COMPARING JUDICIAL COMPENSATION: APPLES, ORANGES, AND CHERRY-PICKING

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ABSTRACT

United States Supreme Court Chief Justice John Roberts describes the American judiciary as the envy of other constitutional democracies. But in one respect, the judiciary apparently trails others: judicial pay. Citing higher salaries of judges in other countries, Chief Justice Roberts and Associate Justices Stephen Breyer and Samuel Alito have all argued that inadequate judicial pay leads to a decline in judicial performance and quality.

Judicial pay advocates apparently make these comparisons to emphasize that low judicial salaries “threaten” judicial quality and independence or, alternatively, that high judicial salaries “ensure” quality and independence. But the argument is incomplete, relying upon several unsubstantiated assumptions. This Article notes these assumptions, asks whether they are correct and, consequently, whether the international comparisons actually reveal an underpayment of U.S. federal judges. The comparative argument seems a useful avenue for inquiry into whether increases in salary will produce increases in judicial quality. But, as this Article shows, the institutional and societal differences among countries means isolated comparisons to foreign judiciaries raise more questions than answers in the judicial pay debate.

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INTRODUCTION

In the 2006 Year-End Report on the Federal Judiciary, United States Supreme Court Chief Justice John Roberts discussed a single issue: the continued failure of Congress to raise judicial pay. The Chief Justice so narrowly focused his Report to raise awareness of an issue he believes has “reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.” On the same day in April 2007, Justices Stephen Breyer and Samuel Alito echoed the Chief Justice’s concerns while testifying before the House Committee on the Judiciary.

All three justices claim the declining real pay for federal judges has the effect of eroding the quality and independence of the federal judicial institution. In addition to comparing federal judicial salaries to those of legal academia, private practitioners, and the rest of the domestic working population, Justice Breyer offered

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2 Id. at 1.

3 Id. In demonstrating the decline in real judicial compensation, the Chief Justice compared past and current judicial salary levels to those of Harvard Law School’s dean and senior faculty. The comparison shows federal district judges are paid far less than they were in 1969 relative to this purported peer group.

4 Testimony of Stephen Breyer, Associate Justice, Supreme Court of the United States, Before the House Committee on the Judiciary, Subcommittee on the Courts, the Internet and Intellectual Property, Oversight Hearing on “Federal Judicial Compensation,” Apr. 19, 2007, available at http://www.uscourts.gov/testimony/JusticeBreyerPay041907.pdf; Testimony of Samuel Alito, Associate Justice, Supreme Court of the United States, Before the House Committee on the Judiciary, Subcommittee on the Courts, the Internet and Intellectual Property, Oversight Hearing on “Federal Judicial Compensation,” Apr. 19, 2007, available at http://www.uscourts.gov/testimony/JusticeAlitopay041907.pdf. Judicial compensation has been a perennial issue for members of the bench, particularly the Chief Justice of the Supreme Court, dating back to at least when Chief Justice Taft was on the bench. Part of the motivation is selfish—raising judicial pay would necessarily fatten their wallets—and part of it is institutional—having a better-paid judge likely makes the Chief Justice’s job of overseeing the entire federal judiciary easier.
comparative international evidence of the impending “crisis” by noting that American federal judges “receive only 2/3 of the salaries of their judicial counterparts in Australia and 1/2 of their judicial counterparts in England.” Such comparisons are nothing new. Earlier, in his 2002 testimony on the same topic, Justice Breyer cited the disparities among the Chief Judges in the United States, England, and Canada. The American College of Trial Lawyers echoed the comparison to English and Canadian judges in making its recent pitch for increasing federal judicial salaries. Justice Samuel Alito also cited the National Commission on the Public Service’s comparative observation.

These comparisons are apparently made to emphasize that low judicial salaries “threaten” judicial quality and independence. As Justice Breyer observed, “[the United States] cannot hope to continue to have the best judicial system in the world—as the public has come to expect—if we do not compensate our judicial officers accordingly.” Thus, he indicates that the inadequate compensation is likely to lead to Chief Justice Roberts’s “constitutional crisis.” Curiously, Chief Justice Roberts, in the same end-of-year report in

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5 Breyer, supra note 4.
6 Prepared Statement of Justice Stephen G. Breyer before the National Commission on the Public Service, July 15, 2002, at 19 (Chart 8). Although we are not claiming that Justice Breyer cherry-picked through the data to get the results he desired, the fact that he is using different data from different countries does suggest there may be more to explore. This comparison was also picked up by the Second National Commission on the Public Service led by former Federal Reserve chairman Paul Volcker. See NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 22(2003), available at http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf (“The United States currently pays its judges substantially less than England or Canada.”).
8 Indeed, the loss of judicial independence could also hurt the long-run economic development of a country. See Lars P. Feld & Stefan Voigt, Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators, CESifo Working Paper No. 906, available at http://www.ssm.com/id=395403 (finding that “de facto judicial independence” affects real GDP per capita growth, but “de iure judicial independence” does not. Id.
9 AMER. COLLEGE OF TRIAL LAWYERS, supra note 7, at 5.
which he calls for higher pay, also boasts of the number of foreign visitors who come to the U.S. Supreme Court every year to marvel at the American judicial system.  

But even if Justice Breyer’s argument is only one of fairness—other countries pay their judges more, so we should too—this question of what the relationship is between judicial compensation and judicial quality and independence in the comparative setting still warrants attention. Economic development literature suggests that institutional factors such as judicial quality have a significant impact on economic growth. As Professor Kenneth Dam writes: “[T]he idea that institutions and especially legal institutions are crucial to the process of economic development is now broadly accepted in the academies and in the research departments of international financial institutions such as the World Bank.” Sound legal institutions produce, inter alia, judicial independence, which, in turn, correlate with economic growth.

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10 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2–3 (2008), available at http://www.uscourts.gov/newsroom/2007yearendreport.pdf (“When foreign nations discard despotism and undertake to reform their judicial systems, they look to the United States Judiciary as the model for securing the rule of law. . . . [E]ven mature democracies with established traditions have modified their judicial systems to incorporate American principles and practices.”). Of course, the U.S. judicial system may be in a theoretical first place, but still be slipping quickly. If this slide into mediocrity is looming, what evidence do judicial pay advocates offer that judicial pay is, or is on the verge of, declining? What does a constitutional crisis look like? Or, is it a phenomenon that cannot be detected until it is too late? In other words, it could be argued that because there is a significant lag between judicial hiring decisions and their impact on the bench, the problem requires early intervention prior to the ill effects being detectable.

