Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform

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In 2005, Chief Justice John G. Roberts, Jr. warned that “[o]ur system of justice suffers as the real salary of judges continues to decline,” noting that “[i]f Congress gave judges a raise of 30 percent tomorrow, judges would—after adjusting for inflation—be making about what judges made in 1969.” As purchasing power dwindles, judges steadily leave the bench, often to enter private practice. Between 1990 and 2005, “92 judges . . . left the bench” and “[f]ifty-nine of them stepped down to enter the private practice of law.” These developments are disturbing in light of dramatically increasing federal caseloads and constantly rising costs of living.


3. Id. at 21.

4. ROBERTS, supra note 1, at 4.

5. AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 13 & chart D, 18-19 (noting that from 1969 to 2002, the cost of purchasing a home increased 42% and financing a college education increased by 126.3%, and that during the same period the criminal and civil case loads more than tripled from 110,778 to 341,841). Additionally, as of 2005, “[t]he Administrative Office of the U.S. Courts reported . . . that overall case filings in the federal appellate and trial courts climbed in fiscal year 2004, adding up to a double digit percentage increase in workload for the Judiciary since 1995.” News Release, Admin.
Are these the early warning signs of a crisis in the federal judiciary? The Framers of the United States Constitution set out to create an independent judicial branch insulated from dangerous political maneuvering that could affect judges' impartiality while serving on the bench.\(^6\) Through the Constitution's Compensation Clause, salaries are guaranteed to all Article III judges, "which shall not be diminished during their Continuance in Office."\(^7\)

This Comment addresses why available legal and political mechanisms have been largely ineffective in adjusting judicial compensation for over thirty years and why judicial salary deflation is a critically important public issue rather than simply a concern for those sitting on the bench. This Comment also addresses the downward trend in compensation for members of the judiciary for more than three decades and the failure of the legislative and judicial branches to implement a successful remedy. To introduce current issues related to decreasing judicial compensation, this Comment first discusses the fundamental constitutional principle of undiminished judicial compensation, bolstered by deliberations of the Framers of our Constitution. Next, this Comment discusses a series of cases and statutes addressing issues implicated by the Compensation Clause, including the continued implementation and ultimate elimination of judicial cost-of-living adjustments (COLAs). This Comment then acknowledges that ideal reforms would include the decoupling of the decision to grant COLAs to the legislative and judicial branches, as well as an across-the-board increase in judicial salaries, but concludes that such reforms are not politically feasible. This Comment ultimately proposes alternative, more politically neutral solutions, including guaranteed retirement benefits and locality pay adjustments.


Similarly, Justice Breyer asserted that "[t]o permit that kind of pay decrease—particularly when during the same period the pay of the average American has increased and key costs, such as those of higher education, have skyrocketed—creates major financial insecurity among judges." Statements to the National Commission on the Public Service: Statements of Justice Stephen G. Breyer 6 (July 15, 2002) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/ncps-project.pdf).


6. See infra Part II.B.
7. U.S. CONST. art. III, § 1.
I. TENSION BETWEEN JUDICIAL AND CONGRESSIONAL INTERPRETATIONS OF THE COMPENSATION CLAUSE

A. The Current State of the Judiciary

For over thirty years, judicial compensation has been inherently unreliable. Inflation has decreased judges' purchasing power and ability to maintain a constant standard of living. Judges have increasingly experienced unnecessary political maneuvering by the creation and later withdrawal of COLAs, resulting in the diminution of their total incomes. Members of the judiciary assert that this financial uncertainty directly relates to a steady stream of attrition from the bench.

The loss of judges is having a deleterious impact on the fabric of our judiciary. As qualified and experienced judges leave, current judges overextend themselves to bear an increasing number of complex cases until replacements are found. As a result, not only is there a problem of retention, but there is a decreasing pool of capable individuals willing to be considered for judgeships. Moreover, concerns exist regarding the number of applicants for federal judgeships, as well as the quality of those individuals. Ideally, the bench should be comprised of a group of

9. Id. at 12-13, 21.
10. See infra Part II.D.
12. Id. at 1-2.
13. See id. at 20-22. The number of senior government officials that are eligible for retirement by 2008 compounds this problem. Id. at 1 n.1. The Volcker Commission, which “was established to examine ways to restore and renew government service,” id. at 2, found that “the best estimates are that by the end of this decade, the federal government will have suffered one of the greatest drains of experienced personnel in its history.” NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 8 (2003), available at http://www.brookings.edu/gscps/volcker/reportfinal.pdf.
14. AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 22-23. Former Chief Justice Rehnquist has also commented on retention issues recounting that some judges are leaving because the “sense of inequity” surrounding Congress’ failure to provide consistent COLAs. William H. Rehnquist, Statement of William H. Rehnquist, Chief Justice of the United States Before the National Commission on the Public Service (July 15, 2002) (transcript available at http://www.supremecourts.gov/publicinfo/speeches/sp _07-15-02.html). His statement includes a quote from a former magistrate judge who said, “‘[a]lthough I did not enter public service with any thought of becoming wealthy, I did enter with the hope that I would be treated fairly.’” Id. The former Chief Justice also noted that “[d]iminishing judicial salaries affects not only those who have become judges, but also the pool of those willing to be considered for a position on the federal bench.” Id.
15. See Rehnquist, supra note 14. The former Chief Justice commented that “[o]ur judges will not continue to represent the diverse face of America if only the well-to-do or mediocre are willing to become judges.” Id.; see also Adrian Vermeule, The Constitutional Law of Official Compensation, 102 COLUM. L. REV. 501, 535 (2002) (“The constitutional
racially, ethnically, and culturally diverse individuals that are academically and intellectually well-qualified, and representative of the diverse population who will seek justice in their courtrooms. The fiscal reality of current judicial compensation threatens this diversity because only economically well-situated lawyers can afford to accept an appointment as a federal judge.

In addition to inflationary erosion and inconsistent COLA disbursements, judicial salaries remain well below those in the private

rules [governing judicial compensation] affect the composition of the pool of lawyers from which candidates for federal judicial service are drawn, because possible candidates know the rules and select in or out of the pool according to the relative costs and benefits of judicial service and private sector opportunities.


17. See id. (noting that “[w]e cannot afford a Judiciary made up primarily of the wealthy or the inexperienced”). The former Chief Justice’s concerns echoed those of Alexander Hamilton, who warned that “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day.” THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Garry Wills ed., 1982). One lawyer asserted that raising judicial salaries may actually help the judiciary become more diversified, asserting that “[a] greater representation of their less corporate perspectives on the bench might be healthy for the federal judicial system.” Jim Geraghty, Federal Judges: Are We Getting What We Pay For?, SPEAKOUT.COM, Feb. 19, 2001, http://speakout.com/activism/news/5645-1.html (quoting Mark Scherzer).

Others express concern that by asking for higher salaries, the general public may lose esteem for the judiciary. Id. One lawyer explained that “[t]he pay is still far more than what the median American family earns, and the job offers life tenure. Those who would trade serving justice for the continuing pursuit of lottery-like incomes do not value justice richly enough, and are therefore unsuited for the job.” Id. (quoting Jonathan M. Freiman).

Adding a social science perspective, Professor Albert Yoon provided a statistical analysis of the claims that judicial attrition results from inferior compensation. Albert Yoon, Love’s Labor Lost? Judicial Tenure Among Federal Court Judges: 1945-2000, 91 CAL. L. REV. 1029, 1030 (2003). Using time-series regression analysis, Professor Yoon considered whether or not judges are leaving the bench at a higher rate than in the past, and whether such attrition is related to salary considerations. Id. A linear regression is the equation that describes the true relationship between the dependent variable Y and the independent variable X.

In an effort to reach a decision regarding the likely form of this relationship, the researcher draws a sample from the population of interest and using the resulting data, computes a sample regression equation that forms the basis for reaching conclusions regarding the unknown population regression equation. WAYNE W. DANIEL, BIOSTATISTICS: A FOUNDATION FOR ANALYSIS IN THE HEALTH SCIENCES 404 (7th ed. 1999). Professor Yoon’s research suggests that judges are not actually leaving the bench at higher rates due to today’s financial realities. Yoon, supra, at 1030.
sector and academia. As of 2006, judges' salaries ranged from $165,200 for Federal District Court Judges, to $212,100 for the Chief Justice of the United States. In comparison, large law firms in several metropolitan areas pay first-year associates $125,000, plus bonuses. And as an alternative comparison, deans of the top twenty-five ranked law schools reported an average salary of $301,639 for the 2003 school year.

But to fully understand the judicial compensation picture, one must consider more than salary. Judges receive considerable retirement benefits for life, as long as they satisfy a years of service and age requirement, commonly called the "Rule of 80." This rule permits a judge to retire at age sixty-five or later when the judge's age and years of judicial service total eighty. Upon retirement, a judge continues to receive his or her current salary for life. As an alternative to full retirement, a judge may take "senior status," remaining on the bench but retaining a smaller caseload. But, the Rule of 80 is an "all or nothing'

18. AM. BAR ASS'N & FED. BAR ASS'N, supra note 2, at ii. Compare id. at 3 (listing the current federal judicial salaries), with Walsh, supra note 1 (stating partner and first-year associate compensation at major law firms).
21. NAT'L COMM'N ON THE PUB. SERV., supra note 13, at 23, 35 n.10.
22. AM. BAR ASS'N & FED. BAR ASS'N, supra note 2, at 16 n.49. The "Rule of 80" provides that

Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

28 U.S.C. § 371(a) (2000). Furthermore,

[b]eginning at age 65, a judge may retire at his or her current salary . . . after performing 15 years of active service as an Article III judge (65+15 = 80). A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of 10 years of service (70+10 = 80).

