Nothing was provided in the statute regarding the compensation of other judges. The chief justice also was to hold twice a year a court of assize, oyer and terminer, and general "goal" delivery.[143] The Court of Chancery, apparently to consist of the governor and council (the statute was silent on this point), was to be held immediately following the adjournment of every General Court session.

A 1748 statute enumerated the fees "several Officers" were allowed to charge for performing certain functions.[144] The chief justice and the judge of the admiralty court were on the list, other judges were not.[145] A 1749 statute "put in force" in the province specific English laws.[146] Several concerned the authority of minor judicial officers. Another 1749 statute "revived" the 1715 act concerning appeals and writs of error, the 1741 act regarding the trial of small and mean causes, the 1746 judiciary act, and the 1748 schedule of fees.[147] A separate 1749 law authorized the justices of the county courts to purchase law books[148]—a striking signal that the *law* mattered—while another added to the chief justice's two hundred pounds per year compensation "Thirty Three Pounds Thirteen Shillings and Four Pence" for every court of assize, oyer and terminer, and general goal delivery he held.[149]

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141. *Id.* at 226.

142. *Id.* at 228.

143. *Id.* at 226.

144. An Act, for Regulating the Several Officers Fees within this Province, and Ascertaining the Method of Paying the Same (1748), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 250, 250.

145. *Id.*

146. An Act, to Put in Force in this Province, the Several Statutes of the Kingdom of England, or South Britain, Therein Particularly Mentioned (Oct. 16, 1749), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 293, 293.

147. An Act, to Confirm the Several Acts of Assembly of this Province Therein Mentioned, as Revised by the Commissioners Appointed by an Act of the General Assembly of This Province (1749), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 308, 308.

148. An Act, to Enable the Justices of the Several Counties to Provide Certain Law Books, for the Use of Their County Courts (1749), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 321, 321–22.

149. An Additional Act to an Act, Intituled, An Act, to Fix a Place for the Seat of Government, and for Keeping Public Offices; for Appointing Circuit Courts, and Defraying the Expence Thereof; and also for Establishing the Courts of Justice, and Regulating the Proceedings Therein (1749), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 324, 325. A number of statutes throughout this

Governor Johnston, like Governor Burrington before him, sometimes fought with the general assembly over control of the courts. The most dramatic episodes again involved Chief Justice William Smith. However, this time the governor wanted to keep Smith in office, while several members of the assembly wished him removed.[150] The accusations against Smith were many, and they ranged from his allegedly voting twice during a council proceeding on a particular bill (once as a councilor and once as chair)[151] to a series of allegedly abusive exercises of judicial power, including—according to the 1740 articles of impeachment against him—"causing execution to be done on the bodys of such offenders by his own orders" (rather than by order of the governor), "imposing excessive fines," "extorting" fees in civil cases, and "promoting" suits and issuing writs "against any person under his displeasure."[152] Smith had his defenders, however, not the least of whom was Governor Johnston himself, who saved the chief justice from impeachment by dissolving the legislature for want of a quorum that he, the governor, had engineered.[153]

C. *Governor Arthur Dobbs*

Arthur Dobbs served as North Carolina's royal governor from 1753 to 1763.[154] The crown instructed him with respect to the courts in June of 1754 in a fashion that differed markedly from the instructions his predecessors received: "It is Our further Will and Pleasure that all Commissions to be granted by you to any person or persons to be Judges, Justices of the Peace or other necessary Officers be granted

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period concerned the precise dates on which certain county courts were to be held. *See, e.g.*, An Act, to Alter the Times for Holding the Courts for the County of Craven (1749), *in* 1 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, *supra* note 64, at 344, 344.

150. Letter from Nathaniel Rice, Eleazer Allen, Edward Mosely, and Roger Moore to James Murray (July 3, 1740), *in* 4 COLONIAL RECORDS I, *supra* note 33, at 465, 465–70.

151. Letter from Nathaniel Rice, Eleazer Allen, Edward Mosely, and Roger Moore to Governor Gabriel Johnston (May 22, 1740), *in* 4 COLONIAL RECORDS I, *supra* note 33, at 448, 449–53; *see also* Rice, Allen, Mosely, and Moore's Objection to the Bill (Feb. 19, 1740), *in* 4 COLONIAL RECORDS I, *supra* note 33, at 479, 480–81.

152. Letter from Nathaniel Rice, Eleazer Allen, Edward Mosely, and Roger Moore to James Murray, *supra* note 150, at 465–70.

153. William L. Saunders, Prefatory Notes to 4 COLONIAL RECORDS I, *supra* note 33, at iii, v; *see also* Letter from James Murray to the Board of Trade (Nov. 3, 1739), *in* 4 COLONIAL RECORDS I, at 462, 462–65 (defending Smith's actions); Letter from Will Smith, Robert Halton, Matthew Rowan, and James Murray to Governor Johnston (June 5, 1740), *in* 4 COLONIAL RECORDS I, at 455, 455–60 (same).

154. *See, e.g.*, The State Library of North Carolina Encyclopedia, http://statelibrary.ncdcr.gov/nc/stgovt/governor.htm (last visited Aug. 22, 2009).

during pleasure only."[155] The Board of Trade explained in its cover letter to the governor that this change was "more consistent with the Article next following in these Instructions which leaves a power in the Governor of removing Judges & Justices under certain restrictions."[156] The crown repeated this instruction in December of 1761 in a tone that left no doubt how important it was to His Majesty:

> Whereas Laws have been lately passed or Attempted to be passed in Several of our Colonies in America enacting that the Judges of the Several Courts of Judicature or other Chief Officers of Justice in the said Colonies shall hold their Offices, during good Behavior ... It is therefore our express Will and Pleasure that you do not upon any pretence whatever upon pain of being removed from your Government give your assent to any Act, by which Tenure of the Commissions to be granted ... shall be regulated, or ascertained in any manner whatsoever; and you are to take particular care in all commissions ... Granted to the ... Justices of the Court of Judicature that the said Commissions are Granted, during Pleasure only, agreeable to what has been the Antient practice and usage in our said Colonies and Plantations.[157]

The justice system was in disarray during virtually the entire ten years of Dobbs's governorship. The most visible illustration of this fact was the six year battle between the crown, the governor, and the assembly over the "Court Bills." The court bills represented attempts by the assembly to provide a comprehensive judicial system for North Carolina—or, more precisely, a judicial system staffed by judges who were not under the thumb of the executive. The first court bill, that of 1756, specified that no person was eligible to serve as a judge who was not an "out barrister" of five years' standing in England, or an attorney with seven years' practice in North Carolina or an adjoining colony.[158] The objective was to secure the same privilege of "home judges" as that afforded to the English people.[159] The bill also provided that judges were to hold their offices during good behavior, rather than at the pleasure of the crown or governor.[160] The chief

155. Instructions to Governor Dobbs (June 17, 1754), *in* 5 COLONIAL RECORDS I, *supra* note 33, at 1103, 1104.

156. *Id.*

157. Instructions to Arthur Dobbs Concerning the Tenure of Judges in North Carolina (Dec. 9, 1761), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 591, 591–92.