11 There is another fairness argument raised by judicial pay advocates that we also do not quarrel with: the idea that judges were promised raises several years ago, and they should get what they were promised. See 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY, supra note 1, at 5 (“In the face of continuing congressional inaction to fix these problems, the late Chief returned to this subject again and again in his year-end reports. Sixteen years later, Congress has still not enacted a salary increase . . . .”).


Thus, the inquiry into whether increasing compensation has a positive effect on judicial quality matters not only for determining what the proper recourse is for the U.S. debate but also for designing new judicial institutions in transitioning countries. Thus, even if Justice Breyer is not implying that countries with higher judicial pay have higher better judiciaries, this argument should be tested to determine its validity for the sake of learning how best to develop institutions that create economic growth.

The Article’s focus is this comparative argument. As made, the argument is incomplete because it does not contemplate the institutional and non-pecuniary variation among these countries. Maybe, if we examine facts more closely, it will turn out that the English judges have different functions and have a greater workload, justifying their higher salaries. And perhaps Canadian judges face mandatory retirement at a certain age and that affects their incentives. The point is that Justice Breyer and others do not give us enough information for us to know whether the comparison is meaningful—that is, whether we are comparing apples to apples. Moreover, the comparison is selective, using only England, Canada, and Australia. Although one explanation for such a narrow comparison could be a common ancestry between these judiciaries, it also may reveal a selection of only the highest paid judiciaries that looks like cherry-picking.¹⁴

Four assumptions appear to be necessary to support Justice Breyer’s argument that judicial pay increases performance, which, as of yet, have not been substantiated: (1) that judicial performance or independence is better in the countries highlighted by Justice Breyer (or any other countries for that matter)—or at least that these

¹⁴To be clear, we are not suggesting that this was intentional, only that other countries should be included in any comparative argument.

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countries threaten the United States’ hegemony; (2) that there is a relationship between judicial compensation and judicial performance and independence; (3) that this relationship is positive and causal in one direction—that is, higher judicial salaries lead to better performance and more independence; and (4) that other institutional variables do not account for this superior performance or independence of other countries’ judiciaries.

In this Article, we ask whether the above assumptions are correct and, consequently, whether the comparisons reveal an underpayment of U.S. federal judges. We have no quarrel with the comparative argument; it is a useful and unique avenue for inquiry into the question of whether increases in salary will produce increases in judicial quality. We question whether the comparative argument supports (or refutes) an impending constitutional crisis in the federal judiciary. Generally, the relationship between judicial compensation and judicial quality is a poorly understood one; given institutional and societal differences among countries, isolated comparisons to foreign judiciaries raise more questions than they provide answers.

Despite the difficulty in empirical work in this area, several authors have also attempted to study the relationship between judicial compensation and judicial quality and performance. Professor Scott Baker attempts to overcome the lack of variation among U.S. federal judicial salary by developing a variable based on private law firm partner salaries that serves as a proxy for the opportunity cost of judging. In doing so, Baker manufactures variation into an otherwise constant salary schedule.

Professors Stephen Choi, Mitu Gulati, and Eric Posner avoid the lack of variation in judicial salaries by studying the compensation of state appellate judges. Neither study shows that judicial pay has an effect on quality or performance. In both studies, however, there

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remains a lack of institutional and working condition variation that would allow the studies’ authors to evaluate the effect of other labor market factors on quality and performance. We posit that international data provide the best opportunity for observing variation and thus studying how compensation influences performance and quality.

Part I outlines the ways in which pay might influence judicial quality and performance, as described in the existing literature. It also describes how the existing literature on judicial compensation—to the extent it is focused exclusively on domestic U.S. judges—fails to meaningfully discuss the impact of several institutional variables (such as selection, pension, and tenure) on judicial productivity. That is, because the institutional differences across federal and even state court judgeships in the United States are trivial relative to the institutional variation internationally, we suspect the current

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20 Although state judiciaries do vary in terms of such institutional factors as the method of appointment (appointment versus election) or the presence of life tenure, Choi, Gulati & Posner, supra note 17, find that many of these institutional variables are less significant in predicting judicial performance than previously thought because the perceived risk of termination, was small—even for judges facing re-election.
discourse on judicial compensation that uses international data overstates the impact of salary on judicial independence and quality because it does not study a data set that includes sufficient variation. Moreover, the existing literature does not directly respond to the comparative argument for raising federal judicial pay; neither Baker nor Choi, et al. actually compared federal judges in the United States to foreign federal judges. This is the comparison Justice Breyer and others have made, and the question this Article seeks to answer.

Part II identifies several institutional variables and non-pecuniary benefits of judging that, in addition to salary, are likely to influence the quality as well as marginal productivity of federal judges in any country. It also lays the foundation for testing those suspicions by analyzing the institutional variation across the four countries Justice Breyer asks us to consider: Australia, Canada, the United Kingdom, and the United States.

Part III reports the available data that might be used to make a more complete comparative argument about judicial salaries. Although results are necessarily tentative, the bottom line is that the comparative data does not make out a clear case for raising judicial salaries for the U.S. judiciary. Though limited, the data suggest the links among judicial compensation, independence, and quality are not obvious.

The Article concludes by suggesting that the comparative argument is a worthwhile area for future research, but that more data needs to be collected to analyze the complex questions raised in this Article—only then will we be able to evaluate the comparison’s weight in the debate on judicial pay.

I. JUDICIAL COMPENSATION AND PERFORMANCE

With an eye towards the international comparative argument, we begin by presenting a basic economic framework for the relationship between judicial compensation and performance. We then summarize the current literature, particularly the empirical work

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21 See supra notes 15–18 and accompanying text.
22 We use the term “performance” as short-hand for the nebulous concepts of judicial quality, productivity, and independence—those characteristics of our federal judiciary with which Chief Justice Roberts and Justice Breyer are so concerned.
that has been done to evaluate the relationship between judicial compensation and performance. None of it thus far has looked to the international scene, even though comparative analysis might provide the variation necessary for significant results. This is all to set up the discussion in Part II of the factors/variables that complicate this relationship and wreak havoc on these empirical studies.