23. 28 U.S.C. § 371(a), (c).
24. Id. § 371(a).
25. Id. § 371(b), (e). The statute explains the option of taking on senior status as opposed to full retirement:

Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his
proposition”; if a judge leaves the bench before satisfying the Rule of 80, the judge forfeits all retirement pay.\(^\text{26}\)

In addition to receiving full pay for life, judges may also prepare for retirement through participation in the government’s Thrift Savings Plan, (TSP) which is similar to a private sector 401K plan.\(^\text{27}\) The TSP allows all federal employees to contribute as much as fifteen percent of their income per pay period, up to a maximum dollar amount specified by the IRS.\(^\text{28}\) However, unlike many civilian employees, federal judges do not receive a matching contribution from the government.\(^\text{29}\)

While a generous retirement system exists, it does not solve the cash flow problem for younger judges.\(^\text{30}\) As part of the available remedy for this short-term cash flow problem, judges are permitted to earn additional income through, for example, teaching courses at law schools, in compliance with the honoraria restrictions of The Ethics in

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\(^\text{26}\) AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 16 n.49; see also 28 U.S.C. § 371(a), (b)(1). Additionally, it is important to consider that judges’ retirement benefits are not a pension. Joe Mandak, Greener Pastures Lure Some Judges, GRAND RAPIDS PRESS, Feb. 19, 2004, at A30. While judges continue to receive full pay for life, “because [the pay is] not a pension, their dependents lose that income when the judges die.” Id. To compensate, many judges buy additional life insurance. Id.

\(^\text{27}\) TSP Features for Civilians, chapter 1, http://www.tsp.gov/features/chapter01.html (last visited Feb. 12, 2006). The TSP is a “retirement savings and investment plan” that offers federal employees similar savings and tax incentives as are offered to private sector employees via 401K plans. Id; see also I.R.C. § 7701(j)(1)(A) (2000) (“[T]he [TSP] shall be treated as a trust described in [I.R.C. §] 401(a) which is exempt from taxation under 26 U.S.C. Subsection 501(a).”). “TSP regulations are published in title 5 of the Code of Federal Regulations, Parts 1600–1690, and are periodically supplemented and amended in the Federal Register.” TSP Features for Civilians, supra.


\(^\text{29}\) See TSP Features for Civilians, chapter 4, http://www.tsp.gov/features/chapter04.html (last visited Feb. 12, 2005). While a broader range of civilian government employees may participate in the TSP program, only Federal Employees’ Retirement System (FERS) employees are “entitled to receive agency contributions” as part of their employee benefits program. Id. Federal judges are excluded from FERS and therefore do not receive such contributions. CONG. BUDGET OFFICE, COMPARING THE PAY AND BENEFITS OF FEDERAL AND NONFEDERAL EXECUTIVES 5 (1999), available at http://www.cbo.gov/ftpdocs/17xx/doc1763/execpay.pdf.

\(^\text{30}\) AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 12-15.
Government Act of 1989. Also, when judges file annual Financial Disclosure Reports, they report non-investment income as net income, not gross income. This permits judges to deduct significant necessary expenses, such as travel, thereby complying with the maximum net income limitations of the Ethics in Government Act.

In addition to the purely fiscal benefits, judges receive “psychic income” that can substantially add to quality of life and job satisfaction. Indeed, “[f]or [many] judges . . . rendering public service in a highly visible and respected role and serving in a lifetime appointment are intangible benefits that help compensate for the reduced salary levels associated with the bench.”

Yet, these facets of compensation do not offer a complete picture of the current state of the judiciary. Anecdotal evidence suggests that part of the judicial compensation gridlock problem relates to a basic political reality. Members of Congress must run for reelection every two or six years and, therefore, are continually fundraising and campaigning. In contrast, federal judges receive lifetime appointments and a generous retirement package. Therefore, members of Congress may hesitate to approve any judicial compensation plan, whether temporary or long-term, to increase judicial salaries to a level above their own. This political reality may call for more creative solutions to the judicial compensation dilemma.

B. The Compensation Clause and the Intent of the Framers

Article III, Section 1 of the United States Constitution establishes that “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." In drafting this language, the Framers, above all, set out to preserve "complete independence of the courts of justice." Alexander Hamilton emphasized the proper balance of power between the legislative and judicial branches of government, stating that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will." For example, Hamilton


Despite these protections, "the King converted the tenure of colonial judges to service at his pleasure" in 1761. Will, 449 U.S. at 219. As a result, "[s]ubjecting colonial judges to the whims and caprices of the King was one of the royal abuses cited in the Declaration of Independence, which denounced the King for making [']Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.'" Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners at 4, Williams v. United States, 535 U.S. 911 (2002) (No. 01-175) (quoting THE DECLARATION OF INDEPENDENCE paras. 10-11 (U.S. 1776)).

42. THE FEDERALIST NO. 79 (Alexander Hamilton), supra note 17, at 400. Hamilton further expounded on the idea of judicial independence by explaining that "we can never hope to see realised in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter." Id.

There is also evidence to suggest that the Framers drew on their own colonial experiences when considering the protections that should be provided to the judiciary. See Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners, supra note 41, at 4-5. For example, according to one commentator,

the judiciary in many states was made subservient to the state legislature. . . . Judicial appointments and terms of service were controlled by legislatures, as were salaries and fees. State legislatures regularly overturned judicial findings and often took over traditional judicial duties such as rulings on probate, debt, and even marriage and divorce.

Id. at 5 (alteration in original) (quoting THE FEDERALIST at 22 (Isaac Kramnick) (Isaac Kramnick ed., 1987)). There is also evidence that the Framers sought to promote an independent judiciary to preserve the Union after the Revolutionary War. JACK N. RAKOVE, ORIGINAL MEANINGS 290 (1996). According to one scholar:

It took a decade of experience under the state constitutions to expose the triple danger that so alarmed Madison in 1787: first, that the abuse of the legislative power was more ominous than arbitrary acts of the executive; second, that the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government; and third, that agencies of central government were less dangerous than state and local despotisms.

Id. Armed with this knowledge, the Framers established more stringent protections for judicial independence than found in the British system. See Brief Amicus Curiae of the
asserted that in order to specifically protect the vulnerability of the judiciary, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support." Thus, the Framers acknowledged the importance of an independent judiciary in the structure of the United States Government while further recognizing that in order to preserve judicial independence, it would be imperative to preserve a secure means of financial support for judges.

Additionally, the Framers considered drafting the Compensation Clause in such a way as to prevent any increase or decrease in judicial compensation by the legislature, as evidenced by James Madison's notes during the Constitutional Convention. Madison's observation that "judges would be inclined to defer to Congress" demonstrates his perception that judges may find themselves at the mercy of Congress to provide any upward adjustment in pay. Despite this possibility, the

American College of Trial Lawyers in Support of Petitioners, supra note 41, at 5. For example, the delegates to the Constitutional Convention "rejected a proposal by John Dickinson of Pennsylvania to allow the removal of judges by a joint address of Congress." Id.

43. THE FEDERALIST NO. 79 (Alexander Hamilton), supra note 17, at 400. While under British rule, judges received compensation at the pleasure of the Crown; this absence of judicial independence was rebuked in the Declaration of Independence, "[the King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); see also WILLIAM S. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 2-3 (1918); Breyer, supra note 5 (noting that the Framers' grievances over judicial independence are reflected in the Declaration of Independence).

44. THE FEDERALIST NO. 79 (Alexander Hamilton), supra note 17, at 400-01. The Framers also considered several other methodologies to effectuate and establish judicial independence. The Framers rejected a fixed compensation rate, because the "fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible." Id. at 400 (explaining that salaries are not capped because "[w]hat might be extravagant to-day, might in half a century become penurious and inadequate"). Similarly, Madison considered linking judicial salaries with a highly valued commodity, such as wheat, in order to adjust for "[t]he variations in the value of money." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 45 (Max Farrand ed., rev. ed. 1966). This notion of linking judicial salaries to a commodity to adjust for inflationary fluctuations affecting the value of money demonstrates an early understanding of the potential need for some kind of automatic cost of living increase. Cf. LAWRENCE HENRY GIPSON, THE COMING OF THE REVOLUTION, 1763-1775, at 46-54 (Henry Steele Commager & Richard B. Morris eds., 1954). But Madison's concept of linking compensation to a commodity was ultimately rejected for fear that the cited commodity may change in value over time. Will, 449 U.S. at 220. The idea may also have been eliminated from consideration because of the recent failure of a similar plan in Virginia, linking the salary of clergy to a commodity. Id. at 220 n.22.


Framers decided to “leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances.”\textsuperscript{47} While this decision gives Congress the power to set judicial compensation, Hamilton carefully explained that once compensation is set, the Compensation Clause “put[s] it out of the power of that body to change the condition of the individual for the worse.”\textsuperscript{48} Under this system, each judge could “be sure of the ground upon which he stands, and . . . never be deterred from his duty by the apprehension of being placed in a less eligible situation.”\textsuperscript{49}

C. Stage I: Revising Government Salaries and the Introduction of COLAs

Almost two hundred years later, similar issues surrounding the Compensation Clause arose when Congress, seeking a general overhaul of government salaries,\textsuperscript{50} enacted the Postal Revenue and Federal Salary

\textsuperscript{47} \textsc{The Federalist} No. 79 (Alexander Hamilton), supra note 17, at 400. The Framers also considered the different terms of office between the President and federal judges when determining different methods of compensation. \textit{Id.} at 401. Hamilton explained that because the President is “elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to the end of it.” \textit{Id.} Hamilton compared this to judges where, “it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.” \textit{Id.}

\textsuperscript{48} \textit{Id.} at 400. Moreover, [I]n framing the Constitution . . . the power to diminish the compensation of the federal judges was explicitly denied, in order . . . that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support.


