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# GETTING WHAT YOU PAY FOR: JUDICIAL COMPENSATION AND JUDICIAL INDEPENDENCE

Jonathan L. Entin\*

## I. INTRODUCTION

One vital way of assuring judicial independence is to guarantee that judges need not fear that their salaries will be reduced if they render unpopular or controversial decisions. The United States Constitution seeks to do this by providing that all federal judges “shall, at stated Times, receive for their Services, a Compensation, *which shall not be diminished during their Continuance in Office.*”<sup>1</sup> As the Supreme Court explained in perhaps the leading case on the Compensation Clause, “[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.”<sup>2</sup>

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This is a revised version of the paper I presented at a conference on Judicial Independence in Times of Crisis at the S.J. Quinney College of Law at the University of Utah in October 2010. Thanks to Shimon Shetreet and Christopher Forsyth for inviting me to participate and to Hiram Chodosh, Wayne McCormack, and everyone else at the S.J. Quinney College of Law for their efficiency and hospitality. Errors of commission, omission, and interpretation are mine alone.

<sup>1</sup> U.S. CONST. art. III, § 1 (emphasis added). State judges enjoy similar protections against reduction in compensation. *See, e.g.*, OHIO CONST. art. IV, § 6(B) (“The judges of the Supreme Court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office.”); UTAH CONST. art. VIII, § 14 (“The legislature shall provide for the compensation of all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office.”); *see also infra* notes 30, 44 and accompanying text.

<sup>2</sup> *United States v. Will*, 449 U.S. 200, 217–18 (1980). Alexander Hamilton made a similar point: “Next to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support.” THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, federal judges do enjoy “permanency in office”: the language immediately preceding the Compensation Clause provides that these officials “shall hold their Offices during good Behaviour.” U.S. CONST. art. III, § 1.

It is not clear that “permanency in office” matters as much as Hamilton suggested. As Justice Story explained, “Without [the Compensation Clause], the other [constitutional provision], as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1622, at 490 (Da Capo Press 1970) (1833). State judges typically do not enjoy life tenure but do enjoy protection against salary reduction. *See, e.g.*, OHIO CONST. art. IV,

The Compensation Clause does not forbid increases in judicial pay; rather it prohibits only reductions in judges' salaries. This aspect of the clause undoubtedly reflects the notion that the prospect of a pay cut poses a greater threat to judicial independence than does a pay raise.<sup>3</sup> While the prospect of a salary increase also could influence a judge's rulings,<sup>4</sup> the framers debated at length the propriety of allowing for increasing judicial pay before deciding to omit any reference to that matter from the Compensation Clause.<sup>5</sup>

The apparent simplicity of the language of the federal Compensation Clause and its state counterparts conceals several troublesome issues.<sup>6</sup> Part II of this Article will address when a judicial salary becomes vested and thus no longer susceptible to reduction. Part III considers whether taxation of judicial salaries can amount to an unconstitutional diminution in compensation. Part IV focuses on the extent to which withholding cost-of-living increases impermissibly reduces judicial pay. Even in situations that do not violate the Compensation Clause, questions

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§ 6(A)–(B); UTAH CONST. art. VIII, §§ 9, 14. Indeed, most state judges must face the electorate at some point to obtain or retain their positions. See *Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Jan. 19, 2011). In a previous symposium paper, I suggested that whether judges are elected or appointed matters less than how politically salient the judiciary is at any particular moment in history. See Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523 (2002). Whatever the accuracy of that assessment, resolving the debate over whether judges should be elected or appointed is beyond the scope of this paper.

<sup>3</sup> In Hamilton's words, "a power over a man's subsistence amounts to a power over his will." THE FEDERALIST No. 79, *supra* note 2, at 472.

<sup>4</sup> Cf. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264–65 (2009) (holding that a state supreme court justice should have recused himself from a case in which the chairman, CEO, and president of a company that was about to appeal a \$50 million judgment spent \$3 million in support of that justice's election); *Turney v. Ohio*, 273 U.S. 510, 531–32 (1927) (concluding that a judge who has a direct pecuniary interest in the outcome of a case—in this instance by receiving additional compensation from fees assessed against defendants whom the judge finds guilty when no such fees are assessed against defendants whom the judge finds not guilty—may not conduct judicial proceedings).

<sup>5</sup> See Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965, 971–75 (2006). State counterparts to the federal Compensation Clause similarly allow for judicial pay raises. See, e.g., state constitutions cited *supra* note 1.

<sup>6</sup> The relationship between judicial compensation and judicial independence has generated controversy outside the United States. See, e.g., *Provincial Judges Ass'n of New Brunswick v. New Brunswick*, [2005] 2 S.C.R. 286, paras. 8–12 (Can.) (addressing compensation issues in four Canadian provinces where the government had rejected proposed increases in judicial pay); *In re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, paras. 5, 110–185 (Can.) (holding that reductions in judicial salaries made to reduce budget deficits were impermissible and concluding that the salary recommendations of independent commissions established to improve processes that ensure judicial independence need not be binding).

about how much to pay judges, as well as how often and by what process judicial salaries should be increased, present potentially significant policy issues. Part V considers some of those questions, and suggests that the case for raising judges' pay should not rest exclusively or even primarily on the financial aspects of judicial service.

## II. VESTING OF JUDICIAL SALARIES

The Supreme Court has established that judicial salaries vest for purposes of the Compensation Clause when they take effect. Proposed pay raises may be rescinded before their effective date, but once they have gone into effect any such raises may not be revoked. This is the lesson of *United States v. Will*.<sup>7</sup> Remarkably, the issue did not reach the Court until 1980, nearly two centuries after the ratification of the Constitution.<sup>8</sup>

At issue in *Will* were appropriations acts for four consecutive fiscal years that purported to forbid pay raises for federal judges.<sup>9</sup> On October 1, 1976, the first day of fiscal year 1977, the president signed a bill that contained a prohibition on judicial pay increases.<sup>10</sup> On July 11, 1977, the president signed a similar bill that forbade judicial pay raises for fiscal year 1978, which was to begin on October 1, 1977.<sup>11</sup> On September 30, 1978, the president signed analogous legislation to repeal a judicial salary hike for fiscal year 1979, which was to begin the next day (October 1, 1978).<sup>12</sup> Finally, on October 12, 1979, the president signed legislation that reduced the amount of a judicial pay raise for fiscal year 1980, which had begun on October 1, 1979.<sup>13</sup>

More than a dozen federal district judges filed class actions challenging all four of these measures.<sup>14</sup> The Supreme Court concluded that the judicial pay raises for fiscal years 1977 and 1980 "had taken effect, since [they were] operative with the start of the month—and the new fiscal year."<sup>15</sup> This was true for fiscal year

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<sup>7</sup> 449 U.S. 200 (1980).

<sup>8</sup> *Id.* at 221 (noting that the case posed a question "never before addressed by this Court").

<sup>9</sup> *Id.* Those measures also affected members of Congress and the executive branch, but the Constitution does not forbid pay cuts for those officials.

<sup>10</sup> *Id.* at 205–06.

<sup>11</sup> *Id.* at 206–07.