158. William L. Saunders, Prefatory Notes to 6 COLONIAL RECORDS I, *supra* note 33, at iii, xvi–xvii.

159. *Id.* at xvii.

160. *Id.*

justice and the attorney general advised the crown to reject the bill on the grounds that it infringed upon the crown's prerogative and it provided for "no adequate salaries."[161] The crown disallowed the bill in April of 1759.[162] Perhaps surprisingly, the governor was not pleased with the crown's decision, in large part because the repeal of the 1756 bill left only the 1715 law in force, "and no place, save Edenton, in an extreme part of the Province, for holding the Courts, and there was such a confusion in the laws before and since 1715 until the late law was made, that neither Judges nor lawyers knew how to act."[163]

Governor Dobbs convened the legislature on April 24, 1760, for the purpose of authorizing a particular appropriation desired by the crown.[164] The assembly instead passed another court bill, albeit one containing the objectionable provisions of the 1756 bill.[165] The governor was thereby forced to approve it, or go without the needed appropriation. He informed the assembly that if it would pass the appropriation bill and amend the court bill, either by deleting the objectionable provisions or by making the bill temporary, he would approve them.[166] The assembly refused, went into secret session, and issued the following complaint to the crown concerning the governor's administration of North Carolina's justice system:

> But when by injudicious and partial appointments of Justices not qualified for such trust, and the abrupt removal of Others whose Characters have been liable to no objection Magistracy has fallen into Contempt and Courts have lost their Influence and dignity; When Mobbs and Insurrections are Permitted to assemble in different parts of the Province Erecting Sham Jurisdictions, Imprisoning your Majesty's Subjects, Breaking open Gaols and releasing Malefactors with impunity; When several of the Malecontents in those Riotous and Treasonable Assemblies are Honoured with Commissions from his Excellency as Justices and Militia Officers; When persons have suffered Corporal Punishment by the Arbitrary and Private orders of Justices still retained in their Offices; When Moneys have been Exacted of the Subject for the use of the Governor and Secretary, expressly against Law; When the forms of Writs

161. Letter Relaying the Opinion of the Chief Justice and the Attorney General (Apr. 12, 1759), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 25, 26.

162. Order of the Privy Council of Great Britain Concerning Acts of the North Carolina General Assembly Concerning Courts (Apr. 14, 1759), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 28, 28–29.

163. Saunders, *supra* note 158, at xvii.

164. *Id.* at xviii.

165. *Id.*

166. *Id.*

> of Election have been arbitrarily Altered and diversified to get particular men Chosen and defeat the choice of others, some of them directing the freeholders, others the Inhabitants Generally to chuse, by which last form Servants and even Convicts might be admitted to Elect, whereas by the Royal Charter of King Charles the Second Laws are directed to be made by the Assent of the freemen or of their Delegates; When a Writ has been Issued to one County for fewer Members than they have used and ought to Send, and to another none at all till several Bills had passed in the Present Session, by which open Practices it remained no longer a secret that the Governor Intended to modell the Assembly for his own particular Purposes, in like manner as he had before reformed the Council by suspensions and new appointments; When being Insulted by Blood thirsty savages on our Exterior Settlements and in no less danger of falling a Prey to our Internal Enemies; Whither can we resort for succor but to your sacred Majesty, as the fountain from whence Justice and Protection is derived to your most Distant Subject?[167]

The editor of *The Colonial Records of North Carolina* called this harsh "arraignment" against the governor "without an equal until that brought against King George at Philadelphia by the United Colonies, on the 4th of July, 1776."[168] Governor Dobbs rejected the court bill and prorogued the legislature for several weeks.[169] When the legislature reconvened, it passed both the appropriations bill and the temporary version of the court bill, as the governor had requested. The governor approved the court bill, (strangely) rejected the appropriations bill, and prorogued the legislature until early September.[170]

With respect to the court bill, the governor received unexpected support from the chief justice and the attorney general, both of whom originally had opposed the bill.[171] The chief justice now maintained that the bill was not inconsistent with the crown's prerogative,[172] while the attorney general insisted that because judges in England held office during "good behaviour," so should North Carolina judges.[173]

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167. *Id.* at xix–xx (quoting the assembly's complaint to the crown) (internal quotations omitted).

168. *Id.* at xxi.

169. *Id.* at xx.

170. *Id.*

171. *Id.* at xxii.

172. Minutes of the North Carolina Governor's Council (May 21, 1760), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 332, 335–36.

173. *Id.* at 337.

Both men emphasized the disarray then existing in the North Carolina courts and the resulting damage to "the rights of the People."[174]

Notwithstanding this newfound support for the court bill, Governor Dobbs wrote the Board of Trade and urged that the king reject the bill.[175] On December 14, 1762, the king did so, but he also rebuked the governor for approving it in the first place and for failing to approve the appropriations bill.[176] The king undoubtedly was influenced by two letters from the Board of Trade written in November and December of 1761. The Board reminded the king that English judges were afforded life tenure during good behavior only "at the Revolution" (i.e., the Glorious Revolution of 1688, in which King James II was overthrown), and that that practice had been an "Arbitrary and illegal" encroachment on the crown's prerogative.[177] The Board maintained that permitting judges in North Carolina to serve during good behavior would render it impossible to displace incompetent men—of whom there were many, given the absence of stable and settled judicial salaries in the colony.[178] The Board, as the chief justice and the attorney general had before it, expressed great concern for the security of the "Rights and Liberties" of the people,[179] albeit for converse reasons than those expressed by the chief justice and the attorney general. The Board also insisted that commissioning judges during good behavior, while at the same time permitting the assembly to control their salaries, would subject the judiciary to the assembly's "Factious will and Caprice."[180] The Board likewise noted that the chief justice served during the crown's pleasure only.[181]

In the apt words of the editor of *The Colonial Records of North Carolina*, "So the effort failed, and the people of the Province, at the end of six years, found themselves just where they were when they began."[182] The result was a justice system in crisis—so much so that the assembly requested that Governor Dobbs issue a proclamation "requiring the Chief-Justice and other Justices of the Supreme

174. *Id.* at 338.