\textsuperscript{49} \textsc{The Federalist} No. 79 (Alexander Hamilton), supra note 17, at 401. As observed by Alexander Hamilton, because the judiciary has “no influence over either the sword or the purse,” it has “neither Force nor Will, but merely judgment.” \textsc{The Federalist} No. 78 (Alexander Hamilton), supra note 17, at 393-94.

\textsuperscript{50} \textit{See infra} text accompanying notes 51-55. In addition, the Supreme Court decided several judicial compensation cases beginning in 1920. \textit{Evans v. Gore}, 253 U.S. 245 (1920), first established that Congress could not discriminate against the judiciary through compensation diminutions in the form of taxes. \textit{Id.} at 264. In \textit{Evans}, the Court held that a federal income tax enacted after the petitioning judge joined the bench was unconstitutional under the Compensation Clause. \textit{Id.} at 246-47, 263-64. In \textit{Miles v. Graham}, 268 U.S. 501 (1925), “[t]he Court subsequently extended the holding of \textit{Evans} to all federal taxes, whether enacted before or after a judge was appointed.” \textit{See} Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners, supra note 41, at 11. Miles was highly criticized and was ultimately overruled by \textit{O'Malley v.
Act of 1967. Then, to strengthen the Postal Revenue and Federal Salary Act, Congress passed the Executive Salary Cost-of-Living Adjustment Act in 1975, which adjusted salaries for inflation. The Executive Salary Cost-of-Living Adjustment Act provided high-level executive employees, members of Congress, and judges with automatic annual COLAs unless expressly rejected by Congress. Yet, in practice, these two acts did not provide a stable, recurring assessment of judicial salaries. Instead, Congress frequently rejected its own COLA increases, as well as COLA adjustments for top executive members and the judiciary.

In 1980, a group of judges filed suit in United States v. Will, thereby affording the Supreme Court the opportunity to address whether Congress’ actions to alter statutorily mandated COLA increases violated the Compensation Clause. The Supreme Court reinstated the COLAs

Woodrough, 307 U.S. 277 (1939), where the Court held that “[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.” Id. at 282.


The Commission “commonly referred to as the ‘Quadrennial Commission,’ ... was composed of private sector members appointed by the President, leaders of the Senate and House of Representatives, and the Chief Justice of the United States.” AM. BAR ASS’N & FED BAR ASS’N, supra note 2, at 5; see also Pub. L. No. 90-206, § 225, 81 Stat. at 642. From 1968 through 1988, the Commission met every four years to make salary recommendations and sent its recommendations to the President. AM. BAR ASS’N & FED BAR ASS’N, supra note 2, at 5. When the President then made his recommendations to Congress, they became law by default unless Congress expressly objected. Id.


See id. (linking the COLAs for judges to any COLAs allotted to general federal workers). The 1967 Federal Salary Act Quadrennial Commission review process also operated in parallel with the newly-instituted COLAs. Postal Revenue and Federal Salary Act of 1967, § 225, 81 Stat. at 642-45.

AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 5-6.

Id. at 8.


Id. at 202.
for two of the four instances in which their denial was appealed. The Court held that denying judges these 1976 and 1979 pay adjustments violated the Compensation Clause.

The Court differentiated between the four instances by considering when the judges' interests became vested. 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." Therefore each issue turned on whether the congressional "blocking laws," intended to cancel out the COLA adjustments, took effect before or after judges' interests vested. The Court's rationale for the vesting test was to prevent the judicial branch from "command[ing] Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress."

In 1994, the District of Columbia Circuit Court reached the same result where a COLA provision applied to members of Congress. In *Boehner v. Anderson*, member of Congress John Boehner claimed that the COLA provision of the 1989 Ethics Reform Act violated the Twenty-seventh Amendment, which states that no law "varying compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened." Here, the

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59. Id. at 226, 229-30.
60. Id. at 226, 230. The Court clarified that "[t]he inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for 'nondiscriminatory' reductions." Id. at 226.
61. Id. at 228-29.
62. Id. at 229; see also United States v. More, 7 U.S. (3 Cranch) 159, 167 (1805) (holding that there was a violation of the Compensation Clause because the fee system in dispute was already in place before Congress repealed it). Notably, the *Will* Court did not specifically address the United States Court of Claims decision in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert denied*, 434 U.S. 1009 (1978). In *Atkins*, the Court of Claims held that "the Constitution affords no protection from such an indirect, nondiscriminatory lowering of judicial compensation, not involving an assault upon the independence of judges." Id. at 1051. Furthermore, "[b]y concluding that Congress could constitutionally repeal a proposed cost-of-living increase that had not yet taken effect, the Court indicated that the judicial Compensation Clause did not obligate Congress to counter the effects of inflation on a regular basis." W. Parker Moore, *Hoodwinked by Hatter: Creating a Test for Constitutional Waivers of Sovereign Immunity to Pre-Judgment Interest Awards*, 27 VT. L. REV. 1061, 1078 (2003).
64. Id. at 228; see also AM. BAR ASS'N & FED. BAR ASS'N, supra note 2, at 8 (discussing Congress' reaction to *Will* and subsequent controversy regarding COLAs).
66. 30 F.3d 156 (D.C. Cir. 1994).
67. Id. at 158.
68. U.S. CONST. amend. XXVII.
COLA took effect during the subsequent congressional term, and, thus, the Supreme Court held that this was not a violation of the Twenty-seventh Amendment.\textsuperscript{69}

The struggle to maintain a fairly compensated judiciary continued beyond the immediate aftermath of \textit{Will}.\textsuperscript{70} To address lingering problems with salary instability and attrition rates of high-level government officials,\textsuperscript{71} Congress passed the Ethics Reform Act of 1989 (Ethics Act).\textsuperscript{72} The Ethics Act significantly altered the boundaries of judicial compensation.\textsuperscript{73} The Ethics Act “revised the mechanism [for providing COLAs to] judges, Members of Congress, and other high-level officials” by treating all three as one group, meaning that if members of Congress received the COLA, members of the judiciary and select executive branch employees would receive the same increase at the same time.\textsuperscript{74} These high-level government officials would now receive COLAs in accordance with the increases afforded to general government employees through the Employment Cost Index (ECI).\textsuperscript{75}

\textsuperscript{69} Boehner, 30 F.3d at 163.

\textsuperscript{70} See discussion \textit{supra} Parts II.C.-D.

\textsuperscript{71} AM. BAR ASS'N & FED. BAR ASS'N, \textit{supra} note 2, at 9. The Bipartisan Task Force on Ethics identified the failure to implement COLAs as “the single, most important explanation for the growing disparity between top salaries in government and the private sector, and the 38\% loss of purchasing power by these officials since 1969.” 135 CONG. REC. H9265 (daily ed. Nov. 21, 1989) (statement of Rep. Martin).

\textsuperscript{72} Pub. L. No. 101-194, 103 Stat. 1716 (1989) (stating that the official purpose of the act was “to amend the Rules of the House of Representatives and the Ethics in Government Act of 1978 to provide for Government-wide ethics reform, and for other purposes”).


\textsuperscript{73} See \textit{supra} text accompanying notes 60-63. Additionally, the Citizens’ Commission of Public Service and Compensation replaced the Quadrennial Commission as the mechanism for continuing compensation evaluation. Ethics Reform Act of 1989, § 701, 103 Stat. at 1763-67. The Commission of Public Service and Compensation consisted of eleven members. \textit{Id.} § 701(b), 103 Stat. at 1763-64. The executive, legislative, and judicial branches appointed six members. \textit{Id.} Five members were selected from the general public by using voter registration lists and the Administrator of the General Services Administration facilitated the process. \textit{Id.}

\textsuperscript{74} See AM. BAR ASS'N & FED. BAR ASS'N, \textit{supra} note 2, at 9.

\textsuperscript{75} See 28 U.S.C. § 461(a) (2000) (noting, however, that any such Employment Cost Index (ECI) adjustment cannot “exceed the percentage adjustment taking effect in such calendar year under Section 5303 of Title 5 in the rates of pay under the General Schedule”).
new methodology for assessing COLAs was to operate in conjunction with General Schedule employee salary adjustments, unless the President determined that severe economic circumstances precluded an allotment of COLAs.

Additionally, the Ethics Act significantly limited activities that provided alternative sources of income to judges, including honoraria, teaching, and writing. Judges could no longer receive payment for any "appearance, speech or article." However, judges could still earn limited outside income by teaching law school courses, for example, as long as those earnings did not exceed the specified annual threshold.

Although the Ethics Act promised a more consistent methodology to counter the effects of inflation on judicial salaries, the reality was quite different. Judges received COLA increases only half of the time from 1993 to 2003, despite the ECI's indication to the contrary. Even though judges did not receive these expected COLAs, the Ethics Act continued to impose strict honoraria limitations. Moreover, the Commission of Public Service and Compensation established by the Ethics Act never became functional, nor were funds ever appropriated to operate the Commission. Therefore, the new Commission did not monitor

The ECI, established by the Bureau of Labor Statistics, is:

- a measure of the change in the cost of labor, free from the influence of employment shifts among occupations and industries. The compensation series includes changes in wages and salaries and employer costs for employee benefits.
- The wage and salary series and the benefit cost series provide the change for the two components of compensation.


76. See Ethics Reform Act of 1989, § 701(f), 103 Stat. at 1765.


78. 5 U.S.C. app. §§ 501(b), 505(3).

79. Id. § 501(a). Additionally, judges' transportation, food, and lodging expenses are exempted from the prohibition on honoraria. See 31 U.S.C. § 1353(a) (2000). All outside income may not exceed fifteen percent of the Executive Level II pay rate for that fiscal year. COMM. ON FIN. DISCLOSURE, supra note 32, at 20.