<sup>12</sup> *Id.* at 207–08.

<sup>13</sup> *Id.* at 208–09.

<sup>14</sup> *Id.* at 209–10 & nn.7–8.

<sup>15</sup> *Id.* at 224–25 (fiscal year 1977); *id.* at 230 (fiscal year 1980). Before reaching the merits, the Court concluded that it could decide the case even though every justice had a financial interest in the outcome. *Id.* at 210. The challenges to these appropriations riders were class actions on behalf of all Article III judges who were on the bench during the relevant time periods. *See id.* at 209. The justices concluded that, under the Rule of Necessity, they had an obligation to decide the case. *Id.* at 217. The correctness and propriety of this conclusion are beyond the scope of this Article.

1977 even though the appropriations bill had become law just a few hours into the budget period, on October 1. The bill "purported to repeal a salary increase already in force."<sup>16</sup> And while the fiscal year 1977 and fiscal year 1980 riders also applied to congressional and executive salaries, the absence of discrimination against judges was irrelevant: the other officials did not enjoy the protection against salary reduction that the Compensation Clause affords to the judiciary.<sup>17</sup> By contrast, the laws applicable to fiscal years 1978 and 1979 passed constitutional muster—in both instances, the president had signed the measures before October 1, the first day of the fiscal year.<sup>18</sup>

Why the different results? The Court explained that "a salary increase 'vests' for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges."<sup>19</sup> Under the statute that governed judicial compensation at the time, salaries became effective on October 1, the first day of the fiscal year.<sup>20</sup> Accordingly, the fiscal year 1977 pay raise had gone into effect and could not be revoked later in the day.<sup>21</sup> In addition, the fiscal year 1980 increase had been effective for nearly two weeks when Congress tried to eliminate it.<sup>22</sup> On the other hand, a rescission that takes effect even on the very last day of the previous fiscal year can prevent a judicial salary increase from taking effect at the start of the new fiscal year. That is why the fiscal year 1979 rider was permissible.<sup>23</sup> The fiscal year 1978 measure was even more clearly permissible because it had been adopted nearly three months in advance of the compensation hike's effective date.<sup>24</sup>

In short, Congress may not lower judges' salaries, but it has broad discretion to grant or withhold judicial pay raises before the beginning of the fiscal year. This was especially true because the proposed pay raises resulted from the application of a formula that applied only prospectively, with the start of the new fiscal year. To hold that Congress must apply the formula would show disrespect for a "coequal branch[]" and necessarily imply that "the Judicial Branch could

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<sup>16</sup> *Id.* at 225.

<sup>17</sup> *Id.* at 226. The president's compensation was not affected by these appropriations riders. A separate constitutional provision freezes the chief executive's compensation during his term of office. U.S. CONST. art. II, § 1, cl. 7 (providing that the president's salary "shall neither be increased nor diminished during the Period for which he shall have been elected"). A subsequently ratified constitutional amendment would have prevented any change in congressional salaries until after the next biennial election. *Id.* amend. XXVII (prohibiting the passage of any measure "varying the compensation for the services of the Senators and Representatives . . . until an election of Representatives shall have intervened").

<sup>18</sup> *Will*, 449 U.S. at 226, 229.

<sup>19</sup> *Id.* at 229.

<sup>20</sup> *Id.* at 204.

<sup>21</sup> *Id.* at 226.

<sup>22</sup> *Id.* at 230.

<sup>23</sup> *Id.* at 229.

<sup>24</sup> *Id.*

command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.”<sup>25</sup>

Similar issues have arisen at the state level, where courts also have enforced judicial salary protections analogous to those in the federal Compensation Clause. A recent example comes from Pennsylvania. In *Commonwealth v. Stilp*,<sup>26</sup> the state supreme court rebuffed an effort to roll back a pay raise four months after it had gone into effect. In July 2005, the Pennsylvania General Assembly, literally in the middle of the night and without debate, passed a bill that raised salaries of legislators, many executive officials, and judges.<sup>27</sup> In a remarkable piece of judicial understatement, the court described voter reaction as “negative.”<sup>28</sup> Shortly after the November 2005 election, the legislature repealed the controversial measure.<sup>29</sup>

The Pennsylvania Constitution contains a clause providing that judges’ compensation “shall not be diminished during their terms of office, *unless by law applying generally to all salaried officers of the Commonwealth*.”<sup>30</sup> Because of the italicized exception, no analogue of which appears in the federal Compensation Clause, the court discerned two issues: (1) whether the repeal diminished judicial compensation, and (2) whether the exception applied.<sup>31</sup> The first issue, the court observed, “need not detain us long.”<sup>32</sup> The challenged measure quite clearly “reduced [judicial] salaries during the judges’ terms of office” to the levels that existed before middle-of-the-night passage of the July pay raise.<sup>33</sup>

The more complicated issue related to the applicability of the exception for general pay cuts for all salaried state officers. The exception served as “a failsafe during a state-wide economic crisis,”<sup>34</sup> not as a legitimate reaction to “a political backlash.”<sup>35</sup> Pennsylvania faced no “dire financial circumstances,”<sup>36</sup> so the exception could not justify repeal of the judicial pay raise. Even if the legislators had acted in “good faith,” their motivation did not matter.<sup>37</sup> Any other conclusion would leave “no barrier preventing [them] from pursuing other means of attacking

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<sup>25</sup> *Id.* at 228.

<sup>26</sup> 905 A.2d 918 (Pa. 2006).

<sup>27</sup> *See id.* at 925. The measure adopted formulas for determining compensation levels for officials in all three branches effective immediately. *Id.*

<sup>28</sup> *Id.* In fact, two Pennsylvania Supreme Court justices had difficult retention elections later in the year. One justice was defeated, and the other survived “by an unusually narrow margin.” *Id.* at 926.

<sup>29</sup> *Id.*

<sup>30</sup> PA. CONST. art. V, § 16(a) (emphasis added).

<sup>31</sup> *Stilp*, 905 A.2d at 939.

<sup>32</sup> *Id.* Before addressing the merits, the court, relying in part on *Will*, concluded that the Rule of Necessity authorized the justices to decide the case despite their financial stake in the outcome. *Id.* at 929.

<sup>33</sup> *Id.* at 939.

<sup>34</sup> *Id.* at 948.

<sup>35</sup> *Id.* at 944.

<sup>36</sup> *Id.* at 940.

<sup>37</sup> *Id.* at 944.

the independence of the Judiciary.”<sup>38</sup> Beyond these general concerns, the repeal measure did not fit within the terms of the exception because it did not actually apply to “all salaried officers of the Commonwealth.”<sup>39</sup> The original bill, which had generated so much controversy, applied to judges and legislators effective immediately, but executive salaries would not go up until more than a year later.<sup>40</sup> Because the repeal measure reduced only judicial and legislative pay, it did not qualify under the constitutional exemption for general rollbacks in compensation.<sup>41</sup> Accordingly, the judicial salary increases provided in the controversial July law remained in effect.<sup>42</sup>

While *Stilp* follows the analytical framework laid down in *Will*, some state courts have followed a more robust approach that might have invalidated even the pre-October 1 rescissions that *Will* found to be compatible with the federal Compensation Clause. For example, in *Jorgensen v. Blagojevich*<sup>43</sup> the Supreme Court of Illinois found that efforts to prevent judicial salary increases from taking effect before the start of the fiscal year violated the Compensation Clause of the state constitution.<sup>44</sup> The issue arose when Governor Blagojevich sought to block cost-of-living increases for judges that had been authorized by law for fiscal years 2003 and 2004. Before the start of fiscal year 2003, the legislature suspended cost-of-living increases for all state officials.<sup>45</sup> Later, however, both chambers passed a bill restoring the raise for judges only, but the governor vetoed that bill.<sup>46</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 946.