175. *See* Saunders, *supra* note 158, at xx.

176. *Id.* at xx–xxii.

177. Letter from the Board of Trade to King George III (Nov. 11, 1761), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 582, 585.

178. *Id.*

179. *Id.* at 585–86.

180. *Id.* at 586.

181. Letter from the Board of Trade to King George III (Dec. 3, 1761), *in* 6 COLONIAL RECORDS I, *supra* note 33, at 587, 589.

182. Saunders, *supra* note 158, at xxii.

Courts" and "Justices of the County Courts" to "apprehend[] and bring[] to justice . . . offenders" who were violating the law.[183]

D. Governor William Tryon

William Tryon succeeded Arthur Dobbs as governor of North Carolina.[184] His instructions from the crown regarding the judiciary mirrored those issued to Dobbs, including the one that stated that if the governor "Assent[ed]" to any bill passed by the general assembly that commissioned judges for any term but "Pleasure only," the governor risked "pain of being removed from your Government."[185]

On November 4, 1766, Governor Tryon delivered a speech to both houses of the legislature in which he reported that the "system of the Court Laws are found by experience to be on so good an establishment, and afford so easy and regular administration of Justice under the present situation and circumstances of the Country that they appear to want nothing to give them a greater efficacy and dignity but . . . ."[186] Nothing could have been further from the truth. As noted above, North Carolina's justice system was in disarray for most of the royal period. However, what came after the "but" in the governor's speech suggests that the governor was merely trying to make the legislature feel good about itself so that it would award "handsome Salaries . . . to the assistant or Associate Judges for such Gentlemen of the Law as may fill those offices."[187]

Governor Tryon again remarked on the status of the judiciary as a part of a lengthy 1767 report on North Carolina's "civil constitution."[188] He opened his report by mentioning that the legislative power was "vested in the Governor, Council and Representatives of the people," that the executive power was "lodged" in the governor, as the king's "lieutenant," and that the "members of his Majesty's Council have always claimed and in fact have been in the exercise of a negative in the making of laws."[189] The governor also mentioned that the house of assembly was comprised of

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183. William L. Saunders, Prefatory Notes to 5 COLONIAL RECORDS I, *supra* note 33, at iii, lvii–lviii (quoting the assembly's formal request).

184. *See, e.g.*, William L. Saunders, Prefatory Notes to 7 COLONIAL RECORDS I, *supra* note 33, at iii, iii.

185. Instructions to Governor William Tryon (Dec. 2, 1765), *in* 7 COLONIAL RECORDS I, *supra* note 33, at 137, 138.

186. Speech by Governor William Tryon (Nov. 4, 1766), *in* 7 COLONIAL RECORDS I, *supra* note 33, at 292, 295.

187. *Id.*

188. Letter from Governor William Tryon to the Earl of Shelburne (June 29, 1767), *in* 7 COLONIAL RECORDS I, *supra* note 33, at 472, 472.

189. *Id.* at 472–73.

representatives of each of the counties and many of the towns.[190] He then devoted the remainder of his report to describing the court system. He began with the "Court of Equity and Conscience," which was "not established by any positive statute."[191] This court was staffed by the governor and council, and the "governor may hold court when and where he pleases," although he seldom convened the court "oftener than twice a year."[192] The governor was paid a mere forty shillings for service on the chancery court, while the other judges "have no pecuniary appointment either in the way of fee or salary."[193] The governor alone could execute the power of chancellor to issue injunctions to stay common law proceedings that might interfere with equitable ones. The governor also served as "Ordinary" and issued "all letters of Administration and letters testamentary."[194] The governor likewise sat on the "Court of Claims," again with the council.[195] That court granted "fee farms" from the king's lands in the province.[196]

Governor Tryon next described how the common law courts were divided into five districts, with the chief justice of the province serving as the presiding judge over each district, assisted by an "associate judge" of each particular district.[197] "The jurisdiction of each associate is confined to the district for which he is appointed."[198] The associate judge of the Salisbury district was the only associate judge required to be a lawyer, and he was the only associate judge paid a salary.[199] He was treated differently from the other associate judges because the Salisbury district was remote and the chief justice often could not travel to it.[200] All the judges, including the chief justice, held their offices "during pleasure."[201] The chief justice received a salary of seventy pounds sterling per year paid by "his Majesty's Receiver General out of the quit rents," and also had received by act of the assembly—before the act expired—twenty-six

190. *Id.* at 473.
191. *Id.*
192. *Id.* at 474.
193. *Id.*
194. *Id.* at 475.
195. *Id.* at 476.
196. *Id.*
197. *Id.* at 476–77.
198. *Id.* at 477.
199. *Id.* (noting the associate judge received 100 pounds for each court he held in the district and that he had the power of the chief justice in the chief justice's absence).
200. *See id.* (noting that the chief justice had the option to travel to the Salisbury district or allow the associate judge to sit in his place).
201. *Id.* at 478.

pounds currency to defray the costs of his travels.[202] He likewise received a series of "trifling fees" for the performance of certain duties (e.g., the issuing of certain orders).[203] The decisions of the common law courts could be appealed to the governor and council, and then to the king in council. Governor Tryon also described a fairly typical system of "inferiour Courts of Pleas and quarter sessions" administered by justices of the peace and a court of admiralty, which "seldom meets." He concluded by noting that there were "no spiritual courts of judicature" or exchequer, although there was a "Baron of the Exchequer" appointed pursuant to the king's September 18, 1733, order.[204]

E. *Governor Josiah Martin*

In 1771 James Hasell succeeded William Tryon as royal governor of North Carolina.[205] Governor Hasell served for less than a year, and Josiah Martin replaced him. Martin was to be the last royal governor of North Carolina.[206] The struggle over the court bills was renewed during Martin's governorship. Although, at least at first, the issue was framed differently for Martin than it had been for Dobbs—during the Martin administration, the dispute was about the right to "proceed by attachment against the property of debtors who had never been" present in North Carolina; for the Dobbs administration, it was about judicial tenure[207]—the story unfolded in a similar fashion.[208] The assembly passed a court bill containing a provision to which the crown and the governor objected (the attachment clause), the crown and the governor rejected it, the assembly passed the bill again, and the governor again rejected it and prorogued the legislature.[209]

The battle over judicial tenure likewise recurred during the governorship of Josiah Martin. In a series of 1775 letters from Martin to the Earl of Dartmouth, the governor warned that the "life, liberty and property" of the people of North Carolina had become insecure

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202. *Id.* at 479.