80. See AM. BAR ASS'N & FED. BAR ASS'N, supra note 2, at 9-10.

81. Id.


83. AM. BAR ASS'N & FED. BAR ASS'N, supra note 2, at 10 ("[T]here has been no systematic review of the adequacy of Federal judicial salaries . . . since 1998, the date of the last Quadrennial Commission.").
government employee salaries and did not offer recommendations for reform, as was originally contemplated by the Act. 84

D. Stage II: Judicial Interpretations of the Compensation Clause: Williams and Hatter

In Williams v. United States, 85 ten years after codification of the Ethics Act, a group of judges filed suit in the United States District Court for the District of Columbia. 86 The judges argued that in 1995, 1996, 1997, and 1999, congressional "blocking laws" canceled out the COLA increases that the judges were intended to receive under the Ethics Act. 87 These judges argued that the blocking laws violated the Compensation Clause because Congress was diminishing judicial salaries. 88

In 1999, the United States District Court for the District of Columbia granted summary judgment in favor of the plaintiffs. 89 On appeal, the United States Court of Appeals for the Federal Circuit held that COLAs established under the Ethics Act did not "vest" until the first day of the applicable fiscal year, and, thus, Congress may lawfully deny COLA adjustments as long as Congress passes the corresponding blocking legislation prior to this key date. 90 Therefore, the Williams court adopted Will's narrow definition of "vesting," and left the door open for Congress to revoke its past compensation increases to the judiciary as long as

84. See id. at 9-10.
86. Id. at 53.
88. Id.
89. Williams, 48 F. Supp. 2d at 65. Williams is actually a consolidation of two cases, one involving the denial of COLAs from 1995 to 1997, and the second a response to the same COLA denial in 1999. Petition for Writ of Certiorari at 5-6, Williams, 535 U.S. 911 (No. 01-175). The two cases were consolidated when the government appealed the declarations of summary judgment to the Federal Circuit. Id. at 6.
90. Williams, 240 F.3d at 1039-40. Further, the Federal Circuit held that this blocking law, commonly referred to as Section 140, was no longer good law because it was only intended to remain viable through the 1982 fiscal year. Id. at 1026-27.

The court in Williams also asserted that even if Section 140 was determined to be permanent, binding legislation, it is preempted by the more recent legislation under the Ethics Reform Act of 1989. Id. at 1027. The Court explained that the 1989 Act was enacted after Section 140, and the 1989 Act, by providing a specific process by which federal judges are to become eligible for COLAs, is inconsistent with the general ban on pay increases established by Section 140. Thus, should there be any disagreement that Section 140 died according to its terms, the 1989 Act controls, rendering the government's reliance on Section 140 moot.

Id.
Congress passed a blocking law before the amount was technically "due and payable." 91

In response to the Federal Circuit's holding in Williams, plaintiffs filed a motion for leave to file a second petition for rehearing in light of the Supreme Court's recent holding in United States v. Hatter. 92 In Hatter, another group of judges asserted that the Compensation Clause precluded the federal government from levying certain Social Security and Medicare taxes on federal judges who were in office prior to Congress' extension of a general tax on federal judges' salaries. 93 Although the Court held that general Medicare taxes were constitutionally applicable to judges, the Court also held that the Social Security taxes "singl[ed] out judges for disadvantageous treatment" and, therefore, violated the Compensation Clause. 94 The Court noted that such discrimination need not be the result of a conscious effort by Congress to "intimidate, influence, or punish [judges]." 95 Instead, the Court explained that "[i]f the Compensation Clause is to offer meaningful protection . . . we cannot limit that protection to instances in

91. Id. at 1039; see also United States v. More, 7 U.S. (3 Cranch) 159, 161-62 (1803) (declaring a violation of the Compensation Clause because the fee system in dispute was already in place before Congress repealed it); cf. Petition for Writ of Certiorari, supra note 89, at 10 (arguing that the Compensation Clause should be read broadly, in a way that achieves its objectives).

92. 532 U.S. 557 (2001); Petition for Writ of Certiorari, supra note 89, at 8. Additionally, the Williams decision spurred Congressional action to reenact the controversial Section 140. Judiciary Appropriations Act, 2002, Pub. L. No. 107-77, § 305, 115 Stat. 780, 783 (codified as amended at 28 U.S.C.A. § 461 note (West Supp. 2005) (Salary Adjustments for Justices and Judges)). In the new version of the statute, Congress included explicit language that the provision was permanent binding law. Id. This language eliminated the previous debate over Section 140. See id.

93. Hatter, 532 U.S. at 564-65. Hatter overruled the Evans holding that the Compensation Clause guards against any diminution of judicial salaries, including general taxation. Id. at 567. The Court stated that "[w]e now overrule Evans insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax." Id. Therefore, the Hatter court ruled that the Medicare taxes imposed were constitutionally viable because of their general nature. Id. at 561.

94. Id. at 576. The Medicare taxes were held to be constitutional under the Compensation Clause because taxes of a general nature apply to judges just like any other citizen. Id. at 571-72. Similar reasoning was used earlier in O'Malley v. Woodrough, 307 U.S. 277 (1934), where the Court held that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." Id. at 282.

95. Hatter, 532 U.S. at 577.
which the Legislature manifests . . . direct hostility to the Judiciary. 96 Thus, Hatter offered an alternative means of analyzing Williams, focusing on the discriminatory nature of the blocking laws rather than the time at which the COLAs became "vested." 97

Meanwhile, Williams continued to work its way through the courts. After the Federal Circuit denied a rehearing, 98 plaintiffs petitioned the Supreme Court for certiorari in 2001. 99 The petition was denied. 100 But Justice Breyer, joined by Justices Scalia and Kennedy, provided an unusual, strongly worded dissent discussing the importance of hearing Williams to resolve unsettled constitutional issues. 101

The dissent asserted that the Court should hear Williams in order to consider whether the Ethics Act contained precise language as to create an "expectation" protected by the Compensation Clause. 102 Justice Breyer further asserted that if "expectation" was part of the issue, then

96. Id.
97. Id. at 576-77. Yet there is significant criticism of Hatter. For example, Professor Vermeule argues that the Court erred in Hatter by creating an antidiscrimination rule and not following a stricter textual reading of the Compensation Clause. See Vermeule, supra note 15, at 504. Professor Vermeule explains that

[the Compensation Clause is best understood strictly as a substantive rule, not an antidiscrimination rule. The Court neither is nor can be serious about policing substitutes for "direct" attacks on judicial compensation, and the ease with which judges may manipulate the baseline against which discrimination is measured entails that a nondiscrimination test both produces excessive scope for judicial bias and hampers oversight by nonjudicial observers.]

Id. Professor Vermeule further remarks that although judges can only block unconstitutional legislative actions to diminish judicial salaries rather than independently implementing salary increases, this only “diminishes . . . the scope of judicial opportunities to self-deal, not the severity of the resulting harms.” Id. at 522. Professor Vermeule acknowledges that political pressures may keep judges from self-dealing in extreme cases, but asserts that “those pressures would not be thought sufficient to alleviate the duty of recusal for a single judge with a direct financial stake in the case.” Id. at 522-23.

100. Williams v. United States, 535 U.S. 911, 911 (2002). The Clerk of the Supreme Court explains that one must exercise caution, however, when trying to interpret an outcome based on voting to grant or deny certiorari. Interview with General William K. Suter, Clerk, Supreme Court of the United States, in Wash., D.C. (Oct. 19, 2004). General Suter noted that just because a Justice voted to grant or deny does not in any way establish the way in which he or she would vote on the substantive issues. Id.
101. See Williams, 535 U.S. at 911 (Breyer, J., dissenting).
102. Id. at 918. Justice Breyer explained that the issue in Williams may be framed as "whether the 1989 statute is sufficiently precise and definite to have created an 'expectation' that the Compensation Clause protects." Id.
Will was not controlling, and the Court should grant certiorari to review Williams. Justice Breyer also suggested that the denial of COLAs in Williams may be constitutionally questionable based on its singular focus on judges in light of the Court's 2001 holding in Hatter.

Additionally, the Williams dissent from denial of the petition for certiorari directly addressed prudential concerns that may have affected the Court's decision not to hear the case. Justice Breyer acknowledged that hearing a case that could directly affect his own compensation gave him pause. But he noted that under some circumstances, the Rule of Necessity requires judges to decide cases where they admittedly have an

103. Williams, 535 U.S. at 918 (Breyer, J., dissenting). Justice Breyer further expands upon his point that "expectation" was not considered in Will because to read that opinion as the lower court read it would render ineffectual any congressional effort to protect judges' real compensation, even from the most malignant hyperinflation . . . . Indeed, that reading would permit legislative repeal of even the most precise and definite salary statute—any time before the operative fiscal year in which the new nominal salary rate is to be paid. I very much doubt that the Court in Will intended these consequences.

Id.

Moreover, petitioner's brief asserted that while Congress is generally free to rescind its legislation, exceptions exist "where a right or entitlement has been created by the initial enactment." Petition for Writ of Certiorari, supra note 89, at 11-12 (citing United States v. Winstar Corp., 518 U.S. 839 (1996)). Finally, Justice Breyer noted that Section 140 was not controlling in Williams because it was not codified during the years in question. Williams, 535 U.S. at 918-19 (Breyer, J., dissenting).

104. Williams, 535 U.S. at 918-19 (Breyer, J., dissenting). (Justice Breyer references Hatter where the Court declared a Social Security tax on judicial salaries unconstitutional under the Compensation Clause because the tax "almost exclusively singled out federal judges"). Id. (quoting United States v. Hatter, 532 U.S. 587, 564 (2001)).