<sup>40</sup> *Id.* at 947.

<sup>41</sup> *Id.* The court also concluded that the original bill’s provisions applicable to legislators violated a constitutional prohibition against mid-term pay raises for members of the Pennsylvania General Assembly. *Id.* at 970. Finally, the court refused to enforce the nonseverability clause in the July pay-raise bill. *Id.* at 980. This ruling had particular significance for the fate of the judicial pay provisions because of the court’s conclusion that the section of the pay-raise bill relating to legislators was unconstitutional. If the nonseverability clause were enforced, the judicial salary increases also would have been struck down. That would have rendered superfluous the November repeal measure and meant that judges’ compensation should never have increased.

<sup>42</sup> *See id.* at 949.

<sup>43</sup> 811 N.E.2d 652 (Ill. 2004). It should be noted that this case arose several years before Governor Blagojevich found himself in such hot legal water that he was impeached and removed from office by the state legislature and put on trial for political corruption. *See* John Chase & Stacy St. Clair, *A Politician’s Rise, Hard Fall*, CHI. TRIB., Jan. 30, 2009, at 4; Malcolm Gay & Susan Saulny, *Blagojevich Is Removed by Illinois Senate*, 59-0, N.Y. TIMES, Jan. 30, 2009, at A19. It should also be noted that the governor’s earlier actions in connection with judicial compensation played no role in his impeachment and criminal proceedings.

<sup>44</sup> *Jorgensen*, 811 N.E.2d at 670; *see also* ILL. CONST. art. VI, § 14 (“Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office.”).

<sup>45</sup> *Jorgensen*, 811 N.E.2d at 655.

<sup>46</sup> *Id.* at 655–56.

Meanwhile, two days after the start of fiscal year 2004, the governor deleted from that year's appropriation bill the funds that would have covered annual cost-of-living increases for judges.<sup>47</sup>

The Supreme Court of Illinois held that the state could not withhold the cost-of-living increases for either year.<sup>48</sup> It did not matter whether the measures setting aside the pay raises had been enacted before or after the start of the fiscal year. Under Illinois law, those increases had vested years earlier.<sup>49</sup> In 1990, the legislature approved a report by the Compensation Review Board, which set salaries for various state officials (including judges).<sup>50</sup> That report contained standards for adjusting salaries and made clear that cost-of-living increases "were to be considered a component of salary fully vested at the time the . . . report became law."<sup>51</sup> Under the circumstances, state judges were entitled to their cost-of-living increases whether the governor's efforts to block those increases took place before or after the first day of the applicable fiscal year.<sup>52</sup>

These cases establish a baseline principle: constitutional prohibitions against diminishing judicial compensation mean that the other branches may not reduce the salaries paid to judges once those salaries have vested. There might be disagreement about when those salaries vest but, at a minimum, it is clear that after the beginning of the fiscal year salaries may not be reduced.<sup>53</sup> More difficult questions have arisen with respect to whether judicial salaries may be taxed and whether compensation is unconstitutionally reduced when the other branches withhold cost-of-living increases for a prolonged period of time during which inflation erodes the purchasing power of the nominal salary. The next two parts address these questions.

### III. TAXING JUDICIAL SALARIES

The Supreme Court struggled for more than eighty years with the question of whether imposing taxes on the salaries of federal judges violated the

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<sup>47</sup> *Id.* The legislature enacted the appropriations bill before the start of the fiscal year, but the governor did not use what is known as a "reduction veto" until after the fiscal year had begun. *Id.* at 656.

<sup>48</sup> *Id.* at 665. Before addressing the merits, this court followed *Will* and concluded that it could decide the case under the Rule of Necessity even though all of its members were part of the plaintiff classes for fiscal year 2003 and fiscal year 2004. *Id.* at 660.

<sup>49</sup> *Will* did not control resolution of the issue of vesting. According to the Illinois court, the vesting issue was controlled by state law. *Id.* at 664.

<sup>50</sup> *Id.* at 655. The board's salary determinations go into effect unless both houses of the legislature reject or alter them within a specified statutory period. *Id.* at 654.

<sup>51</sup> *Id.* at 664.

<sup>52</sup> *See id.* at 665.

<sup>53</sup> Courts have permitted a reduction in the amount of a judge's pay when there has been a mistake in determining the judge's salary. *See, e.g., Maddox v. Hayes*, 598 S.E.2d 505, 506–07 (Ga. 2004). Cases like this present the only exception I have found to the general statement in the text.



Compensation Clause.<sup>54</sup> The problem arose in the wake of the adoption of the Sixteenth Amendment, which authorized the federal government to levy taxes "on incomes, from whatever source derived," and without regard to the apportionment requirement for direct taxes.<sup>55</sup>

In *Evans v. Gore*,<sup>56</sup> a 1920 case, the Court held that Congress could not constitutionally extend the federal income tax to Article III judges. The case was brought by a federal district judge who had been on the bench for two decades when the tax was imposed.<sup>57</sup> By requiring the judge to remit the tax after receiving his pay, the government was, for all practical purposes, reducing his salary: "Was he not placed in practically the same situation as if [the money] had been withheld in the first instance? Only by subordinating substance to mere form could it be held that his compensation was not diminished."<sup>58</sup> The whole point of the Compensation Clause was that "the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage."<sup>59</sup>

Five years later, in *Miles v. Graham*,<sup>60</sup> the Court ruled that the income tax could not constitutionally be applied to a judge who was appointed after the enactment of the tax. Justice McReynolds explained that the timing of the judge's appointment made no difference to the Compensation Clause analysis: Congress must fix judicial salaries, after which "the amount specified becomes the compensation which is protected against diminution during [the judges'] continuance in office."<sup>61</sup> Because the tax diminished the judge's pay, it was invalid.<sup>62</sup>

*Miles v. Graham* did not last long as a precedent. For one thing, the challenge was brought by a judge of the old Court of Claims. At the time, both the parties

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<sup>54</sup> The issue flared briefly when Chief Justice Taney objected to paying the income tax that was imposed during the Civil War. The issue was never litigated, but in 1873 the federal government refunded the taxes that federal judges had paid. See Entin & Jensen, *supra* note 5, at 979-81.

<sup>55</sup> U.S. CONST. amend. XVI. On the apportionment requirement, see Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2339-41 (1997). The Sixteenth Amendment was adopted to overrule *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), which invalidated a nineteenth-century income tax because it was an unapportioned direct tax. The income tax at issue in *Pollock* was not the tax that was imposed during the Civil War, the validity of which was never litigated. See *supra* note 54.