A. Basic Economic Framework

Pay raise advocates generally argue salary influences judicial performance in two distinct ways. The first claim is high salaries improve the composition or quality of a judiciary by recruiting top candidates to the bench and retaining high quality judges on the bench. A large literature suggests the depth and quality of any judicial applicant pool improves—and turnover within the judiciary declines—at higher salary levels.23 The intuition’s simplicity is appealing: as the financial compensation for judging increases, so too does the attractiveness relative to other legal professions and, with it, the quality of the applicants seeking those positions.

Proponents of a judicial pay raise argue that the quality of the selection pool will improve and the number of financially-induced resignations will decline if Congress increases the salary of federal judges to levels commensurate with other legal professions. To dramatize the declining judicial pay relative to other legal professions, several commentators note the salaries of first-year associates at several top-tier law firms now exceed those of federal district court judges.24 This disparity in compensation, so the

24 See, e.g., Paul Volker, Op-Ed., Judgment Pay, WALL ST. J., Feb. 10, 2007 (“It is surely anomalous that federal district court judges make less than the salary plus bonuses of newly minted lawyers in . . . prestigious firms . . . .”); Michael J. Frank, Judge Not, Lest Yee be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary “Crisis”, 87 MARQ. L. REV. 55 (2003) (surveying the various complaints about inadequate judicial salaries, as of 2003); Kristen A. Holt, Justice for Justices: The Roadblocks on the Path to Judicial Compensation Reform, 55 CATH. U. L. REV. 513 (2006). Although the primary focus of this paper is the international comparison of federal judges’ salaries, we feel it
argument goes, implies a decline in the quality of candidates for judicial appointments because the opportunity costs of judging preclude many well-qualified candidates from seeking judicial appointments and, at the same time, induce many current judges to resign.25

Although it may seem shocking, or at least counter-intuitive, that an entry-level associate with no legal experience that could not even obtain a clerkship for a federal judge earns more than a federal judge tasked with deciding individual liberties,26 and it may be disappointing when an acclaimed judge returns to private practice for financial reasons, such anecdotes hardly rise to the level of constitutional crisis. By themselves, they tell us little about the quality of the federal judiciary.27

necessary to address this more common comparison both for completeness and because doing so requires a discussion of the many non-pecuniary factors that make federal judgeships in this country so unique compared to other countries. 25 See, e.g., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY, supra note 1. Similarly, proponents of a judicial raise also relate stories of talented judges resigning from the bench for financial reasons.

This disparity is not as surprising once the efficiency wage principle is considered. In the simple shirking model, developed by Professor Carl Shapiro and Joseph Stiglitz, increasing wages increases the cost of losing the job given the prospect of involuntary unemployment and thus deters shirking. Carl Shapiro & Joseph E. Stiglitz, Equilibrium Unemployment as a Worker Discipline Device, 47 AMER. ECON. REV. 433, 433–34 (1984). But this model only works if the threat of losing one’s job is real: For judges and academics who enjoy life tenure, higher wages will have no effect because they still will not be fired even if they shirk. Higher wages also makes the applicant pool larger, putting even more competitive pressure on the young associate to work hard and long. The same will also be true for the judicial labor market: the pay increase may lengthen the queue for judicial nominations—or even improve the quality of the queue. But the pay increase will also make a judge less likely to resign so that these improvements would be trivial. 27 Moreover, given the important public function judges carry out, it may be the case that the best judges, the most productive, fair, and independent, are individuals whose utility functions place less weight on financial remuneration than on serving the public good, obtaining or maintaining social status, or intellectual stimulation. As such, increasing judicial compensation may not produce the desired improvement in judicial quality or independence. Indeed, if the appointment process fails to screen out applicants whose primary motivation is money or those requiring external motivation, the quality of the judiciary may even decline as a result of a pay raise. See Choi, Gulati & Posner, supra note 17; Baker, Should We Pay Judges More?, supra note 15.
Whether that intuition is correct for all federal judiciaries is unclear, however, because institutional variables such as fixed terms, mandatory retirement ages, and discrete judicial career paths may make the demand for judicial nominations more elastic with respect to salary in other countries than it is in the United States. Additionally, characteristics of the “ideal” judge may also make the demand for judicial nominations less elastic with respect to salary than is observed in other legal professions. The quality of the federal bench may not improve—or could even decline—if a substantial pay increase leads to a pool of judicial candidates motivated more by financial gain than public service since these more money-oriented candidates may be poorer judges in a profession with necessarily little external accountability. As such, salary statistics from other countries, without more, tell us little about recruiting and retaining quality in our judiciary.

In addition to improving judicial quality, pay raise advocates argue high salaries improve judicial performance by motivating on-the-job productivity. As opposed to the effect of salary levels on the recruitment and retention of judges, the validity of this argument depends on whether and to what extent judges vary their effort (e.g. number of cases decided, the number of published opinions, number of dissenting opinions, opinion length, etc.) according to the amount they are paid. Just like recruitment and retention, the literature suggests worker productivity improves with pay, all else equal. But in this section and throughout this article we discuss how compensation affects judicial quality and productivity when “all else” is not equal—as is the case internationally. As before, life

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28 Phrased slightly differently, because federal judges in the United States do not work for fixed terms, face mandatory retirement, or choose a judicial career during law school, the demand for judicial nominations in the U.S. may be inelastic with respect to salary as compared to judiciaries with those institutions – including the countries Breyer referred in his congressional testimony.

29 We analyze the compensation-performance relationship as two distinct issues for several reasons. First, the recruitment/retention analysis focuses on the discrete choice made by legal professionals between alternative legal professions; at issue here is the opportunity cost of judging. The analysis of judicial compensation as a motivator of judicial productivity takes as given an individual’s decision to be a federal judge and focuses instead on the effort expended thereafter as a function of pay.