105. Id. at 919.

106. Id. In his dissent, Justice Breyer admitted that the Supreme Court Justices "face the serious embarrassment of deciding a matter that would directly affect our own pocketbooks; and, in doing so, we may risk the public's high opinion of the Court insofar as that opinion rests upon a belief that its judges are not self-interested." Id. Such concerns arise whenever a branch of government is involved in setting its own compensation. James Madison discussed this dilemma when he introduced "what would become the Twenty-seventh Amendment." Vermeule, supra note 15, at 506. Quoting Madison, Vermeule explained that "although political checks are largely sufficient to prevent the grossest forms of legislative self-dealing through salaries, 'there is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets.'" Id. (quoting ANNALS OF CONG. 440 (Joseph Gales ed., 1834)). Thus, even if there is a political check in place, the risk remains that public perception may be that of impropriety. Id. But Professor Vermeule warns that even these political checks may not be present for the judicial branch, as they are for the legislative, because federal judges are "indirectly elected official[s]" with life tenure, and thus may be "removed from [significant] political oversight" as compared to the members of Congress. Id.
interest when "'no provision is made for calling another in, or where no one else can take his place.'”

The Williams dissent from the denial of the petition for certiorari considered whether Congress could remedy any deficiency in judicial compensation through the Ethics Act mandate “that real judicial salaries will not fall significantly unless those of the typical American worker or the typical civil servant decline significantly as well.” However, Justice Breyer noted that Congress passed blocking laws “about half the time” since the Ethics Act was enacted and that “real salaries of district court judges have declined about 25 percent in the past several decades.”

In addition to the three Justice dissent, several prominent organizations filed amicus briefs in support of the Petitioner encouraging the Supreme Court to hear the case. These included the American Bar Association, twelve state and local bar associations, and the American College of Trial Lawyers. The amicus briefs encouraged the Court to

107. Williams, 535 U.S. at 919 (Breyer, J., dissenting) (quoting United States v. Will, 449 U.S. 200, 214 (1980)) (explaining that sometimes judges must hear difficult cases when no one means of attaining justice is available). Justice Breyer noted:

Nor shall judges, who are called upon to protect the least popular cause and the least popular person where the Constitution demands it, be moved by potential personal embarrassment. Whenever a court considers a matter where public sentiment is strong, it risks public alienation. But the American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity.

Id. Moreover, throughout history the bench has recognized the idea of judicial necessity. For example, in 1870, the Supreme Court of Pennsylvania noted that “where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be.” Philadelphia v. Fox, 64 Pa. 169, 185 (1870); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

108. Williams, 535 U.S. at 919 (Breyer, J., dissenting).

109. Id. at 919-20. Additionally, Justice Breyer noted that “[t]he Compensation Clause . . . is not concerned with the absolute level of judicial compensation,” and therefore the true issue in Williams was whether “a congressional decision in 1989 . . . protect[ed] federal judges against undue diminishment in real pay by providing cost-of-living adjustments to guarantee that their salaries would not fall too far behind inflation.” Id. at 920.

Similarly, while many Americans consider judicial salaries to be at the high-end of the spectrum, General William Suter, Clerk of the Supreme Court, explains that most judges are not “doing this for the money,” and that “many judges leave the courtroom, take off their robes, put on an old sweater with a hole in it, get in an old car and drive home, just like anybody else.” Interview with General William K. Suter, supra note 100.

110. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioners, Williams, 535 U.S. 911 (No. 01-175); Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners, supra note 41; Brief Amici Curiae of National, State and Local Bar Ass’ns in Support of Petitioners, Williams, 535 U.S. 911 (No. 01-175).

Participating bar associations included: Boston Bar Association, Connecticut Bar Association, Federal Bar Council, Los Angeles County Bar Association, New York County Lawyers’ Association, Philadelphia Bar Association, Chicago Bar Association,
hear Williams in order to resolve the ongoing judicial compensation gridlock.\textsuperscript{111}

\textbf{E. Stage III: Post-September 11 Attempts at Reform}

Prior to September 11, it appeared that significant compensation reform may occur. The 106th Congress doubled the President’s salary from $200,000 to $400,000, indicating a potential openness for the re-evaluation of compensation of other high-level government employees.\textsuperscript{112} But the repercussions of September 11 changed the focus of the nation to urgent matters of national security.\textsuperscript{113} As a result, attention to judicial compensation reform decreased as the demands of the war on terror quickly gained priority.\textsuperscript{114}

Judicial compensation again received publicity in 2003 with the establishment of the "Volcker Commission."\textsuperscript{115} Congress established this commission to reexamine the state of public service opportunities and

\footnotesize{Federal Bar Association, Illinois State Bar Association, The Association of the Bar of the City of New York, Ohio State Bar Association, and The Bar Association of San Francisco. Brief Amici Curiae of National, State and Local Bar Ass’ns in Support of Petitioners, supra, at 1. With the ABA’s membership reaching over 400,000, the membership of the conglomeration of state and local bar associations reaching over 250,000 members, and the American College of Trial Lawyers’ invitation-only membership of exceptional trial lawyers, these groups represent a substantial portion of the nation’s legal community. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioners, supra, at 1; Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners, supra note 41, at 1; Brief Amici Curiae of National, State and Local Bar Ass’ns in Support of Petitioners, supra, at 1.

111. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioners, supra note 110, at 1-2 (attempting to “assist the Court in understanding the profound impact of continuing erosion of the compensation of federal judges”); Brief Amicus Curiae of the American College of Trial Lawyers in Support of Petitioners, supra note 41, at 1-2 (presenting policy considerations pertaining to the diminution of judicial salaries); Brief Amici Curiae of National, State and Local Bar Ass’ns in Support of Petitioners supra note 110, at 1-2 (representing the bar because of the “damage caused to a independent judiciary by inadequate compensation and the demoralizing effect of a diminishment of compensation of federal judges”).


114. AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at 2.

115. Id. at 2 n.5. (explaining that the Volcker Commission is a non-partisan organization of several former government leaders and is formally called the National Commission on the Public Service).}
compensation.\textsuperscript{116} The Volcker Commission determined that "[j]udicial salaries are the most egregious example of the failure of federal compensation policies."\textsuperscript{117} Echoing the sentiment of the Volcker Commission, the American Bar Association (ABA) and Federal Bar Association (FBA) also published a "white paper" in 2003 detailing the urgent need for judicial compensation reform.\textsuperscript{118} The white paper received considerable attention from members of the judiciary, including former Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Breyer.\textsuperscript{119}

These actions within the judicial community spurred Congress to reconsider judicial compensation reform. On May 7, 2003, Senator Orrin Hatch introduced a bill supporting a 16.5\% increase in judicial salaries for all Article III, bankruptcy, and magistrate judges.\textsuperscript{120} The following week Representatives Henry Hyde and John Conyers introduced identical legislation in the House of Representatives.\textsuperscript{121} Senator Hatch's bill received approval from the Senate Judiciary Committee in late May 2003, and it was added to Senate Bill 1585, an appropriations bill for Commerce, Justice, the Judiciary, and Related Agencies.\textsuperscript{122} Senate Bill 1585 was then incorporated into a conference report,\textsuperscript{123} at which point the judicial pay provisions were eliminated as part of a compromise between the House and Senate.\textsuperscript{124} Although judicial compensation reform was ultimately unsuccessful, the issue received significant attention from

\begin{itemize}
  \item \textsuperscript{116} Id. at 2.
  \item \textsuperscript{117} NAT'L COMM'N ON THE PUB. SERV., supra note 13, at 22.
  \item \textsuperscript{118} See AM. BAR ASS'N & FED. BAR ASS'N, supra note 2.
  \item \textsuperscript{119} See Walsh, supra note 1. The ABA/FBA white paper was released during a press conference at the Supreme Court, attended by former Chief Justice Rehnquist, Justices Scalia, Souter, and Breyer, the President of the American Bar Association, and the President of the Federal Bar Association. Id.
  \item \textsuperscript{120} S. 1023, 108th Cong. (2003). Senators Harry Reid and Patrick Leahy also introduced bills to raise judicial salaries in 2003, but neither bill received bipartisan support, or the support of President Bush. American Bar Association, Independence of the Judiciary: Judicial Resources: Judicial Compensation and Court Funding, http://www.abanet.org/poladv/priorities/judicial_pay.html (last modified Apr. 13, 2005). Senator Reid's bill, S. 1100, 108th Cong. (2003), called for a twenty-five percent increase in judicial salaries to effectively close the salary gap created by inflation since 1969. Id. Senator Leahy's bill, S. 787, 108th Cong. (2003), provided for a six percent raise while adding additional restrictions onto judges' attendance of educational seminars. Id.
  \item \textsuperscript{121} H.R. 2118, 108th Cong. (2003).
  \item \textsuperscript{122} S. 1585, 108th Cong. § 305 (2004).
  \item \textsuperscript{123} H.R. 2673, 108th Cong. (2004).
  \item \textsuperscript{124} See Am. Bar Ass'n, supra note 120, at 3-4.
\end{itemize}

II. A BROKEN SYSTEM: A LOOK AT THE UNRESOLVED ISSUES SURROUNDING JUDICIAL COMPENSATION AND THE COMPENSATION CLAUSE

A. Remaining Legal Issues

The United States Constitution establishes that all judges “shall” receive “at stated Times” compensation “which shall not be diminished during the Continuance in Office.” Because this language is anchored by the text of the Constitution and supported by the debates and comments of the Framers, strong binding authority supports it. However, differing interpretations of the text of the Compensation Clause have historically led to conflict between the judiciary and Congress as to the limitations Congress may place on judicial compensation.