<sup>56</sup> 253 U.S. 245 (1920), *overruled by* United States v. Hatter, 532 U.S. 557 (2001).

<sup>57</sup> *Id.* at 246.

<sup>58</sup> *Id.* at 254.

<sup>59</sup> *Id.* at 249.

<sup>60</sup> 268 U.S. 501 (1925), *overruled by* O'Malley v. Woodrough, 307 U.S. 277 (1939).

<sup>61</sup> *Id.* at 509.

<sup>62</sup> *Id.*

and the Supreme Court assumed that the Court of Claims was an Article III tribunal, and therefore its members were covered by the Compensation Clause.<sup>63</sup> Eight years later, however, the Supreme Court held that the Court of Claims was an Article I court, so its members were not protected by the Compensation Clause.<sup>64</sup> Nevertheless, by the time Congress established the Court of Claims as an Article III body,<sup>65</sup> *Miles v. Graham* had been overruled.

In 1939, *O'Malley v. Woodrough*<sup>66</sup> upheld the taxation of the salary of a federal circuit judge who took office after the relevant tax statute was enacted.<sup>67</sup> Seeking to avoid the judicial tax immunity recognized in *Evans v. Gore*,<sup>68</sup> Congress limited the statute's coverage to Article III judges who were appointed after its effective date.<sup>69</sup> Justice Frankfurter could scarcely conceal his incredulity at the view that subjecting newly appointed judges to a nondiscriminatory, pre-existing income tax might compromise judicial independence. The tax merely "charge[s] them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government."<sup>70</sup> The contrary position "trivialize[s] the great historic experience on which the framers based the safeguards of Article III, § 1."<sup>71</sup> The opinion concluded by observing that, if any of its reasoning was "inconsistent with what was said in *Miles v. Graham*, [that decision] cannot survive."<sup>72</sup> In short, *Miles v. Graham* was overruled. Curiously, all of the criticism that *O'Malley v. Woodrough* had heaped on that case applied equally to *Evans v. Gore*, but the Court said nothing about the earlier case's vitality.<sup>73</sup> It took more than sixty additional years for the Court to repudiate *Evans v. Gore*.

Its end came in the 2001 case of *United States v. Hatter*,<sup>74</sup> which challenged the extension of Medicare and Social Security taxes to sitting federal judges. Before 1983, Article III judges—as well as most other federal employees—were exempt from both taxes.<sup>75</sup> Eight federal judges, who were on the bench when the change took place, claimed that extending Medicare and Social Security taxes to

<sup>63</sup> See *id.* at 502 (government); *id.* at 503 (Judge Graham); *id.* at 505 (Supreme Court).

<sup>64</sup> *Williams v. United States*, 289 U.S. 553, 569–70 (1933).

<sup>65</sup> Act of July 28, 1953, ch. 253, § 1, 67 Stat. 226, 226 (codified as amended at 28 U.S.C. § 171 (2006)).

<sup>66</sup> 307 U.S. 277 (1939).

<sup>67</sup> Woodrough had been a district judge when the tax statute was adopted and was appointed to the court of appeals after the enactment of the tax law. The Court found this fact "wholly irrelevant to the matter in issue." *Id.* at 279–80.

<sup>68</sup> *Id.* at 280.

<sup>69</sup> *Id.* at 281–82.

<sup>70</sup> *Id.* at 282.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 283 (citation omitted).

<sup>73</sup> See Entin & Jensen, *supra* note 5, at 988–89.

<sup>74</sup> 532 U.S. 557 (2001).

<sup>75</sup> *Id.* at 561–62.

them violated the Compensation Clause.<sup>76</sup> The *Hatter* Court concluded that *Evans v. Gore* had misapprehended the scope of the prohibition against diminution of judicial salaries and must be overruled.<sup>77</sup> The Constitution does not forbid “a nondiscriminatory tax that treat[s] judges the same way it treat[s] other citizens.”<sup>78</sup>

Turning to the merits, the Court had little difficulty upholding the extension of Medicare taxes to Article III judges as part of a statute that also brought most other federal workers, who previously had been exempt, into that program.<sup>79</sup> The Social Security tax extension was another matter. Although that change brought previously exempt federal workers under Social Security, it also effectively insulated virtually all newly eligible workers—except for federal judges—from additional payroll taxes.<sup>80</sup> As a result, the Social Security extension discriminated against federal judges and thereby ran afoul of the Compensation Clause.<sup>81</sup>

As a practical matter, *Hatter* makes it unlikely that taxation issues will intersect with the Compensation Clause in the future. *Hatter* allows Congress to impose nondiscriminatory taxes on federal judges but prohibits the imposition of taxes that target the judiciary, which seems to be a highly unlikely prospect. The main qualification to this assessment concerns the purpose of the Compensation Clause. To the extent that this provision is meant to safeguard judicial independence, it is difficult to envision a scenario under which Congress would enact a tax that discriminates against federal judges, no matter how controversial or unpopular the judges’ rulings might be.

Lurking in these cases, however, is another rationale for the Compensation Clause: to attract excellent lawyers to the bench. This was part of the rationale for the decision in *Evans v. Gore*. Justice Van Devanter’s majority opinion in that case quoted Chancellor Kent’s observation that the prohibition on diminution of judicial salaries serves “to secure a succession of learned men on the bench.”<sup>82</sup> Although *Evans v. Gore* has been overruled, the Court continues to endorse this rationale for the Compensation Clause. Indeed, *Hatter* endorsed this aspect of the *Evans* opinion<sup>83</sup> just three paragraphs after announcing that *Evans* was no longer good

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<sup>76</sup> *Id.* at 564.

<sup>77</sup> *Id.* at 571.

<sup>78</sup> *Id.* at 569.

<sup>79</sup> *Id.* at 572.

<sup>80</sup> *See id.* at 562–64, 572–73.

<sup>81</sup> *Id.* at 576. All seven justices who participated in *Hatter* agreed that extending Social Security taxes to sitting Article III judges violated the Compensation Clause. *See id.* at 581 (Scalia, J., concurring in part and dissenting in part); *id.* at 586–87 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>82</sup> *Evans v. Gore*, 253 U.S. 245, 253 (1920) (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*294), *overruled by* United States v. *Hatter*, 532 U.S. 557 (2001). Justice Van Devanter added that the Compensation Clause’s “primary purpose” was “to attract good and competent men to the bench and to promote that independence of action and judgment which is essential” to the proper administration of justice. *Id.*

<sup>83</sup> 532 U.S. at 568.

law.<sup>84</sup> In addition to possibly deterring outstanding lawyers from considering careers on the bench, stagnant judicial salaries have fueled widespread concern and generated litigation claiming that persistent failure to raise judicial salaries has led to significant erosion in judges' purchasing power, which is said to represent unconstitutional diminution within the meaning of the Compensation Clause. We turn next to that issue.