203. *Id.* (describing how the majority of the chief justice's compensation came from the fees he was entitled to collect).

204. *Id.* at 483.

205. *See, e.g.*, The State Library of North Carolina Encyclopedia, *supra* note 154.

206. William L. Saunders, Prefatory Notes to 9 COLONIAL RECORDS I, *supra* note 33, at iii, iii.

207. *Id.* at xx.

208. *See id.* at xx–xxvi.

209. *See id.*

because of the absence of an adequate court system.[210] The governor thereby recommended that the king permit him to establish the courts himself as a matter of prerogative, as the king had always permitted the governor of New York to do. Martin wrote:

> For this great purpose for the reasons I have here enumerated to your Lordship, and because I am persuaded it will be the first and greatest improvement that can be made in the Civil Polity of this Province, I shall think it proper by Ordinances to be made with the advice of the Council, pursuant to the Powers granted to me in that behalf by his Majesty's Royal Commission, to erect Sufficient Courts of Justice throughout this Colony as was done at New York early in the establishment of English Government, and has been practiced continually since to the present day on the erection of new Counties in that Province where the people have been ever wisely satisfied with those Institutions enjoying under them the benefit of a better administration of Justice than any other Colony.[211]

The governor reported to the earl in April of 1775 that the assembly "will probably" refuse to pay the chief justice and the other judges, and "will not under any circumstances establish permanent Salaries for them," unless the king agreed to appoint judges for life during good behavior.[212] The governor therefore recommended that the king permit him to grant the judges "Salaries payable out of some certain Fund."[213] However, in October of 1775 the governor became resigned to the fact that appointing judges during good behavior was "perhaps [the] only means to induce the Assembly to make honorable, suitable, permanent settlements upon those important

210. Letter from Josiah Martin to William Legge, Earl of Dartmouth (Oct. 16, 1775), *in* 10 COLONIAL RECORDS I, *supra* note 33, at 264, 274 (recognizing the importance of these rights and the need to protect them because they are the "grand ends and objects of all civil Government").

211. *Id.* at 275–76; *see also* Letter from Josiah Martin to William Legge, Earl of Dartmouth (May 18, 1775), *in* 9 COLONIAL RECORDS I, *supra* note 33, at 1257, 1258 ("I have long wished to receive the Royal disallowance of the present inadequate system of Court Laws, that effectual Court Laws might be established by the Royal Prerogative . . . .").

212. Letter from Josiah Martin to William Legge, Earl of Dartmouth (Apr. 20, 1775), *in* 9 COLONIAL RECORDS I, *supra* note 33, at 1223, 1227.

213. *Id.*

Offices."[214] It was not until North Carolina was in the midst of the "alarms of war" that the court bill was finally adopted.[215]

Before turning to the organic law that resulted from the war—the American Revolution—that made North Carolina an independent state, it is worth mentioning that separation of powers was as absent in royal North Carolina as it was in the other American colonies.[216] Nowhere was this more in evidence than in the county courts of the colony. As historian Julian P. Boyd put it in his 1926 study of the subject:

> The county court was the logical system of government for the Colony, and it was for these reasons that it became the chief and almost the only unit of local government, developing during the Colonial period to the point where it possessed all judicial, executive, and administrative duties of county government.[217]

The justices of the peace who staffed the county courts also played a leading role in the government of the colony as a whole: many simultaneously served in the general assembly. For example, Boyd reported that of the forty-seven members present at the January 1735 meeting of the assembly, at least thirty-three were justices of the peace—and six more were appointed as justices shortly thereafter.[218] Of the fifty-seven members present at the assembly of 1755, thirty-eight were justices of the peace.[219] This caused royal

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214. Letter from Josiah Martin to William Legge, Earl of Dartmouth, *supra* note 210, at 277.

215. Walter Clark, Prefatory Notes to 12 THE STATE RECORDS OF NORTH CAROLINA iii, iv (Walter Clark ed., Broadfoot Publ'g Co. 1993) (1895) [hereinafter STATE RECORDS].

216. *See generally* LEONARD WOODS LABAREE, ROYAL GOVERNMENT IN AMERICA: A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783, at 92–133 (1930) (describing the authority of royal governors and their nearly unchecked power).

217. Julian P. Boyd, The County Court in Colonial North Carolina vii (1926) (unpublished M.A. thesis, Duke University) (on file with the North Carolina Law Review). Among the justices of the peace's local non-judicial powers were the power to tax and the power to recommend pensions to soldiers disabled in the Regulators' War. *Id.* The Justices of the U.S. Supreme Court famously refused, on separation of powers grounds, to perform a similar function with respect to pensioners of the American Revolution. *See* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1851) (full court decision discussing United States v. Yale Todd (1794)); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409–14 (1792) (circuit decision).

218. Boyd, *supra* note 217, at 177.

219. *Id.* The practice also worked in the reverse direction. Members of the governor's council, and the senior judicial officers of the colony, sometimes were issued general commissions of the peace, if for no other reason than to increase their fees. *See id.* at 21, 23. The same was true during the proprietary period. *See, e.g.*, Minutes of the General Court of North Carolina (Oct. 27, 1724 - Nov. 3, 1724), *in* 2 COLONIAL RECORDS

governors all manner of consternation—including as far as the courts were concerned—especially as tensions with Great Britain increased. Governor Martin wrote the Earl of Dartmouth in 1773:

> With regard to the Court Acts, I am concerned to inform your Lordship, that I was obliged to reject it at the late Session, such as were calculated for the present administration of the Law . . . because I knew that a majority of the Assembly were Magistrates whose policy and aim it had ever been, to usurp to the County Courts as much power as possible, I feared that those little jurisdictions were once established alone, that Branch of the legislature, designing thereby all the power of the Laws into their own hands, would be less willing to erect Superior Tribunals, if they should not openly oppose their future Establishment.[220]

III. NORTH CAROLINA CONSTITUTION OF 1776

All of this said, North Carolina was more efficient and prosperous under royal control than under the control of the Lords Proprietors. The population jumped from 30,000 in 1729 to 265,000 in 1775, much of which spread westward to the Blue Ridge Mountains.[221] Conflict developed between the eastern portion of the colony, which controlled the government, and the western portion, which felt unfairly taxed by the east.[222] A War of Regulation resulted in which western protestors refused to pay taxes and interfered with the judicial process in the colony.[223] On May 16, 1771, the west was defeated at the Battle of Alamance Creek.[224] However, internal conflict recurred during the period of royal rule. Indeed, it has been suggested that force and violence were frequently resorted to in North Carolina because the people had never experienced a form of government that adequately addressed their concerns.[225] The North Carolina Constitution of 1776 attempted to remedy this state of affairs.