Williams posed the most recent debate over a potential violation of the Compensation Clause. In Williams, the concept of “vesting” supports the United States Court of Appeals for the Federal Circuit’s holding that Congress’ denial of judicial COLAs was not a violation of the Compensation Clause. Therefore, each COLA does not vest until the first day of the applicable fiscal year, allowing Congress to deny COLA adjustments as long as it passes the appropriate legislation before the vesting date. Because the Supreme Court denied certiorari in 2002, the

125. See Walsh, supra note 1.
128. E.g., THE FEDERALIST NO. 79 (Alexander Hamilton), supra note 17, at 400.
130. See Vermeule, supra note 15, at 501-02. Professor Vermeule describes the inherent conflict between the legislative and judicial branches as created by “structural tensions between aggrandizement and self-dealing.” Id. at 501. He further explains that if no branch enjoys untrammeled power to set its own compensation, some institution will necessarily enjoy the power, shared or exclusive, to set its rivals’ most immediate rewards and penalties. Yet institutional arrangements that avoid the risk of aggrandizement through salary control may well create unacceptable costs on other dimensions. The most obvious alternative—diminishing leverage, or protecting independence, by allowing institutions to set their own compensation—creates the competing risk that members of those institutions will use the compensation power to engage in self-dealing.
131. See Williams v. United States, 240 F.3d 1019, 1023 (Fed. Cir. 2001).
132. Id. at 1039-40.
133. Id. at 1039.
Federal Circuit's holding in Williams stands. However, the Williams holding does not resolve all issues surrounding judicial compensation and the denial of COLAs. Below, this Comment discusses several Compensation Clause issues that require future clarification.

1. Reconciling Williams with Hatter

Williams must be reconciled with the Supreme Court's decision in Hatter, issued shortly after the Federal Circuit's decision in Williams. In Hatter, the Court held that while general taxation was permissible upon the judiciary, the Social Security tax at issue in the case "singl[ed] out judges for disadvantageous treatment" and, therefore, violated the Compensation Clause. Hatter stated that discrimination against judges does not have to manifest itself through "direct hostility to the Judiciary" to "intimidate, influence, or punish" judges. Similarly, it is arguable that the judges in Williams were "singl[ed] out" when Congress expressly selected the judiciary alone as the group of federal employees to be denied automatic COLA adjustments during four instances in the 1990s. So even though Congress did not intend to punish the judiciary in Williams, their actions could still be considered discriminatory, and thus unconstitutional under Hatter.

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134. See Williams, 535 U.S. at 911. The Federal Circuit opinion was hesitant to uphold the narrow interpretation of Will's vesting language. See Williams, 240 F.3d at 1040. The court noted that it was "profoundly disappointing" to uphold such an inconsistent compensation system. Id.

135. See Williams, 535 U.S. at 918 (Breyer, J., dissenting); Williams, 240 F.3d at 1040 (Plager, J., dissenting).


137. Hatter, 532 U.S. at 576. Furthermore, the Court rejected the government's argument in Hatter "that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay," because of prior holdings in O'Malley and Will. Id. at 576-77.

138. Id. at 577. The Court further stated that both direct and indirect diminution of judiciary salaries is forbidden: "[T]he Compensation Clause offers protections that extend beyond a legislative effort directly to diminish a judge's pay . . . . Otherwise a legislature could circumvent even the most basic Compensation Clause protection by . . . precisely but indirectly achiev[ing] the forbidden effect." Id. at 569 (citation omitted).

139. See Williams, 535 U.S. at 918-19 (Breyer, J., dissenting). However, the Brief for the United States in Opposition in Williams argued that the Ethics Act also affected "[m]embers of Congress and high-level Executive branch officials," so judges were not entirely singled out. Brief for the United States in Opposition at 21, Williams, 535 U.S. 911 (No. 01-175). Moreover, the government argued that Congress was "entitled" to treat this group of government officials differently than other government employees. Id.

2. **Expectation Interest**

In his *Williams* dissent from the denial of the petition for certiorari, Justice Breyer explained that the way the Court frames an issue could determine whether or not a violation of the Compensation Clause has occurred.\(^{141}\) Justice Breyer stated that the issue in *Williams* could be viewed as "whether the 1989 [Ethics Act] statute is sufficiently precise and definite to have created an 'expectation' that the Compensation Clause protects."\(^{142}\) Consequently, it can be argued that the Ethics Act guarantees COLA adjustments to the judiciary unless a "'national emergency' or 'serious economic conditions affecting the general welfare'" comes about and limits salary adjustments according to the General Schedule.\(^{143}\) Therefore, there is an expectation by judges that they will receive a COLA adjustment unless one of these two circumstances occur.\(^{144}\) Failure to meet this expectation could cause further attrition from the bench, or shrink the pool of applicants for consideration.\(^{145}\) However, because *Williams* eliminates that expectation,

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Redish discussed the application of the Compensation Clause to judicial support services, such as law clerks and secretaries. *Id.* He found that the Compensation Clause "does not extend to nonsalary support services under any circumstances," and that the judiciary is not even protected against "cuts in support services unambiguously designed as retaliation for a specific decision or series of decisions in the federal courts." *Id.* Professor Redish went on to theorize that the Compensation Clause set out a bright line rule "probably in an attempt to avoid the very uncertainty and political friction that would plague an inquiry into the retributive nature of congressional action." *Id.*

However, this argument runs contrary to the *Hatter* decision. The *Hatter* Court stated that Congress does not have to manifest "direct hostility to the Judiciary" to violate the Compensation Clause, creating the possibility that an even milder attempt to "punish" the judiciary could be held unconstitutional. *See Hatter*, 532 U.S. at 577. The key in applying this standard in *Hatter* is discrimination; the judiciary must be *singled out* as a group. *Id.* at 576. Professor Redish notes that such an "'antidiscrimination' interpretation of the Compensation Clause" could result by interpreting the Compensation Clause in much the same way as the Free Exercise Clause, thus protecting judicial salaries from unintended discriminatory treatment. Redish, *supra*, at 706; *see also* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990). Moreover, Professor Redish acknowledged that "'[w]hile the antidiscrimination model appears difficult to reconcile with the seemingly absolute terms of the Compensation Clause, it might be defended as a relatively easily applied compromise that fulfills the core independence concerns underlying the clause.'" Redish, *supra*, at 706.

142. *Id.*
143. *Id.*
144. *See id.*
145. *See Rehnquist, supra* note 14; *see also* Vermeule, *supra* note 15, at 535.
individuals must now take this information into account when considering a federal judgeship. In Boehner, it appears unlikely that the expectation argument would prevail. In Boehner, a member of Congress challenged the Ethics Act COLA mechanism, claiming that it violated the Twenty-seventh Amendment, which states that "no law varying the compensation . . . shall take effect, until an election of Representatives shall have intervened." The United States Court of Appeals for the District of Columbia held that the Ethics Act COLA did not violate the Twenty-seventh Amendment. Although Boehner is not a Supreme Court decision, there is again a focus on timing and vesting. So it is unlikely that the expectation argument would be successful in Williams, even if the issue was framed to examine expectation interest.

In addition, it remains unclear why compensation should be defined as "vested" only when it is "due and payable." Although the Court feared that holding otherwise would allow the judiciary to "command" Congress, it ignored the argument that future interests are a property interest, which could vest upon the statute's enactment.

146. See Vemeule, supra note 15, at 537 (discussing the expectations argument in Hatter, and noting that any compensation expectation would be revised by candidates for judgeship after a judicial decision made such limitations clear).
147. See Boehner v. Anderson, 30 F.3d 156, 162-63 (D.C. Cir. 1994).
148. Id. at 158.
149. U.S. CONST. amend. XXVII.
150. Boehner, 30 F.3d at 163.
151. Id. at 162.
152. Id. at 163.
153. United States v. Will, 449 U.S. 200, 228-29 (1980) (defining vesting as due and payable); see Williams v. United States, 240 F.3d 1019, 1039 (Fed. Cir. 2001) (defining vesting as due and payable); Vermeule, supra note 15, at 525 ("[T]he Will Court never quite gives a reason, or a valid reason" for deciding upon this characterization of "vesting.").
154. See Will, 449 U.S. at 228; Vermeule, supra note 15, at 525. To clarify, the reason why vesting remains at issue is that if the vesting rule provided that increases vest at the time of enactment then the intent would be, not merely announced for the future, but accomplished in the present, just as entering an executory contract can bind a party now to an obligation in the future. In that case the decision would, as of the time of enactment (also the time of vesting), no longer be one that the Constitution commits exclusively to Congress.

Id. Yet Will refutes the future interests argument asserted by Petitioners in Williams:
The Petitioner’s Brief in Williams raised the issue that there is a significant risk of losing other elements of judicial compensation, such as retirement benefits, if Congress passed a law that expressed intent in a previously codified law, and the concept of future interests is not taken into consideration. Petitioners suggested that Congress may be able to eliminate judicial retirement benefits prior to a judge’s retirement because “retirement benefits are neither determined nor payable until the judge retires.” Retirement benefits are a significant part of a judge’s compensation package. Diminution of such benefits through judicial interpretation of Will’s vesting language presents a serious concern for judges. Thus, under the Will test, Congress could constitutionally revoke judges’ retirement benefits if Congress codifies the legislation prior to the vesting date.

B. Prudential Concerns

In addition to interpreting the language of the Compensation Clause, the nature of the judiciary as an independent, non-political branch of government adds additional complexity to the resolution of the judicial compensation issue. Justice Breyer admittedly acknowledged that granting certiorari in Williams would create the “serious embarrassment of deciding a matter that would directly affect our own pocketbooks.” By determining its own compensation, the Court would create a delicate situation that “may risk the public’s high opinion of the Court insofar as that opinion rests upon a belief that its judges are not self-interested.”