#### IV. WITHHOLDING COST-OF-LIVING INCREASES

The Compensation Clause implications of inflation were foreshadowed in yet another way in *Hatter*. After concluding that the extension of Social Security taxes to sitting federal judges constituted an impermissible diminution in judicial pay, the Court rejected the government's argument that subsequent pay raises, which exceeded the cost of the new taxes, served to remedy the violation. Citing statistics showing that judges' pay had risen less than the rise in the Consumer Price Index and less than private-sector salaries had gone up over a three-decade period,<sup>85</sup> Justice Breyer concluded that "the judicial salary increases [cited by the government] simply reflected a congressional effort to restore . . . to judges . . . some, but not all, of the real compensation that inflation had eroded."<sup>86</sup> Accordingly, those increases could not be used to justify the extension of Social Security taxes to judges in violation of the Compensation Clause.<sup>87</sup>

As it happens, at the time of the *Hatter* decision, *Williams v. United States*,<sup>88</sup> a case addressing the erosion in the real value of judicial salaries, was making its way through the system. *Williams* rejected a Compensation Clause challenge to congressional action setting aside several cost-of-living increases in judicial salaries. The case arose under the Ethics Reform Act of 1989,<sup>89</sup> which established a new system for determining judges' pay. That statute raised judicial compensation by 25% to make up for the effects of inflation.<sup>90</sup> In addition, beginning January 1, 1991, it provided for cost-of-living increases for federal judges in any year that civil service employees received such salary adjustments.<sup>91</sup>

<sup>84</sup> *Id.* at 567.

<sup>85</sup> *Id.* at 579. Federal district judges' pay increased by 253% between 1969 and 1999; the Consumer Price Index rose by 363% and private-sector salaries went up by 421% during the same time period. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 581.

<sup>88</sup> 240 F.3d 1019 (Fed. Cir. 2001).

<sup>89</sup> Pub. L. No. 101-194, 103 Stat. 1716 (1989).

<sup>90</sup> *Id.* § 703(a)(3), 103 Stat. at 1768 (codified at 5 U.S.C. § 5318 note (2006)).

<sup>91</sup> *Id.* § 704(a)(2)(A), 103 Stat. at 1769 (codified as amended at 28 U.S.C. § 461 (2006)). The statute also strictly limited outside income and forbade the acceptance of honoraria. *Id.* § 601, 103 Stat. at 1760 (codified at 5 U.S.C. app. § 501 (2006)).

Although judges received cost-of-living adjustments for several years, Congress passed legislation blocking raises in 1995, 1996, 1997, and 1999.<sup>92</sup>

A group of federal district judges filed the *Williams* suit, claiming that withholding cost-of-living adjustments unconstitutionally diminished their compensation.<sup>93</sup> Reversing the district court, the United States Court of Appeals for the Federal Circuit held that *Will* controlled the dispute and doomed the judges' claims: the blocking statutes were enacted before January 1 of each relevant year, so the cost-of-living increases for those years never took effect.<sup>94</sup>

The Supreme Court denied certiorari, over the dissent of three justices.<sup>95</sup> With the support of Justices Scalia and Kennedy, Justice Breyer (who wrote for the Court in *Hatter*), wrote a twelve-page opinion suggesting that *Williams* raised important issues that deserved plenary consideration.<sup>96</sup> Part of Justice Breyer's reasoning drew on Justice Scalia's partial dissent in *Hatter*, which emphasized that the exemption from taxation "was part of [the judges'] employment package."<sup>97</sup> In Justice Breyer's view, the Ethics Reform Act "mandates adjustments to judicial salaries; the adjustments are mechanical and precise; and they are to take place automatically," subject to very limited statutory exceptions that would deny similar increases in the compensation of federal civil service employees.<sup>98</sup> This arrangement differed significantly from the statutory scheme at issue in *Will*, which was, in Breyer's view, "neither definite nor precise."<sup>99</sup> Accordingly, the Ethics Reform Act could be seen as embodying a congressional commitment "to protect federal judges against undue diminishment in real pay by providing cost-

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<sup>92</sup> *Williams*, 240 F.3d at 1024. In addition, civil service employees did not receive a raise in 1994, so neither did judges. *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1031 ("[E]ach of these unambiguous laws . . . was passed by Congress and approved by the President before the January 1 date that the [cost-of-living adjustments] were to take effect. Under *Will*, put simply, that is the end of our inquiry, and the Judges' cause must fail."). The district court had granted summary judgment to the plaintiff judges. *Williams v. United States*, 48 F. Supp. 2d 52, 60–61 (D.D.C. 1999). The Federal Circuit panel was divided: a dissenting judge argued that the court should uphold the legislative compromise embodied in the Ethics Reform Act. *Williams*, 240 F.3d at 1040 (Plager, J., dissenting).

<sup>95</sup> *Williams v. United States*, 535 U.S. 911 (2002).

<sup>96</sup> *Id.* at 911.

<sup>97</sup> *United States v. Hatter*, 532 U.S. 557, 585 (2001) (Scalia, J., concurring in part and dissenting in part); see *Williams*, 535 U.S. at 916–17 (Breyer, J., dissenting from denial of certiorari). Justice Scalia had agreed with the *Hatter* majority that extending Social Security taxes to sitting federal judges violated the Compensation Clause, but he contended that the Medicare tax extension was also unconstitutional. *Hatter*, 532 U.S. at 581 (Scalia, J., concurring in part and dissenting in part).

<sup>98</sup> *Williams*, 535 U.S. at 912 (Breyer, J., dissenting from denial of certiorari).

<sup>99</sup> *Id.* at 917. The scheme in *Will*, which had been superseded by the Ethics Reform Act, "was imprecise as to amount and uncertain as to effect" because the process for determining whether to increase salaries involved several different actors, each of whom could reject a recommended pay raise. See *id.*

of-living adjustments to guarantee that their salaries would not fall too far behind inflation,”<sup>100</sup> and the blocking statutes that withheld those adjustments could be construed as breaching that congressional commitment in violation of the Compensation Clause.<sup>101</sup>

In addition, failure to raise judicial salaries had caused genuine economic harm. The real value of federal district judges’ pay had declined by nearly 25% since 1969, leaving judicial compensation “below that of typical mid-level (and a few first-year) law firm associates and many law school teachers and administrators, [while] the real compensation earned by the average private sector worker has increased, as has that in nearly all employment categories outside high levels of Government.”<sup>102</sup> To reinforce his point, Breyer attached three charts as an appendix to his opinion.<sup>103</sup>

Meanwhile, in late 2001 Congress made permanent the language of a 1981 appropriations rider requiring specific legislative approval for any judicial pay increase.<sup>104</sup> This development changed the process for awarding cost-of-living increases for federal judges from a presumption *in favor of* such adjustments, the system embodied in the Ethics Reform Act, to a presumption *against* them. Moreover, the change affected only federal judges. Under the reasoning of *Hatter*, which focused on whether Congress had “impose[d] a special legislative burden upon [judges’] salaries alone,”<sup>105</sup> singling out the judiciary for less favorable

<sup>100</sup> *Id.* at 920 (emphasis omitted) (citation omitted).

<sup>101</sup> *See id.* at 921.