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tenure and term limits render the traditional labor economic views of productivity responsiveness less helpful in understanding the production functions of federal judges. Because federal judges in other countries do not all work under these conditions, however, we can test the significance of these institutional variables in motivating additional effort with increased pay. And again, the “ideal” federal judge may possess certain characteristics—namely intrinsic motivation—that undercut the importance of pay on performance. Understanding how these individual and institutional variables influence judicial performance vis-à-vis salary is essential for the international comparative argument to have meaning but, surprisingly, these issues have received only limited attention in the current literature.

By arguing that salary influences productivity on the bench as well as the quality of the bench, much of the existing literature on judicial compensation treats judges the same as other employees insofar as their response in effort to increases in compensation. Because judges maximize utility like the rest of us, this thinking appears correct. But federal judges in the United States labor under very different conditions than the rest of the world’s labor force, namely, they enjoy life tenure and salary protection. Here again, the institutional construction of a federal judiciary seems critical in the relationship of pay and performance, yet was omitted from the international comparisons.

The unique characteristics of our federal judicial system require us to consider more closely the impact of pay on performance because their primary purpose, their constitutional significance, is to separate economic incentives from the judicial production function.

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32 Id.

33 Id. at 1 (‘At the heart of economic analysis of law is a mystery that is also an embarrassment: how to explain judicial behavior in economic terms, when almost
More to the point, the efficiency wage rationale seems inapplicable to federal judges in the United States because their life tenure negates the possibility of termination: after receiving a raise, federal judges won’t be replaced if they don’t increase effort quid pro quo, so they have little or no incentive to do so. Rather than pay, the intrinsic motivation of U.S. judges seems to dictate their effort on the bench. As such, the relative importance of salary, insofar as judicial productivity, depends in large part upon the existence of life tenure; and, again, this is a testable relationship.

Aside from life tenure, term limits, mandatory retirement ages, other institutional variables could influence judicial productivity such that domestic federal judges are paid less but produce as much or more justice than their Canadian, Australian, or British counter-parts. These include the provision of law clerks, administrative assistants, and myriad technological tools (like computers) that increase productivity. Our intention here is not to catalogue every aspect of the judicial production function—and certainly not to estimate one—but to understand which factors could boost judicial productivity at the lowest cost. If, for example, productivity appears highly dependent upon the number of law clerks assigned to a judge, perhaps Congress should forego the judicial pay raise in favor of hiring additional law clerks.

B. The Current Discourse

Very little empirical research has been published on the question of whether and to what extent pay influences judicial quality or independence. Aside from the challenge of applying empirical methods to a concept as difficult to quantify as judicial quality or independence, the dearth of rigorous empirical inquiry on the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives – to take away the carrots and sticks, the different benefits and costs associated with different behaviors, that determine human action in an economic model.”).
the judicial compensation-performance relationship is, perhaps, the consequence of limited data and a position that is defined by independence. Judge Richard Posner’s 1993 seminal article on judicial behavior proposes a utility-maximizing federal judiciary and, specifically, a utility function accounting for the opportunity costs of judging. The notion that judges consider the salaries of private practitioners—and may even resign from the bench (or never seek an appointment) to obtain those salaries—seems to have opened Pandora’s Box. But despite the new focus on how judges behave, true empirical work continues to be difficult to conduct. Thus, academics, lawyers, and sitting judges alike, continue to rely upon anecdotal evidence of a constitutional crisis and a mass evacuation from the judiciary, decrying the growing disparity between federal judicial salaries and those of other legal professionals without attempting to quantify and measure judicial quality or how the gap may be accounted for by the non-pecuniary benefits of judging.

Nonetheless, several studies have analyzed the effect of salary, pension eligibility, and various non-pecuniary factors on the testable hypotheses, and then proceed further to test them in a systematic manner. This will not be easy. Even under conditions of confidentiality, which have their own methodological problems, I suspect that few judges will admit to having very much self-interest in reputation or promotion”.

39 Id. at 15. Judge Posner proposes both a utility function for both a current judge allocating her time among judging and non-judging activities and a utility function for a potential judge deciding whether to accept or reject a judicial nomination; both include an opportunity cost term.
40 One exception is Scott Baker’s forthcoming article. Baker, Should We Pay Judges More?, supra note 15. To our knowledge, Baker’s article is the first that attempts to directly predict judicial quality with an eye towards the opportunity cost of judging. Baker uses data on regional law firm partner salaries as a proxy for the opportunity cost of accepting/maintaining a seat on the federal bench because that allows him to observe some variation in the opportunity cost of judging. We suspect this method understates the true opportunity cost of, say, an Eighth Circuit Court of Appeals judge who sits in St. Louis but could easily practice in a New York or Los Angeles law firm at a much higher salary than is offered in St. Louis. Nonetheless, Baker’s contribution lays a meaningful foundation for further inquiry because it is the first attempt to apply empirical rigor to question otherwise dominated by conceptual theorizing.
voluntary retirement of Supreme Court Justices, federal circuit court judges, and state supreme court judges. But life tenure and salary protection make retention an imperfect measure of productivity on the bench. As such, these articles address only judicial quality with respect to the composition of the judiciary; and, at that, their exclusive focus on retirement means these articles ignore perhaps the more important issue of judicial quality vis-à-vis recruitment. Those articles that address the effect of pay on

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41 See, e.g., Peverill Squire, Politics and Personal Factors in Retirement from the United States Supreme Court, 10 Pol. Behav. 180 (1988); Christopher J. W. Zorn & Steven R. Van Winkle, A Competing Risks Model of Supreme Court Vacancies, 1789–1992, 22 Pol. Behav. 145 (2000) (finding pension eligibility, pension size, and poor health were significantly positively correlated to retirement, while heavy caseloads and good health were negatively correlated to retirement); Timothy M. Hagle, Strategic Retirements: A Political Model of Turnover on the United States Supreme Court, 15 Pol. Behav. 25 (1993).


43 See Melinda Gann Hall, Voluntary Retirements from the State Supreme Courts: Assessing Democratic Pressures to Relinquish the Bench, 63 J. Pol. 1112, (2001) (concluding that electoral politics did play a statistically significant role in predicting voluntary retirements in states using the Missouri plan, i.e., partisan electoral voting).