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The Court’s decision in Will... did not use the term ‘vest’ in that technical sense, based on arcane principles governing future interests. To the contrary, the Court plainly used the word “vest” in Will as a shorthand to state the constitutional rule that judicial salary increases become irrevocable only once they take effect.

Brief for the United States in Opposition, supra note 139, at 17-18.

156. Id.
158. Petition for Writ of Certiorari, supra note 89, at 10-11.
159. See id. at 12.
161. Id.
162. Id. Professor Vermeule agrees that the Compensation Clause doctrine should be restructured to take into account the... risk of judicial self-dealing that arises when judge-plaintiffs file suits to increase their compensation, suits that are heard by judge-adjudicators who have a direct or indirect financial interest in the proceedings and who would be disqualified from sitting, were it not that no alternative adjudicator is available.

Vermeule, supra note 15, at 504.
Arguably, Congress is in the same uncomfortable situation in making decisions regarding its own compensation.\(^{163}\) The Constitution explicitly states that Congress alone has the ability to appropriate funds.\(^{164}\) Therefore, the legislative branch receives both the benefits, and possible burdens, of such a power.\(^{165}\) The judicial branch, however, was designed to be an independent, apolitical mechanism.\(^{166}\) The Rule of Necessity may require a self-interested judiciary to decide a case where "no provision is made for calling another in, or where no one else can take his place."\(^{167}\) But Congress can help the judiciary resolve the dispute over judicial compensation. Congress is in no way precluded from acting on the judiciary's behalf; in fact, such actions are fully within Congress' power.\(^{168}\) Another branch of government suggesting the increase would mitigate concerns about the public's perception of judicial self-interest.\(^{169}\)

However, in his dissent from the denial of the petition for certiorari in Williams, Justice Breyer noted Congress' lack of inclination to resolve the judicial compensation issue.\(^{170}\) Justice Breyer noted that Congress

\(^{163}\) U.S. CONST. art. I, §§ 6-7.

\(^{164}\) Id. Article I, Section 7 states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills." Id.

\(^{165}\) See id.

\(^{166}\) See Redish, supra note 140, at 697. The author explains that the Constitution set out to create "pragmatic balances" between the legislative and judicial branches:

On the one hand, the Constitution's framers consciously chose to insulate members of the federal judiciary from at least the most acute forms of potential political pressure by expressly providing for the protection of their salary and tenure. On the other hand, the framers simultaneously provided the groundwork to facilitate the exercise of seemingly substantial congressional control of the jurisdiction of the federal courts, thereby potentially undermining the very independence expressly provided to the judges of those courts.

\(^{167}\) Id. at 697-98 (footnote omitted).

\(^{168}\) Williams, 535 U.S. at 919 (Breyer, J., dissenting) (quoting United States v. Will, 449 U.S. 200, 214 (1980)).

\(^{169}\) See U.S. CONST. art. III, § 1. Furthermore, Congress' insistence on tying its own COLA to those of the apolitical judicial branch may be part of the dilemma. According to the Brief of the American Bar Association

[the crux of the problem is congressionally-imposed linkage of judicial salaries protected by Article III with other salaries—particularly those of members of Congress—that do not enjoy such constitutional protection. Thus, federal judges have borne the consequences of the political reluctance of Congress to increase its own pay, or even to accept previously mandated COLAs.

\(^{170}\) See Vermeule, supra note 15, at 501-02.

\(^{170}\) See Williams, 535 U.S. at 919-20 (Breyer, J., dissenting). In fact, Congress is not constitutionally obligated to make adjustments to judicial salaries because "as long as
passed blocking laws "about half the time" since the Ethics Act was enacted and that "real salaries of district court judges have declined about 25 percent in the past several decades." Therefore, Justice Breyer seemed to suggest that if reform were to take place, it would likely be up to the judiciary to take the necessary steps.

As of October 2004, these concerns appear justified. Both houses of Congress considered legislation authorizing increases in judicial salaries for all Article III, bankruptcy, and magistrate judges, but no significant reform became law. Nevertheless, federal judges did receive increases from 2004 though 2006. At best, it appears that Congress continues to operate under an inconsistent, sporadic model of compensation adjustments and COLA allocations.

Congress has not reduced judicial salaries, the Compensation Clause is neutral toward congressional action, even when that action may actually undermine judicial independence." Redish, supra note 140, at 701-02.

171. Williams, 535 U.S. at 919-20 (Breyer, J., dissenting).

172. See id. In addition, there is no longer a debate as to the permanency of Section 140 or the clarity of its language; Congress is not "obligated to expend or increase" judicial salaries "except as may be specifically authorized by Act of Congress." 28 U.S.C. § 461 note (2000) (Specific Congressional Authorization Required for Salary Increases for Federal Judges and Justices of the Supreme Court). The previous discrepancy was resolved in Williams when the Federal Circuit definitively held that Section 140 was no longer good law because, as written, it was only intended to remain viable through the 1982 fiscal year. Williams v. United States, 240 F.3d 1019, 1026-27 (Fed. Cir. 2001); see also Williams, 535 U.S. at 918-19 (Breyer, J., dissenting). In response, the 107th Congress reenacted Section 140, including explicit language that the provision was permanent, binding law. See Judiciary Appropriations Act, 2002, Pub. L. No. 107-77, § 305, 115 Stat. 780, 783 (2001) (codified as amended at 28 U.S.C.A. § 461 note (West Supp. 2005) (Salary Adjustments for Justices and Judges). The reinstitution of Section 140, however, creates ambiguity in terms of Congress' likelihood to increase judicial salaries in the future because additional barriers prohibit the automatic disbursement of COLAs as originally stated under the Ethics Act. See Williams, 535 U.S. at 919-20 (Breyer, J., dissenting). This relates to Justice Breyer's concern in Williams, that Congress has often passed blocking laws while real judicial salaries have been decreasing. Id. Therefore, although Section 140 is now clearly good law, the likelihood of receiving automatic COLAs based on the ECI appears no more likely, and is perhaps more unlikely, than it was prior to the Federal Circuit Court's decision in Williams. See id.; see also Bureau of Labor Statistics, supra note 75, at 1.

173. See supra text accompanying note 120.

174. See supra text accompanying note 125.

175. ADMIN. OFFICE OF THE U.S. COURTS, supra note 19.

176. See id.
III. COMMENT: POTENTIAL JUDICIAL COMPENSATION REFORM
SOLUTIONS

A. Breaking the COLA Link

In 2003, the ABA and FBA recommended judicial compensation
reforms to the 108th Congress through a joint white paper.\(^{177}\) The white
paper proposed raising base salaries "to restore denied Employment
Cost Index adjustments for fiscal years 1995-97 and 1999,"\(^{178}\) as detailed
in \textit{Williams},\(^{179}\) and to "ensure [judicial salaries have a] reasonable
relationship with salaries of professionals in comparable jobs."\(^{180}\) The
ABA and FBA also suggested eliminating the link between judicial and
congressional COLAs through an amendment to the Ethics Act.\(^{181}\)

As stated above, however, specific congressional proposals for reform
fizzled.\(^{182}\) Therefore, it appears that Congress seeks to maintain the
status quo—periodic allotments of COLAs while maintaining control to
reverse its decisions as desired.\(^{183}\)

The idea of providing judges with automatic COLAs began with the
Ethics Act.\(^{184}\) Since 1989, however, Congress has passed a series of
blocking laws, essentially converting these "automatic" adjustments into

\(^{177}\) \textit{AM. BAR ASS'N & FED. BAR ASS'N, supra} note 2, at i.
\(^{178}\) \textit{Id.} at 24.
(discussing petitioners' arguments for reinstating COLAs for 1995-1997 and 1999 due to
unconstitutional blocking laws).
\(^{180}\) \textit{AM. BAR ASS'N & FED. BAR ASS'N, supra} note 2, at 24.
\(^{181}\) \textit{Id.} This would entail repealing Section 140, so as to eliminate any specific
requirement for congressional approval of COLAs for federal judges. \textit{Id.} The white
paper also suggested reinstating an advisory body similar to the Quadrennial Commission
to provide a continual reevaluation of federal pay rates. \textit{Id.}
\(^{182}\) \textit{See} discussion \textit{supra} notes 117-22 and accompanying text.
Adjustments for Justices and Judges)). Section 140 was redrafted and codified in 2001, see
\textit{id.}, and the vesting language established in \textit{Will} and interpreted in \textit{Williams} ensures that
such a provision is permissible in terms of the Compensation Clause, see \textit{Williams v. United States}, 240 F.3d 1019, 1029-30 (Fed. Cir. 2001). However, the Petitioner in
\textit{Williams} argued that the interpretation of "vesting" was misguided, in that
if the \textit{Will} court had intended to hold that only current salary is protected, it
would not have gone to the effort of analyzing the 1975 Act to determine
whether that Act actually fixed salaries or was merely a "method" for doing so.
Under the panel majority's reading of \textit{Will}, this analysis was a meaningless
exercise. The Court could simply have said that legislatively-mandated salary
increases are not protected until \textit{actually possessed}.