<sup>102</sup> *Id.* at 920.

<sup>103</sup> These charts were bound into volume 535 of the U.S. Reports between pages 922 and 923.

<sup>104</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, § 625, 115 Stat. 748, 803 (2001). The rider provides:

Notwithstanding any other provision of law or of this joint resolution, none of the funds appropriated by this joint resolution or by any other Act shall be obligated or expended to increase, after the date of enactment of this joint resolution, any salary of any Federal judge or Justice of the Supreme Court, except as may be specifically authorized by Act of Congress hereafter enacted: *Provided*, That nothing in this limitation shall be construed to reduce any salary which may be in effect at the time of enactment of this joint resolution nor shall this limitation be construed in any manner to reduce the salary of any Federal judge or of any Justice of the Supreme Court. This section shall apply to fiscal year 1981 and each fiscal year thereafter.

28 U.S.C. § 461 note (2006). This provision originated as part of a continuing resolution for fiscal year 1982. H.R.J. Res. 370, Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1981).

<sup>105</sup> *Williams*, 535 U.S. at 918 (Breyer, J., dissenting from denial of certiorari); *see also* *United States v. Hatter*, 532 U.S. 557, 572 (2001) (emphasizing that the extension of Social Security taxes to sitting judges “discriminate[d] against [those] judges in a manner forbidden by the [Compensation] Clause”).

treatment in connection with cost-of-living adjustments might well violate the Compensation Clause. Perhaps the answer to that question depends on whether, as Justice Breyer's dissent from the denial of certiorari in *Williams* suggested, the judges' constitutional entitlement to cost-of-living increases vested with the passage of the Ethics Reform Act<sup>106</sup> or, as *Will* concluded, only on the effective date of any judicial pay raise authorized by Congress.<sup>107</sup>

It is possible that we will soon get an authoritative response from the Supreme Court. After Congress failed to increase judicial salaries for 2007, another group of judges (including Judge Hatter) filed a new lawsuit alleging that their compensation had been diminished unconstitutionally.<sup>108</sup> In *Beer v. United States*,<sup>109</sup> the Federal Circuit summarily affirmed the dismissal of the complaint, reasoning that the case was functionally identical to and therefore controlled by its decision in *Williams*.<sup>110</sup> A petition for certiorari was filed in May 2010, and the case has been on the Supreme Court's conference list regularly since the beginning of the current term, but no disposition of the petition has yet been announced.<sup>111</sup>

Although federal judges so far have been unsuccessful in challenging the withholding of cost-of-living adjustments, a month after the Federal Circuit's rejection of *Beer*, a group of New York State judges prevailed on a similar claim. In *Maron v. Silver*,<sup>112</sup> the New York Court of Appeals ruled that the state judiciary had been wrongly deprived of cost-of-living increases over an eleven-year period during which the real value of judicial salaries had declined between 25% and 33%.<sup>113</sup>

The decision did not rest on the state's Compensation Clause,<sup>114</sup> but rather on general principles of separation of powers. The legislature had not explicitly reduced judicial salaries nor had it passed any measure that discriminated against

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<sup>106</sup> *Williams*, 535 U.S. at 921.

<sup>107</sup> *United States v. Will*, 449 U.S. 200, 229 (1980).

<sup>108</sup> Congress did not approve judicial salary adjustments for 2007 and 2010. *Beer v. United States*, 592 F.3d 1326, 1329 (Fed. Cir. 2010) (Newman, J., dissenting from denial of petition for hearing en banc), *petition for cert. filed*, 78 U.S.L.W. 3689 (U.S. May 14, 2010) (No. 09-1395). Although not at issue in that lawsuit, federal judges also will not receive a pay raise in 2011. *No COLA for Congress, Federal Judges or Judiciary Employees*, THIRD BRANCH, Dec. 2010, at 3.

<sup>109</sup> 361 F. App'x 150 (Fed. Cir.), *petition for hearing en banc denied*, 592 F.3d 1326 (Fed. Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3689 (U.S. May 14, 2010) (No. 09-1395).

<sup>110</sup> *Id.* at 151–52.

<sup>111</sup> As this article was going to press, the Supreme Court vacated the Federal Circuit's judgment and remanded for consideration of whether the claim was precluded because members of the plaintiff class might have been bound by *Williams*. *Beer v. United States*, 131 S. Ct. 2865 (2011).

<sup>112</sup> 925 N.E.2d 899 (N.Y. 2010).

<sup>113</sup> *Id.* at 904.

<sup>114</sup> N.Y. CONST. art. VI, § 25(a) ("The compensation of a . . . judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed.").

judges economically.<sup>115</sup> Indeed, judicial pay remained frozen due to a political impasse over legislators' salaries.<sup>116</sup> Although there was evidence that the framers of the Compensation Clause were concerned about the effects of inflation on judicial salaries, that evidence also suggested that the framers did not regard the effects of inflation as representing "a per se violation of the Compensation Clause."<sup>117</sup> Nevertheless, the political impasse between the governor and the legislature meant that those officials had "fail[ed] to consider judicial compensation increases on the merits, and instead [held] them hostage to other legislative objectives."<sup>118</sup> This in turn "threaten[ed] the structural independence of the Judiciary," which violated fundamental notions of separation of powers.<sup>119</sup>

*Maron v. Silver* did not explicitly hold that New York judges must receive cost-of-living pay increases. Requiring the political branches to consider the issue of judicial pay raises "on the merits" does not direct the governor and the legislature to approve such raises.<sup>120</sup> The court declined to direct any particular substantive result, reasoning that the judiciary should rarely inject itself into budgetary decisions.<sup>121</sup> Issuing a direct order probably was not necessary, as the parties accepted that the state judges "have earned and deserve a salary increase."<sup>122</sup> Hence, addressing the question of judicial pay "on the merits" seems inevitably to foreshadow some kind of upward salary adjustment.<sup>123</sup>

It is far from clear whether *Maron v. Silver* will provide support for the federal judges in *Beer* or their counterparts elsewhere in the nation. For one thing, the New York court thought that *Hatter* and other federal cases did not outlaw indirect diminution of judicial salaries as a result of inflation.<sup>124</sup> Of course, no state court can bind the Supreme Court on a matter of federal law, especially federal constitutional law, but the court's conclusion is consistent with the Federal Circuit's position in both *Williams* and *Beer*. At the same time, some of the reasoning in *Maron v. Silver* appears to be inconsistent with the Supreme Court's view of the federal Compensation Clause. The New York court found no

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<sup>115</sup> *Maron*, 925 N.E.2d at 910.

<sup>116</sup> *Id.* at 904–05.

<sup>117</sup> *Id.* at 911.

<sup>118</sup> *Id.* at 914.

<sup>119</sup> *Id.* at 915. The court declined to decide whether current salaries of Empire State judges were too low, leaving that matter "in the first instance" to the legislature. *Id.* at 916.

<sup>120</sup> *See id.* at 914.

<sup>121</sup> *Id.* at 915.

<sup>122</sup> *Id.* at 904.