44 This may reflect the difficulty of accurately observing judicial productivity, in general, or the constitutional limitation on Congress’s ability to reduce judicial compensation for poor judicial output.
recruitment do so only conceptually, with little or no empirical evidence to substantiate their claims.\textsuperscript{45}

Several articles that have used empirics to study the judicial productivity question have analyzed the effect of working conditions on specific measures of judicial output. Examples include the effect of promotion potential on sentencing\textsuperscript{46} and the effect of workload on the propensity of judges to publish opinions.\textsuperscript{47} Still others have tackled the larger question of how institutional variables, like the method of judicial appointment, influence the rate of litigation, outcomes in death penalty appeals, and voting patterns in selected state courts.\textsuperscript{48} Given their exclusive focus on domestic judges, however, these studies may produce misleading results because the

\textsuperscript{45} See, e.g., Paul E. Greenberg & James A. Haley, \textit{The Role of the Compensation Structure in Enhancing Judicial Quality}, 15 J. LEGAL STUD. 417 (1986) (“Anyone who would accept a judicial appointment would thus be clearly signaling that the nonpecuniary benefits associated with serving on the bench are attractive enough to warrant a diminution of pecuniary returns. By structuring the selection process so as to eliminate those who are primarily motivated by monetary compensation, this screening procedure would likely be effective in choosing judges who would not need external monitors”).


\textsuperscript{47} Ahmed E. Taha, \textit{Publish or Paris? Evidence of How Judges Allocate Their Time}, 6 AM. L & ECON. REV. 1 (2004) (“As expected, a heavier caseload results in a lower propensity to publish [opinions]. All else equal, judges in districts with approximately 100 more weighted cases per judge per year were 10 percent less likely to publish their decisions”); but see Gregory C. Sisk et al., \textit{Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning}, 73 N.Y.U. L. Rev. 1377 (1998).

institutional variation is trivial among the state and federal judiciaries compared to variation among different countries.

Specifically, variables such as retention mechanism may come up insignificant, not because they do not explain variations in judicial productivity or quality, but because there is little actual variation across the states or between the state and federal judiciaries with respect to retention mechanisms. Even though these jurisdictions may employ formally different retention or appointment mechanisms, they may operate much the same in practice. As a result, a finding of no significance could mean that appointed candidates don’t perform differently than elected candidates, or it could mean that elected candidates are not, in practice, chosen much differently than appointed candidates. For example, even state court judges without life tenure—those that face re-election after a fixed term (the vast majority)—may still face little risk of job loss because it is simply too costly for voters to monitor judicial behavior unless the judge makes front-page headlines for misconduct. Such judges might enjoy an unofficial grant of life tenure such that two state court judges (one with and one without life tenure) or a state court judge without life tenure and a federal court judge with it, might “perform” exactly the same regardless of the selection/retention mechanism. Hence, that variable comes up insignificant for what amounts to a coding error. The resulting conclusion, of concern because it could ultimately be incorrect, is that judges with or without life tenure will respond the same to an increase in salary—namely, they will work


“Variation is not, of course, limited to societies abroad. While the President nominates and the Senate confirms all federal U.S. judges, who then go on to serve during good behavior, institutions governing the selection of U.S. state judges differ from each other and usually from those for federal jurists. Today, the states follow one of five basic plans—partisan elections, non-partisan elections, gubernatorial appointment, legislative appointment, and the merit plan—though the intra-plan differences (especially the terms of office) may be as great as those among them.” Id.
harder—when only those judges who face the possibility of termination will work harder.\(^{50}\)

In the international arena, institutional variables like life tenure might be statistically significant in the explanation of judicial performance because the possibility of termination may be positive and accurately perceived as such by judges in those countries. As such, a more complete study would look beyond the United States borders to compare judiciaries to test whether such institutional variables as term limits, life tenure, or the appointment mechanism influence judicial quality or productivity. Indeed, as we argue in this Article, this objective is beyond the reach of currently available data.

II. AN APPLE & THREE ORANGES: COMPARING FOUR JUDICIARIES

This Part fleshes out Justice Breyer’s comparisons between the federal judiciaries of Canada, Australia, and the United Kingdom to the U.S. federal judiciary. Despite the fact that the Australian, Canadian, and American federal judiciaries share a common law tradition traceable to the United Kingdom, they have evolved into unique institutions. And, because many of those institutional differences influence the relationship between judicial compensation, quality, and performance, as discussed in Part I, comparisons among these countries is potentially more informative than the current, domestic-focused research.\(^{51}\)

Various factors influence the relationship between judicial compensation, performance and quality. In the following section, we examine how these factors differ across the judiciaries of Australia, Canada, the United Kingdom, and the United States. The magnitude and breadth of this institutional variation demonstrates how judicial pay raise advocates are comparing apples to oranges when they

\(^{50}\) This notion is commonly termed the efficiency wage model and it holds that employers can induce greater effort from employees by raising their pay, but only if the employer can monitor the employees’ effort and replace (i.e. fire) those workers who shirk. Without the ability to observe and terminate shirkers, however, increasing employee pay will work to increase rents to employees, not effort from them. See George A. Akerlof & Janet Yellen, Efficiency Wage Models of the Labor Market (1986); Carl Shapiro & Joseph Stiglitz, Equilibrium Unemployment as a Worker Discipline Device, 74 Amer. Econ. Rev. 433 (1984).

\(^{51}\) See Choi, Gulati & Posner, supra note 17.
compare the salaries of judges in the United States to those in other countries. A more complete and, therefore, more useful comparison would account for these institutional differences along with the differences in pay.

Because the variation among different counties is nontrivial, international comparisons are helpful in developing a more complete understanding of the various factors that influence judicial productivity. In detailing the institutional differences across the Justice Breyer-chosen countries, however, Part II also makes evident the necessity of full disclosure: salary may influence judicial independence and quality, but it does not appear to do so in isolation. Discrepancies other than judicial salary appear to influence judicial independence and performance in the four countries Justice Breyer asks us to consider.\footnote{Again, the three countries Justice Breyer used for comparison were Australia, Canada, and England. Because Japan is the only other country in the world which grants its federal judges life tenure, it too was included in Part II’s detailed analysis of institutional variables.}

In this Part, we focus specifically on several institutional variables and non-pecuniary benefits that influence the quality and productivity of the American, Australian, Canadian, and British judiciaries. This analysis is essential for international comparisons to contribute meaningful insight to the larger judicial pay discussion. The narratives of the variation in other countries along these variables should not dispel the possibility that judicial salaries and quality are related.\footnote{Nor is our analysis meant to serve as exhaustive historical, legal, or political account of any of the respective countries’ judicial system. Indeed, for data collection purposes, we focus exclusively on the highest courts in each country.} That is not our intention. We hope to show only that the relationship is more complicated than commentators suggest. Thus, when analyzing salaries across federal judiciaries, it is critical to consider institutional and market factors—not to mention differences in judicial quality and productivity—that might explain disparities in pay.