I, *supra* note 33, at 555, 555–56 (recognizing general commissions of the peace for the Lords Proprietors and other high-ranking North Carolina officials).

220. Letter from Josiah Martin to William Legge, Earl of Dartmouth (Mar. 31, 1773), *in* 9 COLONIAL RECORDS I, *supra* note 33, at 618, 619; *see also* Letter from Josiah Martin to George Sackville Germain, Viscount Sackville (May 17, 1777), *in* 11 STATE RECORDS, *supra* note 215, at 721, 723–25 (criticizing those who criticized him for maintaining that courts could be established by prerogative).

221. *See* LEFLER & POWELL, *supra* note 11, at 87–89.

222. *See id.* at 217–39.

223. *See id.* at 231–39.

224. *See id.* at 237–38.

225. BASSETT, *supra* note 50, at 13, 15.

A. Proposals for North Carolina's First State Constitution

Initially, there was an "exciting and bitter" debate about what form North Carolina's first state government should take.[226] Conservatives "favored a strong executive, an independent judiciary with life tenure, adequate protection of property rights, and property qualifications for voting and officeholding," while the more radical camp called for a "strong legislature, a weak executive subordinate to the legislature, and religious freedom with no established church."[227]

The counties of Mecklenburg and Orange, among others, issued Instructions to their respective delegates to the Provincial Congress charged with drafting a constitution and a bill of rights for the state.[228] Mecklenburg instructed its delegates to "establish a free government under the authority of the people" that was a "simple Democracy or as near it as possible" and that did not "lean[] to aristocracy or power in the hands of the rich and chief men exercised to the oppression of the poor."[229] The delegates also were instructed to secure a bill of rights "containing the rights of the people and of individuals which shall never be infringed in any future time by the law-making power or other derived powers in the State."[230] The delegates were specifically instructed to insist upon a constitution dedicated to the separation of powers. Instruction 6 provided:

> That you shall endeavour that the Government shall be so formed that the derived inferior power shall be divided into three branches distinct from each other, viz.:
> The power of making laws
> The power of executing laws and
> The power of Judging.[231]

Mecklenburg also wanted a bicameral legislature elected annually by the people.[232] The governor and the judges were to be selected by the legislature.[233] Judges were to "hold their office during one year."[234] The length of the governor's term was not specified.

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226. LEFLER & POWELL, *supra* note 11, at 282. North Carolina, like other colonies during the American Revolution, was governed for a period by a Council of Safety. *See id.* at 281.

227. *Id.* at 282.

228. The Mecklenburg Instructions can be found in 10 COLONIAL RECORDS I, *supra* note 33, at 870a–870f. The Orange Instructions are in *id.* at 870f–870h.

229. Mecklenburg Instructions, *supra* note 228, at 870a.

230. *Id.*

231. *Id.* at 870b.

232. *Id.* at 870c.

233. *Id.* at 870c–870d.

234. *Id.* at 870d.

(The register was to continue in office during good behavior.)[235] Judges were to be compensated, although the instructions did not describe the terms of judicial salaries.[236] Religious freedom was to be guaranteed to "professing christians."[237]

The Orange County Instructions were briefer than those from Mecklenburg. Orange, like Mecklenburg, instructed its delegates to insist upon a constitution based upon popular sovereignty. Religious freedom was to be guaranteed to "every individual."[238] The government was to be "divided into three branches, to wit: The power of making laws, the power of executing and the power of judging."[239] The legislature was to be comprised of two houses, with the upper house elected by the "freeholders only" and the lower house by the "freeholders and householders."[240] Nothing was stated as to legislative terms of office. The governor was to be elected annually, although the Orange Instructions were silent as to by whom.[241] The Orange Instructions likewise were silent as to the method of judicial appointment, tenure, and compensation. However, all government officials, including judges, were to be prohibited from plural office holding, and Instruction 8 provided "That the judging power shall be entirely distinct from and independent of the law making and executive powers."[242]

Two other plans of note were in circulation prior to the November 13, 1776, formation of a committee of the North Carolina Provincial Congress to draw up a constitution and a bill of rights for the state. One was drafted during the April 1776 meeting of the Provincial Congress that authorized North Carolina's delegates to the Continental Congress to vote for independence from Great Britain.[243] All that remains of the draft is Thomas Jones's brief explanation of it in an April 28, 1776, letter to James Iredell.[244] Jones wrote:

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235. *Id.* at 870f.

236. *Id.* at 870e.

237. *Id.* at 870d.

238. Orange Instructions, *supra* note 228, at 870g.

239. *Id.*

240. *Id.* at 870h.

241. *See id.*

242. *Id.*

243. *See* LEFLER & POWELL, *supra* note 11, at 280–81. On April 12, 1776, the Fourth Provincial Congress of North Carolina passed a resolution authorizing North Carolina's delegates to the Continental Congress to vote for independence from Great Britain. *Id.* The so-called Halifax Resolves made North Carolina the first colony officially to announce its willingness to declare independence. *Id.* at 281.