<sup>123</sup> The New York legislature responded to *Maron v. Silver* by authorizing a commission to make quadrennial recommendations about judicial compensation. Act of Dec. 10, 2010, 2010 N.Y. Consol. Laws Adv. Legis. Serv. 567 (LexisNexis). Many judges have expressed dissatisfaction with this arrangement because any pay increase that the commission might recommend would not take effect until 2012 at the earliest and in any event would not be guaranteed. *See William Glaberson, Angry Over Pay, State Judges Want a Union-Like Group, a Survey Finds*, N.Y. TIMES, Jan. 12, 2011, at A18.

<sup>124</sup> *Maron*, 925 N.E.2d at 910.



impermissible diminution of judicial salaries in part because legislators, the governor, and other constitutional officers also had not received pay raises.<sup>125</sup> In *Will*, however, the Supreme Court found it irrelevant that other federal officials suffered the same financial injury because those other officials did not enjoy the explicit protection against salary diminution that the Compensation Clause accords to Article III judges.<sup>126</sup>

At the same time, the persistent failure to provide New York judges with cost-of-living increases over an eleven-year period appears to be a more compelling case for finding an impermissible diminution in judicial compensation than the erratic course of such increases for federal judges over the past two decades. Still, the 2001 federal legislation requiring specific congressional approval for increasing judicial salaries might constitute the type of discrimination that could run afoul of the federal Compensation Clause.<sup>127</sup> Even if Congress has no constitutional obligation to award cost-of-living increases or set judicial salaries at any particular level, the question of how much judges should be paid deserves thoughtful consideration as a matter of policy. The next section offers an overview of some of the factors that warrant attention in any policy discussion.

## V. JUDICIAL COMPENSATION AS A POLICY ISSUE

The failure to award federal judges cost-of-living increases in about one-third of the years since passage of the Ethics Reform Act has generated widespread criticism and concern. As noted earlier, Justice Breyer addressed the erosion of judicial compensation both in *Hatter* and in his dissent from the denial of certiorari in *Williams*.<sup>128</sup> Chief Justice Rehnquist regularly called attention to judicial compensation in his annual state of the judiciary report;<sup>129</sup> Chief Justice Roberts devoted his entire 2006 report to that subject<sup>130</sup> and has referred to it in almost all

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<sup>125</sup> *Id.* at 912.

<sup>126</sup> *United States v. Will*, 449 U.S. 200, 226 (1980); *see supra* note 17 and accompanying text.

<sup>127</sup> *See supra* notes 104–105 and accompanying text.

<sup>128</sup> *See supra* notes 85–86, 102 and accompanying text.

<sup>129</sup> *See, e.g.*, WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1–3; *see also* WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 2003 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1; WILLIAM H. REHNQUIST, CHIEF JUSTICE'S 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1. All of these year-end reports, as well as those produced by Chief Justice Roberts, *see infra* notes 130–131, are available on the public information page of the Supreme Court's website. *Chief Justice's Year-End Reports on the Federal Judiciary*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last visited Jan. 15, 2011).

<sup>130</sup> JOHN G. ROBERTS, JR., CHIEF JUSTICE'S 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1–8 [hereinafter 2006 REPORT]. This document contains an appendix summarizing the federal courts' workload.

his other reports.<sup>131</sup> Moreover, commentators and bar associations have decried the situation and called for higher judicial compensation to take account of inflation.<sup>132</sup>

Chief Justice Roberts summarized the main points of concern in his 2006 report. Using 1969 as a baseline, he noted that in that year federal district judges were paid “21% *more* than the dean at a top law school and 43% *more* than its senior law professors,” whereas in 2006 federal district judges were making “substantially less than—about half—what the deans and senior law professors at top schools [were] paid.”<sup>133</sup> Moreover, during the same period the average American worker’s real wages had risen by 17.8% while federal judges’ salaries had declined by 23.9%.<sup>134</sup> While compensation was eroding, the composition of the federal judiciary also has changed so its members “are no longer drawn primarily from among the best lawyers in the practicing bar.”<sup>135</sup> Almost two-thirds of President Eisenhower’s appointees to federal district courts came from the private bar, while just over one-third came from the public sector.<sup>136</sup> Under President George W. Bush, however, less than 40% of district judges came to the bench from the private sector, while about 60% came from the public sector.<sup>137</sup> At the same time, attrition has increased, with larger numbers of judges leaving the bench: thirty-eight judges have done so since 2000.<sup>138</sup>

Other critics have pointed to institutional problems associated with judicial attrition. For example, departing judges take with them experience and expertise that are difficult to replace.<sup>139</sup> Early departures result in larger dockets for remaining judges, at least until vacancies are filled, and the process for appointing judges has become increasingly time-consuming and contentious.<sup>140</sup>

These are legitimate concerns, but we should not uncritically accept the diagnosis of impending doom. First, it is important to consider the baseline against

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<sup>131</sup> JOHN G. ROBERTS, JR., CHIEF JUSTICE’S 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8; JOHN G. ROBERTS, JR., CHIEF JUSTICE’S 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6–8; JOHN G. ROBERTS, JR., CHIEF JUSTICE’S 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3–5. Chief Justice Roberts’s most recent report did not address judicial compensation but did note budgetary constraints and judicial vacancies as high-priority concerns. JOHN G. ROBERTS, JR., CHIEF JUSTICE’S 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–8.

<sup>132</sup> See, e.g., AM. BAR ASS’N & FED. BAR ASS’N, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION (2003) [hereinafter *FEDERAL JUDICIAL PAY*]; Blake Denton, *The Federal Judicial Salary Crisis*, 2 DREXEL L. REV. 152 (2009).

<sup>133</sup> 2006 REPORT, *supra* note 130, at 2.

<sup>134</sup> *Id.* at 3.

<sup>135</sup> *Id.* at 4.

<sup>136</sup> *Id.* at 3–4.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 6. The American Bar Association noted that “more than 100 Article III judges left the bench between 1990 and 2006, as did additional numbers of bankruptcy and magistrate judges.” AM. BAR ASS’N, BACKGROUND INFORMATION ON THE NEED FOR JUDICIAL PAY REFORM 2 (2007).

<sup>139</sup> FEDERAL JUDICIAL PAY, *supra* note 132, at 21.

<sup>140</sup> See *id.* at 21–22.

which we measure trends in the real value of judicial compensation. It is quite common to use 1969 for this purpose, but that year might bias conclusions about the effects of inflation. Federal judicial salaries increased substantially in 1969, reaching their highest value in real terms since 1913.<sup>141</sup> The whole point of the 1969 pay raise was to make up for stagnant salaries for officials in all three branches of the federal government.<sup>142</sup> Using 1986 as a starting point might suggest a different conclusion: in real terms, judicial salaries in 2006 were more than 14% higher than they were two decades earlier.<sup>143</sup> This comparison suggests that concerns about judicial compensation are exaggerated. It is also worth noting that the real value of judicial salaries was lower in 1986 than it was in any year since 1955.<sup>144</sup> In other words, we should recognize that the choice of baseline can affect the interpretation of trends in judicial compensation.