Although additional factors surely influence the judicial compensation, performance, quality dynamic, this Part lists several of the more obvious ones, and then describes how variations across the factors complicate international comparisons between federal judiciaries. We begin by exploring the institutional variables that
confine the labor market of judges and then move on to consider the different non-pecuniary benefits that judges might accrue in their position.

A. Institutional Constraints to the Judicial Labor Market

If an employer posts a want ad to pay ten thousand dollars a day, almost anyone might initially jump at the opportunity, quit her current job, and begin work right away. Prior to walking into the soon-to-be-former boss’s office and telling her what you really think, a few questions (hopefully) might pop into the employee’s head: Are there any special qualifications for the new position? Is there requisite education or experience? Is there any guarantee that the new position will last more than a day? Can the employee be fired without cause? What would the employee have to do (or not do) to be fired? Is the employee forced to retire at a certain age? Who sets this salary? Is the ten thousand dollars a day guaranteed as a minimum for as long as one works, or can it be changed like a cellular phone plan as soon as one gets settled into the job?

Judicial candidates face these same questions. And once a person arrives on the bench, these same questions affect whether the person decides to stay or go.54 Thus, before evaluating whether a salary alone affects the quality of the judiciary or the productivity of a particular judge, it is instructive to examine these institutional variables that affect the judicial labor market. Although they share similarities, the judicial labor markets that the candidates face in Australia, Canada, the United Kingdom, and the United States are far from uniform.

1. Selection Mechanism

Absent from Justice Breyer’s comparison is mention of the selection process and how it may complicate the relationship between judicial pay and performance. By selection process, we refer not only to the question of election versus nomination but also the positions from which most of the candidates are elected or selected. If, for example, the majority of federal judges are selected from higher-paying careers in private practice, the total compensation (salary and non-pecuniary benefits) required to attract

54 For a list of Article III judges who have recently decided to leave, see Alito, supra note 6, at 15–19.
the best candidates would necessarily be higher than if a candidate of the same quality was selected from a public service position like a prosecutor or district attorney. The opportunity cost of judging depends on the financial opportunities of the candidate. Similarly, it may be the case that nominated judges require more pay than elected judges because the costliness of a successful campaign ferrets out those judicial candidates primarily motivated by money. This rationale would seem even more applicable when candidates self-select for judicial appointments before their legal training is complete. Indeed, the selection process and typical nominee differs markedly among the countries compared by Justice Breyer.

Like jurisdiction, the appointment mechanisms for the respective high courts vary significantly from one another, and from the process for appointment to the United States Supreme Court. This variation is apparent in substance as well as process; candidates for the respective appointments hail from different legal backgrounds and, consequently, have different opportunity costs. Such differences must be considered before comparing salary levels across judiciaries in general and high courts in particular.

The Australian Constitution vests in the Governor-General in Council the power to appoint Justices to the Australian High Court. Beyond the Constitution, the High Court of Australia Act of 1979 further requires that (1) the Governor-General consult with State attorneys-general prior to the appointment; (2) a candidate must have served as a barrister or solicitor for at least five years; and (3) a candidate must have been a judge of a federal, state, or territorial court.

Although the Parliament can determine the count of the High Court Justices, the High Court is made up of 7 Justices—5 men and

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55 Phrased slightly differently, if the typical appointee is selected from private practice instead of public service, holding pay constant, judicial quality may be lower because the former group’s higher relative opportunity cost prevents the best candidates from accepting positions on the bench.

56 Federal judges in some countries, such as Japan, must receive judge-specific training while stay in school.

57 High Court of Australia Act of 1979.

58 Id. § ______.

59 AUSTRL. CONST. § 79.
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2 woman—all of whom served on a federal or state appellate court prior to their appointment. All seven have had some experience in the private bar prior to assuming the bench; the 2007 retiree, Justice Ian David Francis Callinan, came directly from private practice to his appointment to the High Court. In contrast, none of the current U.S. Supreme Court justices came from the private bar; all were appointed from a federal appellate bench.

Despite these shared traits, the Australian Constitution makes no requisite qualifications for judicial candidates other than that they are under seventy (to avoid the mandatory retirement requirement). The Constitution vests the Governor-General with the formal power to appoint, but the appointment decisions are ordinarily made by the Prime Minister with advice from members of the Cabinet, namely the Attorney-General. Because in this parliamentary system, the Cabinet members are part of the same ruling party as the Prime Minister, there is unlikely to be dissent in the appointment process. Additionally, because there is no parliamentary confirmation process akin to the hearings in the U.S. Senate, appointments generally lack both the spectacle and transparency offered in the United States.

The Supreme Court of Canada is composed of a Chief Justice and eight associate (or “puisne” meaning ranked after) justices. The Governor-in-Council may appoint any member of the legal profession who has been a member of the provincial or territorial bar for at least ten years. This requirement applies to all federal courts, but not provincial courts. Judges must then devote themselves exclusively to their judicial function, being forbidden

61 HIGH COURT OF AUSTRALIA, supra note 86, at 4–7.
62 Id.
64 Simon Evans, Entry on Appointment of Justices, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA (Tony Blackshield, Michael Coper, & George Williams, eds., 2001).
66 Id.
from carrying out any business enterprise or holding another public office.

The selection process in the United Kingdom is more complex, and the prerequisites are more numerous than in any other country. The Supreme Court is still only an idea, expected to begin its work in 2009 once its new building is complete.67 Once the Supreme Court begins functioning, the Appellate Committee of the House of Lords will expire; the Privy Council will still exist—and will be housed in the new building—as it remains the court of law resort for some members of the Commonwealth of Nations and British Overseas Territories. In the transition, the sitting Law Lords—the Lords of Appeal in Ordinary—will become the first justices of what will be a twelve-member Court.