244. Letter from Thomas Jones to James Iredell (Apr. 28, 1776), *in* 10 COLONIAL RECORDS I, *supra* note 33, at 1033, 1034. Thomas Jones soon was to become the spokesman for the committee charged with drafting a constitution and a bill of rights for

> The plan, as it now stands, will be subject to many alterations; at present it is in the following manner: 1st. A House of the representatives of the people—all free householders of one year standing to vote; and, 2nd. A Legislative Council: to consist of one Member from each County in the Province—to sit as an Upper House, and these two houses are to be a check on each other as no law can be made without the consent of both, and none but freeholders will have a right to vote for the members of this Council. Next, an Executive Council, to consist of a President and six Councillors; to be always sitting; to do official business of Government—such as managing the army, issuing commissions, military and civil; filling up vacancies; calling the two branches of the Legislature to-gather; receiving foreign ambassadors, &c. &c. The President and council to be elected annually, as also the Assembly and Legislative Council—but have some reason to believe the President will have a right to be chosen yearly for three years successively, and no more, until the expiration of three years thereafter. So much for the outlines of the Constitution.[245]

Nothing was said in this "outline of the constitution"[246] about the judiciary, let alone about the *independence* of the judiciary. Such was not the case for the final plan in circulation that requires consideration, John Adams's *Thoughts on Government.*

Adams became involved in the formulation of the North Carolina Constitution of 1776 in the same manner that he had become involved in the formulation of the constitutions of several other newly-independent states: because he had been asked to help. In January of 1776 the North Carolina Provincial Congress authorized North Carolina's delegates to the Continental Congress "to apply to Mr. Adams for his views of the nature of the government it would be proper to form, in case of a final dissolution of the authority of the crown."[247] The result was that North Carolina received the first drafts of Adams's influential *Thoughts on Government.* (It is "drafts," plural, because Adams sent two slightly different drafts to John Penn and William Hooper, respectively.) The

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North Carolina. James Iredell was perhaps North Carolina's most significant figure during the early years of the American Republic. For more about Iredell, see generally Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist*, *in* SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 198 (Scott Douglas Gerber ed., 1998); WILLIS P. WHICHARD, JUSTICE JAMES IREDELL (2000).

245. Letter from Thomas Jones to James Iredell, *supra* note 244, at 1034.

246. *Id.*

247. Editor's Note to Letter from John Adams to John Penn, *in* 4 THE WORKS OF JOHN ADAMS 203, 203 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1851).

versions Adams subsequently provided to other colonies—soon-to-be states—and later published as a pamphlet were more expansive than the version Adams sketched for North Carolina, but the North Carolina version nevertheless reflected Adams's commitment to the separation of powers in general and to the independence of the judiciary in particular. With respect to the latter, Adams wrote: "I lay it down as a Maxim that the judicial Power should be distinct both from the Legislative and Executive."[248] He recommended that judges be appointed by the "Governor, by and with and not without the Advice and Consent of the Council [the upper house of the legislature]," or "If you choose to have a Government more popular Still ... all Officers," including judges, could be "chosen by one [house of the legislature], concurred by the other and consented to by the Governor."[249] Adams was particularly insistent on the need for stable judicial tenure and compensation:

> The Stability of Government, in all its Branches, the Morals of the People, and every Blessing of Society depends so much upon a true Interpretation of the Laws, and an impartial Administration of Justice, that the Judges Should always be Men of learning and Experience in the Laws, exemplary Morals, great Patience, Calmness, Coolness and Attention. Should not have their Minds distracted with complicated jarring Interests, or be Subservient to any Man or Body of Men, or more complaisant to one than another. To this End, they should hold Estates for Life in their Offices, and their Salaries Should be fixed by Law. By holding Estates for Life, I mean their Commissions Should be during good Behaviour.[250]

Curiously, the letter Adams sent to Hooper was silent about what was to happen if judges (or other government officials) failed to

248. Letter from John Adams to William Hooper (ante Mar. 27, 1776), *in* 4 THE PAPERS OF JOHN ADAMS 73, 76 (Robert J. Taylor & Gregg L. Lint eds., 1979). Adams's letter to John Penn did not include this phrase. *See* Letter from John Adams to John Penn (ante Mar. 27, 1776), *in* 4 THE PAPERS OF JOHN ADAMS, *supra*, at 78, 78–84.

249. Letter from John Adams to William Hooper, *supra* note 248, at 77. Adams's letter to Penn omits the governor's role in the "more popular" alternative. *See* Letter from John Adams to John Penn, *supra* note 248, at 82.

250. Letter from John Adams to William Hooper, *supra* note 248, at 77. Adams's letter to Penn contained almost identical language. *See* Letter from John Adams to John Penn, *supra* note 248, at 82–83. Hooper also admired the Delaware Constitution, especially with respect to judicial tenure. He wrote: "I admire no part of the Delaware plan more than the appointing Judges during good behaviour. Limit their political existence and make them dependent upon the suffrages of the people, that instant you corrupt the Channels of publick Justice. Rhode Island furnishes an example too dreadful to imitate." Letter from William Hooper to the Congress at Halifax (Oct. 26, 1776), *in* 10 COLONIAL RECORDS I, *supra* note 33, at 862, 868.

exhibit the requisite good behavior. Adams did speak to the issue in his letter to Penn: "If accused of Misbehaviour, by the Representative Body, before the Governor and Council, and if found guilty after having an opportunity to make their Defence, they should be removed from their Offices and Subjected to such Punishment as their Offences deserve."[251]

B. The Judicial Power in the North Carolina Constitution of 1776

The North Carolina Constitution was reported out of committee on December 6, 1776, and the Declaration of Rights on December 15.[252] Neither document generated much disagreement among the delegates.[253] The Declaration of Rights was adopted on December 17 and the Constitution on December 18.[254] The Declaration of Rights borrowed heavily from those of Virginia, Maryland, and Pennsylvania.[255] Most notable as far as the independence of the judiciary is concerned, Article IV declared as a fundamental right of the people "That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[256]

The North Carolina Constitution, "or Form of Government, &c.,"[257] opened as many of the original state constitutions did: with a declaration of independence from Great Britain.[258] The form of government it created reflected that the radical proponents of a weak executive had carried the day. (The radicals also prevailed on religious toleration.)[259] The Governor and a seven-member executive advisory Council of State were to be appointed by the General Assembly for one-year terms (Articles XV and XVI). The Governor

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251. Letter from John Adams to John Penn, *supra* note 248, at 83.

252. *See, e.g.*, LEFLER & POWELL, *supra* note 11, at 283.

253. *See* Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. HIST. REV. 215, 218 (1929) (noting that there were few meetings to discuss the constitution and the bill of rights, and that those meetings were crowded with other matters to address).

254. *Id.* The North Carolina Constitution of 1776 and the Declaration of Rights are reprinted in FEDERAL AND STATE CONSTITUTIONS, *supra* note 12, at 1409, 1409–14.

255. *See* LEFLER & POWELL, *supra* note 11, at 283.