Petition for Writ of Certiorari, \textit{supra} note 89, at 28 (citation omitted).
\(^{184}\) \textit{See AM. BAR ASS'N & FED. BAR ASS'N, supra} note 2, at 9.
discretionary payments.\textsuperscript{185} Behind these discretionary payments is an unnecessary linkage between congressional COLAs and judicial COLAs.\textsuperscript{186} This connection should be severed through an amendment to the Ethics Act in order to eliminate unnecessary political game-playing.\textsuperscript{187}

There are three main reasons why the congressional-judicial COLA connection need not exist. First, the Ethics Act’s sole condition for denial of judicial COLAs is a situation involving a national fiscal crisis, thus creating an expectation interest for judges that they will receive COLAs unless this condition occurs.\textsuperscript{188} In addition to an expectation analysis, a Hatter discriminatory analysis could result in a holding that the isolation of the judiciary is unconstitutional.\textsuperscript{189}

Second, judicial salaries make up only a tiny part of the national budget.\textsuperscript{190} Had judges received COLA adjustments in 1995, 1996, 1997, and 1999, as disputed in Williams, there would have been a 9.40% increase in judicial salaries.\textsuperscript{191} The effect of this salary increase would have accounted for “less than 0.00012% of the 2001 [fiscal year] total federal budget, and only about 0.009% of the federal budget dedicated to the administration of justice.”\textsuperscript{192} Considering these statistics, aside from times of extreme fiscal national distress, judicial COLA adjustments will only have a negligible effect on the total outlays of the federal government.

Third, COLAs are commonly understood to be a mechanism used to maintain the purchasing power of an individual’s salary over time.\textsuperscript{193} Many Americans receive similar adjustments in pay,\textsuperscript{194} and it is feasible that the general public would accept judges receiving the same increase as any other federal government employee.

\textsuperscript{185} See Williams v. United States, 535 U.S. 911, 913 (2002) (Breyer J., dissenting); infra Part III.C. (describing the historically inconsistent disbursement of COLAs to the judiciary).

\textsuperscript{186} AM. BAR ASS’N & FED. BAR ASS’N, supra note 2, at i.

\textsuperscript{187} See id. at 24.

\textsuperscript{188} See Williams, 535 U.S. at 916 (Breyer, J., dissenting) (discussing expectation interest).

\textsuperscript{189} See id. at 918-19.

\textsuperscript{190} See Brief of National, State and Local Bar Ass’ns in Support of Petitioners, supra note 110, at 19-20.

\textsuperscript{191} Id. at 20.

\textsuperscript{192} Id.

\textsuperscript{193} See, e.g., Social Security Checks To Increase Next Year, SEATTLE TIMES, Oct. 20, 2004, at A4 (announcing a 2.7% COLA increase for all Social Security check recipients).

B. Alternative Solutions

To uphold the meaning of the Compensation Clause, preserve expectation interests, and protect against discrimination, Congress should amend the Ethics Act to separate the allotments of judicial COLAs from congressional COLAs.\textsuperscript{195} By taking such actions, Congress would strengthen and preserve judicial independence—a fundamental constitutional principle identified by the Framers.\textsuperscript{196}

Congress must also address the judiciary’s existing salary gap. But how much of a salary increase is enough? If salaries increased ten percent, or even fifty percent, would that increase the likelihood of recruiting more qualified judges, preventing fewer early retirements, and creating a higher quality of jurisprudence?\textsuperscript{197} The Compensation Clause plainly states that Congress may not diminish compensation, but it does not require Congress to increase compensation in any way.\textsuperscript{198} Additionally, at a time when America is losing jobs\textsuperscript{199} and facing a growing deficit,\textsuperscript{200} it would be politically unpopular to recommend a significant compensation increase for a group of individuals whose salaries already surpass that of most Americans.\textsuperscript{201}

Thus, despite the constitutional, prudential, and equitable arguments in favor of judicial compensation reform, political realities may make it unrealistic to expect Congress to end the gridlock.\textsuperscript{202} Therefore, it is crucial to consider alternative, creative solutions that could potentially mitigate the adverse impact of such gridlock on the quality and future attractiveness of the federal judiciary.

\textsuperscript{195} In doing so, Congress should also repeal Section 140. See 28 U.S.C.A. § 461 note (West Supp. 2005) (Salary Adjustments for Justices and Judges).
\textsuperscript{196} See \textit{The Federalist} No. 78 (Alexander Hamilton), \textit{supra} note 17, at 397.
\textsuperscript{197} See \textit{Rehnquist, supra} note 14. \textit{But see} Yoon, \textit{supra} note 17, at 1030.
\textsuperscript{198} U.S. \textit{Const.} art. III, § 1.
\textsuperscript{201} See Geraghty, \textit{supra} note 17.
\textsuperscript{202} See Light, \textit{supra} note 36, at 86. The author noted that [t]he [income] gaps are particularly hard on the federal judiciary, where Congress has gotten into the habit of denying federal judges the annual cost-of-living increases prescribed by law. As a result, federal district and circuit court judges have lost almost 25 percent in purchasing power to inflation since 1969, while Supreme Court justices have lost 38 percent (more than half of that since 1993).
\textit{Id.} Furthermore, General Suter, the Clerk of the Supreme Court, stated that the only reason Congress would reform judicial compensation would be because of “pangs of conscience.” Interview with General William K. Suter, \textit{supra} note 100.
First, Congress could enact legislation that vests retirement benefits for federal judges after a short time on the bench, with assurances that retirement benefits will never be reduced by a "blocking law" or other means. In light of the *Will* vesting test, some creative, technical drafting would be required to ensure that retirement benefits vested quickly. While this action would not address the present cash flow dilemma of sitting judges, future judicial nominees may be less apprehensive about accepting positions on the bench, thereby providing an important incentive to make the pay sacrifice inherent in accepting a judgeship.

Second, reflecting the actions taken for federal executive branch employees a few years ago, Congress could enact legislation that will provide locality pay adjustments for federal judges. Many observers, however, sincerely believe that federal judges in their areas simply do not need a pay increase and that qualified and diverse people are lining up for appointments to the bench. Others assert that judges are not

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203. Congress could vest these retirement rights after three years, which is the amount of time it takes for government employees' to vest in the TSP. See TSP Features for Civilians, supra note 27.


206. Light, supra note 36, at 86 (explaining that "Congress has refused to give judges the same local cost-of-living adjustments that help federal civil servants in high-cost cities such as New York, Boston, San Francisco and Los Angeles. Although the Constitution expressly prohibits Congress from cutting the salaries of judges, its inaction has done just that").

207. E.g., Posting of Gary Ruskin to Senate, "Graft for Judges" Provision Threatens Corruption of Federal Judiciary, (Sept. 14, 2000), http://lists.essential.org/pipermail/cong-reform/2000/000004.html, (asking for support against a proposed year 2000 pay raise for federal judges, declaring "[f]ederal judges are already overpaid. They neither need a pay raise nor honoraria"). Others argue that Congress continues to mount opposition to judicial pay raises because "judicial salaries are still well above the median income of most Americans." Geraghty, supra note 17.

Some judges and judicial scholars express similar sentiments. A *California Law Review* article quoted Judge Posner explaining that the difference between judges and associates in private law firms is that associates "work like dogs, and most federal judges do not." Yoon, supra note 17, at 1041 (quoting Richard A. Posner, *Federal Courts: Challenge and Reform* 385-90 (1996)). The same article quoted judicial scholar Pamela Karlan as saying "notwithstanding the fairness concerns underlying federal judicial compensation, 'it would be ludicrous to suggest that current judicial salaries pose any sort of structural threat to judicial independence.'" Id. (quoting Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 538 (1998)).

Similarly, Professor Vermeule argued that raising salaries is not always the solution, and that a slightly lower salary may actually attract individuals who derive "intrinsic satisfaction" from public service. Vermeule, supra note 15, at 536. Moreover, Professor Vermeule explained that there is a scale from which to view this tradeoff where "excessively low compensation might produce a cadre of insufficiently talented amateur
actually leaving the bench because of their decreasing salaries. 208
Yet certain high-cost areas pose a unique problem to generalized conclusions about the adequacy of judicial compensation. 209 Locality pay adjustment would recognize that the same salary does not create the same purchasing power or standard of living in New York City as it does in Omaha, Nebraska. 210 This proposal would result in actual cash flow benefits for members of the judiciary who need it most, without Congress swallowing across-the-board pay increases for the judiciary. 211

IV. CONCLUSION

The Compensation Clause, as interpreted in recent case law, does not require Congress to ensure that automatic COLA increases will take effect in the future, as long as blocking laws are passed prior to the vesting date. However, there are constitutional, legal, and political arguments in favor of creating more stable and consistent judicial COLAs, and decreasing the inflationary gap in judicial salaries. But these substantial reforms may not be realistic in today’s political environment. Congress should consider addressing judicial compensation with imaginative new proposals from a more indirect angle, such as protecting future retirement benefits by vesting them earlier and providing locality pay. Prompt congressional action is necessary to reform a system that consistently fails to protect the third co-equal branch of government as an independent judiciary.

enthusiasts, but excessively high compensation might produce a cadre of talented but venal opportunists." Id. This perspective arises from theories regarding the role of salaries and the motivation for corruption of public officials. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 431-432, (Carolina Academic Press 1987) (1833); see James D. Fearon, Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 61 (Adam Przeworski et al. eds., 1999); Saul Levmore, Voting with Intensity, 53 STAN. L. REV. 111, 115 n.7 (2000).

208. Yoon, supra note 17, at 1030.
209. See Light, supra note 36, at 86.
210. E.g., J. SCOTT MOODY & DAVID K. HOFFMAN, TAX. FOUND., NO. 125, SPECIAL REPORT: FEDERAL INCOME TAXES AND THE COST OF LIVING 2-7 (2003), http://www.taxfoundation.org/files/0385ff418f81ca2b8fe05d52c7f30a7e.pdf (explaining, for example, that as of 2003, "[a]n income of $132,143 in San Francisco, California, yields the same standard of living as $84,111 in Portland, Oregon. . . . or $70,772 in Phoenix, Arizona.").
211. Cf. id.