After one of the current members of the Appellate Committee—and heir apparent to the Supreme Court—steps down from the bench, the Queen, upon the recommendation of the Prime Minister,68 will have the power to appoint a replacement. The candidate must have served on another high judicial office for at least two years and have at least 15 years of experience practicing law.69 Prior to recommendation, the Lord Chancellor must convene an independent selection commission and must consult and go through various processes to determine that the candidate is suitable for the position.70 Justices are appointed for life, but may be removed “on the address of both Houses of Parliament.”71 Like their counterparts in Australia and Canada, certain British judges have a mandatory retirement age, though it is relatively more liberal at 75 and high court judges are exempt from the requirement.

But, although the process of appointing Supreme Court judges has yet to be tried, judges are likely to be appointed through the same informal process currently used in the United Kingdom that, on its face, is similar to the U.S. system:

68 The Prime Minister is the one who will really have the power in this arrangement.
70 Id. §§ 26(5), 27–31.
71 Id. § 33.
In the case of the highest offices—the Law Lords, the Lord Justices of Appeal and the presiding officers of the superior courts—judicial appointments are made by the sovereign on the advice of the prime minister. In the case of High Court puisne (trial) judges, they are made on the advice of the Lord Chancellor. In practice, the Lord Chancellor's role looms larger: convention requires that the prime minister recommend appointees only after consulting with and presumably securing the approval of his chief Law Officer, the Lord Chancellor. Convention also requires that candidates for superior court judgeships not apply or even appear to apply for consideration for appointment. Rather, superior court judges are invited to take up their post—ostensibly on the basis of their meritorious records as leaders of the Bar.72

The appointment decisions are based on an “assessment of the records of the limited number of viable candidates and of the recommendations they solicit from sitting judges.”73

Applications for the more numerous, but not much less well-paid, inferior court judgeships are accepted and even encouraged in order to broaden the group of available candidates. But the self-promoting barrister who would seek to achieve a superior court position by first applying for an appointment as a County Court judge in hopes of winning a promotion to the High Court will find his path stymied: a long-standing convention provides that County Court Judges are almost never promoted.74

For the most prestigious positions—High Court of Justice—being a member of the “Queen’s Counsel” (QCs) is almost a

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73 Id.
74 Id.
prerequisite. This designation is only given to the most esteemed ten percent of practicing barristers. QCs are required to bring along a junior barrister for any court appearance, making their services quite pricey. As a result, the United Kingdom pays even their inferior court judges quite well on the theory that “they won't let a QC starve.”

QCs represent the upper echelon of practitioners with the act of being designated a QC called “taking silk.” Even with higher judicial pay in the United Kingdom, QCs, at the peak of their earning potential fear the drop in income from taking a judgeship, particularly when they are younger:

A successful barrister might well be making a good deal more than a judge's salary, and when he was approached with the possibility of a judgeship he might feel that he could not face a substantial drop in income. . . . At the age of fortyfive the position may be unattractive, whereas at fifty-five the position may be different: the extra years of earning high fees would have put the barrister into a good financial position, and life on the bench would be a welcome relief and at the same time constitute an insurance against the inevitable decline in practice that must occur if a man continues at the Bar when he is growing old.

Thus, the variation in required backgrounds and prerequisites appear to have a demonstrable effect on the compensation paid the judges and justices of the respective high courts. Nonetheless, Justice Breyer and the other judicial pay raise advocates in the United States who employ the comparative international argument ignore these differences and haphazardly compare apples to oranges.

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75 Id. at 251.
76 Id. (quoting P.G. Richards, Patronage in British Politics 136 (1963)).
77 Id.
78 Id. at 254 (quoting R.M. Jackson, The Machinery of Justice in England 290 (5th ed. 1967)). Judicial salary, compared to private compensation, may therefore affect not whether a person enters the judicial labor market but when. This may still have profound effects on the quality of the judiciary if the only judges on the bench are older with less judicial experience but more private practice experience.
Given the importance of opportunity costs in the decision to assume the federal bench,\(^79\) consideration of the various appointees’ background and experience, as well as the selection process itself, is a prerequisite to comparing the salaries of these high court judges and justices.

2. **Life Tenure**

Few other countries grant their federal judges life tenure, and only one of the countries Justice Breyer referenced does.\(^80\) And why might life tenure matter vis-à-vis judicial quality? One possibility is that life tenure separates the judiciary from the will of the other branches in government, making it more independent. The judiciary as a whole is thus free from influence by executive and legislative branches, but more importantly insofar as recruiting and retaining top-quality legal talent, life tenure means federal judges are their own bosses.

This independence means that judges can misbehave (not to suggest that they frequently do) far more than high-level employees in other public and private settings. They can, for example, be abusive of their staffs and those who interact with them (litigants) with little or no fear of penalty. Few other jobs provide the leeway to misbehave in such egregious ways.\(^81\)

But life tenure also means judges may work—and thus continue to be paid—until their death. Moreover, in the U.S. federal system, judges, when eligible for retirement, may instead take “senior status” and thus work on a part-time basis but continue to receive a full-time salary.\(^82\) Compared to a high-ranking administrative post or partnership at a prestigious law firm, where pressure from superiors, clients or other partners often dictates the position an individual must advocate on an issue or case, federal

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\(^80\) Of the countries that Justice Breyer uses for comparison, the United Kingdom is the only other country that truly has life tenure, meaning that there is no mandatory retirement age.


\(^82\) Posner, supra note 79, at 60. Taking senior status means that these judges continue to hear cases, but it also means that they are eligible for future pay raises, unlike their retired counterparts who will only receive cost-of-living adjustments.
judges have free reign (within the loose confines of precedent) to decide cases as they see fit. Surely this intellectual freedom has positive value to judicial candidates and sitting judges such that they would be willing to trade some amount of salary to obtain it.