256. Constitution of North Carolina of 1776, *in* FEDERAL AND STATE CONSTITUTIONS, *supra* note 12, at 1409, 1409.

257. Article XLIV of the North Carolina Constitution provided "That the Declaration of Rights is hereby declared to be part of the Constitution of this State, and ought never to be violated, on any pretence whatsoever." *Id.* at 1414.

258. *Id.* at 1411.

259. *See id.* at 1410 (directing, in the Declaration of Rights, that all men hold a "natural and unalienable right to worship ... according to the dictates of their own consciences").

was prohibited from serving more than three years out of six. He was required to be at least thirty years old, have been a resident of the state for no less than five years, and own one thousand pounds or more of freeholds in land and tenements (Article XV). The Governor had no power to summon or dissolve the legislature. He could propose legislation, but he could not veto it. He did possess the power to pardon and reprieve, and he also was to serve, "for the time being," as commander-in-chief (Articles XVIII and XIX).[260] In sum, although the Governor was vested with some executive power, he was not nearly as strong as he had been during the colonial period.[261]

The legislative power was vested in a two-house General Assembly—a Senate and a House of Commons—accountable to the people (Article I).[262] Members of each house were to serve for one-year terms (Articles II and III). A senator was required to reside in the county he represented for at least one year prior to his election and own not less than three hundred acres of land in the county (Article V). A house member was required to reside in the county he represented for at least one year prior to his election and own at least one hundred acres of land in the county (Article VI). A person was required to own at least fifty acres of land before he could vote for a state senator (Article VII). Payment of "public taxes" was sufficient to be eligible to vote in elections for the state house (Article VIII). All voters were required to be at least twenty-one years old and be male (Articles VII and VIII).[263]

The "Judges of the Supreme Courts of Law and Equity, [and] Judges of Admiralty" were to be appointed by joint ballot of the legislature and "hold their offices during good behavior" (Article XIII).[264] They, along with the Governor and Attorney General, were to receive "adequate salaries during their continuance in office" (Article XXI).[265] Justices of the peace, "for the time being," were to be "recommended" to the Governor by the representatives to the General Assembly of each of the particular counties and continue in

260. *Id.* at 1412.

261. The governor also was weaker than Adams had proposed. For example, Adams thought the governor should possess the power to veto legislation. Letter from John Adams to William Hooper, *supra* note 248, at 76; Letter from John Adams to John Penn, *supra* note 248, at 82. James Madison likewise criticized the legislature's dominance in North Carolina's first state constitution. THE FEDERALIST No. 47, at 307 (James Madison) (Clinton Rossiter ed., 1961).

262. *See* Constitution of North Carolina of 1776, *supra* note 256, at 1411.

263. *Id.* at 1412.

264. *Id.*

265. *Id.* at 1413.

office "during good behaviour" (Article XXXIII).[266] No high-ranking government official, including, pursuant to Article XXIX, any "Judge of the Supreme Court of Law or Equity, or Judge of Admiralty," was permitted to hold another office (Article XXXV).[267] All government "officers" were subject to impeachment for "offending against the State."[268] An offense against the state was defined as "violating any part of this Constitution, mal-administration, or corruption" (Article XXII).[269]

CONCLUSION

The North Carolina Constitution of 1776 contained all three of the central tenets of judicial independence: (1) the judiciary was to be a separate institution of government, (2) judges were to serve for life during good behavior, and (3) they were to receive adequate salaries. (North Carolina's constitution was amended in 1835 to expressly provide that judges' salaries could not be "diminished" while they held office.)[270] North Carolina, in short, had come a long way from the days in which the Lords Proprietors were conferred "full and absolute power" by the crown—including judicial power—"for the good and happy government of the said province."[271]

There were three likely explanations for why North Carolina *constitutionalized* the principle of judicial independence sooner than many of her sister states did. The first was the relatively small size of the state's aristocracy.[272] The organic laws that governed North Carolina during the colonial period tended to ensure that the number of wealthy landholders was kept to a minimum and the absence of significant seaports also tended to hold the accumulation of wealth in check.[273] The result was that a substantial portion of the population was willing to resist loudly and strongly—including through violence—oppressive government.[274] This impulse was amplified by

266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 1416. The impeachment process also was more fully explicated in the 1835 amendments, and a provision was added specifying that judges could be removed for "mental or physical inability" by a two-thirds vote of both houses of the General Assembly. *Id.* at 1417. The latter type of provision was rejected by the framers of the Federal Constitution of 1787 as inconsistent with the independence of the judiciary. *See* THE FEDERALIST No. 79 (Alexander Hamilton), *supra* note 6, at 474.
271. *See supra* note 27 and accompanying text.
272. *See* Ketcham, *supra* note 253, at 216.
273. *See id.*
274. *See id.*

another historical fact: the Church of England, known for its aristocratic tendencies, was much weaker in North Carolina than it was in the neighboring colonies of Virginia and South Carolina.[275]

The second reason for North Carolina's quick recognition of the importance of an independent judiciary was closely related to the first; namely, as the discussion in Parts I and II suggested, the heavy-handed way in which the Lords Proprietors governed the province, and the same fashion by which the royal governors ruled after the Lords Proprietors sold their interests to the crown, led the people of North Carolina to distrust executive power and, hence, to try to limit it.[276] This led in the North Carolina Constitution of 1776 to both a strong legislature and an independent judiciary, something that John Adams—the third reason for North Carolina's prompt recognition of the need to *constitutionalize* the principle of judicial independence—had recommended in his *Thoughts on Government*.[277]

Constitutionalizing the principle of judicial independence did not mean that no practical threats remained. For example, in December of 1778 and January of 1779, Judges Samuel Spencer and Samuel Ashe wrote separate letters complaining of inadequate judicial compensation.[278] Both judges went so far as to suggest that they would be forced to resign if judicial salaries were not increased.[279] Governor Thomas Burke reminded the legislature of the threat to judicial independence resulting from inadequate salaries in a strongly worded April 16, 1782, message:

> The insufficiency of the provisions for the Judges . . . has much embarrassed the Judiciary Department of the Government and threatens to leave the State altogether without Courts of Justice, nor does this arise from want of virtue or a due regard to the public service in those officers, but from an impossibility of performing duties attended with great expenses without the means of paying them.[280]

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275. *See id.*

276. Ketcham characterized "the experience of the people of [the] State" as the "most important source" of the North Carolina Constitution of 1776. *Id.* at 235.

277. *See* Letter from John Adams to William Hooper, *supra* note 248, at 76; Letter from John Adams to John Penn, *supra* note 248, at 78.