Second, it is also important to consider the baseline for assessing the background of newly appointed federal judges. Chief Justice Roberts focused on the Eisenhower administration, but that era might have been atypical. Eisenhower appointed an unusually high percentage of his district judges directly from private practice.<sup>145</sup> In recent years, more newly appointed federal district judges have had previous experience on the bench, either as state judges or as federal magistrate or bankruptcy judges.<sup>146</sup> It is possible that having a more “professional” federal judiciary has benefits both for the judiciary and for the public.<sup>147</sup> It also is possible that the disadvantages of such a system outweigh its benefits. What we can say, however, is that those who deplore the reduction in the proportion of private

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<sup>141</sup> KEVIN M. SCOTT, CONG. RESEARCH SERV., RL 34281, JUDICIAL SALARY: CURRENT ISSUES AND OPTIONS FOR CONGRESS 19 (2008).

<sup>142</sup> FEDERAL JUDICIAL PAY, *supra* note 132, at 7.

<sup>143</sup> See SCOTT, *supra* note 141, at 40–41 (containing a chart indicating a 14% increase in real judicial salaries from \$144,762 in 1986 to \$165,200 in 2006).

<sup>144</sup> *Id.* at 20.

<sup>145</sup> *Id.* at 7–8 (“[T]he Eisenhower Administration appointed 65.1% of its federal judges from private practice, while no other administration since 1933 has appointed more than 55% of its federal judges from the same population.”).

It is also possible that, entirely apart from compensation considerations, the greater length and increasing contentiousness of the process for nominating and confirming federal judges has made the prospect of judicial service less attractive for private practitioners. The disruption affects any prospective judge, but is especially problematic for private practitioners who face pressure to recruit and retain clients in ways that public-sector lawyers do not. I am indebted to my fellow panelists at a November 2010 program on judicial vacancies sponsored by the Federal Bar Association for emphasizing the reluctance of potential nominees to put their personal and professional lives on hold for months if not years. For data on the duration of the confirmation process for recently confirmed judges, see RUSSELL WHEELER, BROOKINGS INST., JUDICIAL NOMINATIONS IN THE FIRST FOURTEEN MONTHS OF THE OBAMA AND BUSH ADMINISTRATIONS (2010).

<sup>146</sup> See Russell Wheeler, *Changing Backgrounds of U.S. District Judges: Likely Causes and Possible Implications*, 93 JUDICATURE 140, 140–41 (2010).

<sup>147</sup> See *id.* at 142 (summarizing arguments in favor of a professionalized judiciary). But see *id.* at 143 (summarizing arguments critical of a professionalized judiciary).

practitioners on the bench have not offered a systematic argument in support of their position.<sup>148</sup>

Third, advocates for increasing judicial compensation point to the number of judges who resign for financial reasons. Much of the evidence adduced in support of this concern is anecdotal.<sup>149</sup> Even one analyst who found a statistically significant relationship between compensation and resignation concedes that “[t]he total number of judicial resignations is quite low, even in recent years, so it is hard to speak of a ‘crisis’ of resignations.”<sup>150</sup> Another analyst noted that “[j]udges have complained about the low salary of the office from the earliest years of the Republic”<sup>151</sup> and found that, over the two centuries she studied, “judges who resign to take other employment, for whatever reason, still represent less than 5% of the judiciary.”<sup>152</sup> In other words, we should be concerned about the possibility that low salaries might lead some judges to leave the bench, but we also should not exaggerate the frequency with which this happens or assume that it is a strictly modern phenomenon.

Fourth, we should recognize that the Compensation Clause might actually hold down judicial salaries by forbidding decreases in judicial pay. As noted at the outset, this ban on salary reduction plays an important role in protecting judicial independence.<sup>153</sup> Nevertheless, this “one-way compensation ratchet”<sup>154</sup> could very well make Congress reluctant to raise judicial salaries too readily because the Constitution prohibits downward adjustments if subsequent events put a strain on the federal budget.<sup>155</sup> Perhaps we should not expect judges and prospective judges to recognize this counterintuitive idea, but it at least suggests that while money might be important, it is not all that matters. This leads to one final point.

Although judges should be paid fairly, we should not forget that judicial service offers more than financial rewards. If, as Chief Justice Roberts suggested at his confirmation hearing, the role of a judge is analogous to that of a baseball umpire,<sup>156</sup> the ability to decide rather than simply to argue must represent a

<sup>148</sup> See *id.* at 142–43.

<sup>149</sup> See, e.g., FEDERAL JUDICIAL PAY, *supra* note 132, at 14–15.

<sup>150</sup> Scott Duke Kominers, Salary Erosion and Federal Judicial Resignation 13 (Oct. 28, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1114432>.

<sup>151</sup> Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 356 (1993).

<sup>152</sup> *Id.* at 364.

<sup>153</sup> See *supra* note 2 and accompanying text.

<sup>154</sup> *Williams v. United States*, 535 U.S. 911, 914 (2002) (Breyer, J., dissenting from denial of certiorari).

<sup>155</sup> See Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 985 (2005).

<sup>156</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”).

significant attraction. Recall the story about the umpire who, when asked whether a pitch was a ball or a strike, replies: "It ain't nothing 'til I say so."<sup>157</sup> Those who believe that the courts are facing a crisis of retention and recruitment due to inadequate judicial salaries typically do not suggest what level of compensation they regard as appropriate or necessary to remedy the problem. Beyond that, we ought to be deeply skeptical about anyone who seeks a judicial position primarily for the salary. Charles Evans Hughes wisely observed that "we should be cautious about increasing the chance of drawing [people] to the public service who seek it for the sake of the compensation,"<sup>158</sup> and added that, "to attract good [people] and to secure efficiency, the honour and independence of the office are of far greater account than the emoluments that attach to it."<sup>159</sup>

## VI. CONCLUSION

Protecting judges against salary diminution is an important device to ensure their independence. The basic principle that judicial salaries may not be reduced seems well established, and the prospect of punitive or discriminatory taxes directed at the judiciary appears remote to say the least. The most challenging issue relating to judicial compensation concerns cost-of-living increases. Under existing doctrine, it is not clear that the simple failure to approve such increases violates the Compensation Clause because those increases might not have vested until the day that they actually would take effect. On the other hand, the statutory change which requires explicit congressional approval for judicial pay raises does pose troublesome constitutional questions. Under this arrangement, only judges must obtain legislative authorization for cost-of-living adjustments, while the Ethics Reform Act provides that all other covered officials receive such adjustments automatically unless Congress passes blocking legislation. This differential treatment might well rise to the level of discrimination against the judiciary that the Supreme Court has found to contravene the Compensation Clause.

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<sup>157</sup> Judge Dee Benson of the United States District Court for the District of Utah related this anecdote in his keynote address to the conference for which this paper was prepared. In Judge Benson's version, the batter was Ted Williams and the catcher was Yogi Berra, both American League stars; the umpire was not identified. I have heard the same story told about the legendary National League umpire Bill Klem (in that version, neither the batter nor the catcher was named). Of course, the specific participants in this episode are not the point of the story.

<sup>158</sup> CHARLES EVANS HUGHES, *CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT* 49 (1910).

<sup>159</sup> *Id.* at 50.