278. Letter from Samuel Spencer to Allen Jones (Dec. 22, 1778), *in* 22 STATE RECORDS, *supra* note 215, at 770, 770–73; Letter from Samuel Ashe to Allen Jones and Thomas Benbury, Speakers (Jan. 15, 1779), *in* 14 STATE RECORDS, *supra* note 215, at 248, 248–51.

279. *See* Letter from Samuel Spencer to Allen Jones, *supra* note 278, at 771; Letter from Samuel Ashe to Allen Jones and Thomas Benbury, Speakers, *supra* note 278, at 250.

280. Message from Governor Thomas Burke to the General Assembly (Apr. 16, 1782), *in* 16 STATE RECORDS, *supra* note 215, at 5, 10.

The situation became so dire for some judges that the Governor was forced to issue procurement orders to the commissary general so that the judges had "all necessary Supplies for traveling."[281] Several months earlier Governor Burke also had evidenced his commitment to the independence of the North Carolina judiciary when he objected to a court bill that would have created a special treason tribunal "composed of persons chosen at the Will and Pleasure of the Governor and altogether dependent on him and the General Assembly."[282] He insisted that such a bill violated the North Carolina Declaration of Rights provision that required the judiciary to be a separate and independent branch of the North Carolina government.[283] In short, the Governor objected to the bill—although he had no power to veto it—in large part because it gave *him* too much power over the judiciary. He wrote:

> Convinced as I am that the execution of this power would afford a most dangerous precedent, and that the General Assembly had no Constitutional authority to invest me with it, and if they had, sensible as I am of the Imperfections of human nature, I dare not undertake it. I feel myself under the necessity of declining the execution of a power so repugnant to my principles as a Citizen of a free Republic and so contrary to my Ideas of the duty I owe the people as their Chief Magistrate.[284]

Governor Burke likewise recognized that judicial review was the ultimate expression of judicial independence, and a necessary expression in any constitutional order committed to protecting individual rights. He argued against the court bill in question because "civil liberty would be deprived of its surest defences against the most dangerous usurpations, that is the independency of the Judiciary power and its capacity of protecting Individuals from the operation of Laws unconstitutional and tyrannical."[285] The year was 1781, not 1803—the year of *Marbury v. Madison*.[286]

281. Letter from Governor Thomas Burke to Judge John Williams (Mar. 4, 1782), *in* 16 STATE RECORDS, *supra* note 215, at 532, 532.

282. Questions and Propositions by the Governor (July 25, 1781), *in* 19 STATE RECORDS, *supra* note 215, at 855, 862–63.

283. *Id.* at 863.

284. *Id.*

285. *Id. See generally* Scott D. Gerber, *Unburied Treasure: Governor Thomas Burke and the Origins of Judicial Review*, 8 HISTORICALLY SPEAKING 29 (2007) (discussing briefly the author's discovery of the Burke precedent for judicial review).

286. 5 U.S. (1 Cranch) 137 (1803) (declaring that federal courts have the power of judicial review).

Governor Burke proved prescient when in 1787, in *Bayard v. Singleton*,[287] the North Carolina Court of Conference—the predecessor to the Supreme Court of North Carolina and a court on which judges did serve for life during good behavior—became one of the first state courts in the United States to declare an act of a coordinate branch of government unconstitutional.[288] Like most states during the American Revolution, North Carolina confiscated property held by individuals who remained loyal to the British.[289] At issue in the case was a statute that required judges to dismiss, without regard to merit, any action brought by an individual seeking to recover title to confiscated property.[290] In a short opinion, the North Carolina high court unanimously declared the statute unconstitutional on the ground that an individual seeking to recover title to confiscated property was entitled to a jury trial on the merits of his claim.[291]

A widely discussed letter "To the Public" published in a local newspaper prior to the outcome of the litigation undoubtedly influenced the court's decision.[292] The letter was written by James Iredell, the plaintiff's co-counsel and a future member of the original U.S. Supreme Court.[293] Iredell emphasized the need to curb the legislature, and he did so by drawing on the lessons of the American Revolution. He wrote:

> It was, of course, to be considered how to impose restrictions on the legislature, that might still leave it free to all useful purposes, but at the same time guard against the abuse of unlimited power, which was not to be trusted, without the most imminent danger, to any man or body of men on earth. We had not only been sickened and disgusted for years with the high and almost impious language of Great Britain, of the omnipotent power of the British Parliament, but had severely

287. 1 N.C. (Mart.) 5 (1787).

288. For a discussion of a 1778 case in which North Carolina's highest court declared that a North Carolina county court had violated the North Carolina Constitution of 1776, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 384–91 (2008).

289. *See Bayard*, 1 N.C. (Mart.) at 8–10.

290. *Id.*

291. *Id.* at 10.

292. Griffith J. McRee, Introduction to "To the Public," *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 144, 144–45 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858).

293. *Id.* For discussions of Iredell's commitment to judicial review throughout the course of his legal and judicial career, see generally William R. Castro, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329 (1995); William R. Castro, *There Were Great Men Before Agamemnon*, 62 VAND. L. REV. 371 (2009).

> smarted under its effects. We felt in all its rigor the mischiefs of an absolute and unbounded authority, claimed by so weak a creature as man, and should have been guilty of the basest breach of trust, as well as the grossest folly, if the moment when we spurned at the *insolent despotism* of Great Britain, we had established a *despotic* power among ourselves.[294]

After the court's decision declaring the confiscation statute unconstitutional—the direct check on legislative overreaching on individual rights for which Iredell had argued—Richard Dobbs Spaight, who was then serving as a North Carolina delegate to the federal constitutional convention in Philadelphia, wrote a letter to Iredell severely criticizing him for encouraging the court to engage in such a "usurpation" of power.[295] Iredell held his ground. He responded to Spaight in a letter that expanded on his earlier letter "To the Public." More specifically, Iredell insisted that judicial review was necessary because without it individual rights such as the right to property would not be adequately protected.[296] And as Governor Burke recognized in 1781, the power of judicial review owed a great deal to the political architecture of judicial independence that preceded it.

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294. James Iredell, Letter To the Public (Aug. 17, 1786), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 292, at 145, 145–46 (emphasis in original).

295. Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 292, at 168, 169–70.

296. Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL, *supra* note 292, at 172, 172–73. The delegates to the federal constitutional convention of 1787 were aware of the debate about *Bayard v. Singleton*. *See* GERBER, *supra* note 49, at 112.