If life tenure is thought to affect judicial quality, then one must analyze the issue of term limits as well. Judges whose terms on the bench are constrained by one or the other may work harder to leave a legacy or try to distinguish their record for subsequent employment. It is unclear, however, whether more experienced judges are better judges, that is, whether a steady turnover of judges is more desirable in a judiciary than having the same judges serve longer terms or for life tenure.\(^{83}\) Also unclear is whether judicial quality declines with age.\(^{84}\)

The Justice Breyer-selected countries also lack uniformity, once the selection has been made, as to how long the tenure lasts. Australia, for instance, differs from the United States in the length of judicial tenure and the reasons for retirement or resignation. The Governor-General in Council appoints Justices to the High Court for terms that expire upon the Justice’s seventieth birthday.\(^{85}\) Prior to a 1977 Amendment, Justices were given life tenure; this mandatory retirement at 70 has been grandfathered into existence.\(^{86}\) In the most recent annual report,\(^{87}\) the High Court reported the first Justice to retire under this mandatory requirement. Justices continue to be salary protected\(^{88}\) and may only be removed by the Parliament and

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\(^{83}\) Legal practitioners in the private sector also are sometimes forced out the door while their birthday cake is still fresh. See Leigh Jones, *Pitfalls of Mandatory Law Firm Retirement*, Nat’l L.J., May 24, 2005. At the time of the article in the *National Law Journal*, 37 percent of firms had a mandatory retirement age with the common age being 70. *Id.*

\(^{84}\) See supra notes 28–30.

\(^{85}\) Id. § 72 (i), (iii).


\(^{88}\) Id. § 72(iii).
the Governor-General in Council for “proved misbehaviour or incapacity.”

These two factors—selection method and mandatory retirement age—likely interact with one another as the mandatory retirement age is likely to give the appointer more cracks at the bat. This might lead to stacking or an attempt to maintain some evenness.

Since the Court’s inception, Justices of the High Court have served on average for 15 years. The current Australian Justices have an average term length thus far of half that value. Even if all do not retire until their seventieth birthday (and there are many other reasons why a judge may retire other than being forced to do so) the mandatory retirement means that the current Court will only average 13.5 years. There are two explanations for this trend: first, the current Justices may have received appointment later in life, and, second, the mandatory retirement limits the extent to which a judge can continue to serve on the Court. Andrew Leigh suggests that the 1977 amendment has had an interesting effect on judicial tenure:

Prior to the constitutional amendment, few judges had retired before they turned 70. Of the 31 judges appointed with life tenure, only four retired below this age—Knox (at age 67), Evatt (at age 46), Williams (at age 69) and Kitto (at age 67).

Yet the main factor affecting the average tenure of High Court judges has not been the introduction of a compulsory retiring age. Rather, it has been the steady increase in the average age of appointees. With the exception of the period 1903-20, when the appointment of several former politicians

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89 Id. § 72(ii).
90 See generally Pushkar Maitra & Russel Smyth, Determinants of Retirement on the High Court of Australia, 81 ECON. RECORD 193 (2005) (concluding that “pension eligibility, active engagement in the Court’s most important cases proxied by judgments reported in the Commonwealth Law Reports and the political persuasion of the appointing government are important predictors of when judges retire” although, curiously, not considering the impact of compensation both in the judiciary and elsewhere in the retirement decision).
91 This is consistent with a general decreasing trend of judicial tenure lengths. See Andrew Leigh, Entry on Tenure, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, supra note 73 (“[W]hilst the average tenure of a High Court judge has fluctuated somewhat, the general trend has been downwards.”).
pushed the average age up to 55, the average age of appointees has risen from 45 (1921–40), to 46 (1941–60), to 52 (1961–80), to 54 (1981–2000).\(^{92}\)

Regardless, the mandatory retirement age still likely affects the labor market for justices. Because seventy is an age that a majority of the current United States Supreme Court has already reached,\(^{93}\) the American experience at the very least suggests that judges could continue to adequately serve on the judiciary. Instead, in Australia, they have the ability to move back into the private sector and profit off of their prestigious experience overseeing the law of the land.\(^{94}\)

In Canada, a judge may be removed “for incapacity or misconduct in office before that time by the Governor General on address of the Senate and House of Commons”\(^ {95}\) but, like the United States’ impeachment process, this is extremely uncommon. Still, this lower standard might impact the judges’ behavior in office and also influence how judges seek to be appointed to the bench. The Constitution Act of 1867 mandates retirement at age 75.\(^ {96}\) Like the United States and Australia, the security of tenure, salary protection,

\(^{92}\) Id.

\(^{93}\) Judge Posner emphasizes the lack of age-related deterioration in judicial quality:

Even apart from exceptionally able judges, such as Holmes, Brandeis, Learned Hand, and Henry Friendly, who performed with distinction well into their eighties (Holmes served into his nineties but was fading toward the end), the federal judiciary in general exhibit little age-related decline in quality or (apart from senior status) even quantity of performance. POSNER, supra note 79, at 161.

\(^{94}\) The two Justices most recently forced into retirement have not taken this path. Justice Ian Callinan was called back into service by Prime Minister John Howard to head a commission investigating the outbreak of equine influenza. Australian Associated Press, Howard Announces EI Inquiry, THE AGE, Sept. 2, 2007. A retired Justice may also consider remaining in adjudication, but on a different bench: for example, Justice Michael McHugh joined former High Court of Australia Justice Anthony Mason on the Court of Final Appeal in Hong Kong. Mason’s still shining his light on the world of law, CANBERRA TIMES (Australia), Sept. 4, 2005, at A26.

\(^{95}\) Id.

\(^{96}\) Constitution Act of 1867, § 100.
and independence of administrative operation ensure the independence of the judiciary.97

Thus, the United Kingdom has the only “high court” that, like the United States truly has life tenure. Because these judges have no need to seek other employment after they leave the bench (though some still do), their behavior—and what they might be willing to accept for salaries and pensions—might differ from those that must exit at a designated age. Thus, with life tenure, involuntary exit from the bench is a rare occurrence.98 Like other countries, U.S. judges have the possibility of being removed from office for bad behavior, but the standard is so high and the political costs so steep that it is rarely used.99

3. Salary Protection

Mandatory retirement ages does not prove that Australian or Canadian judges are less independent than their counterparts in the United States or United Kingdom. Salary protection provides the necessary structure to ensure that judges are not controlled by other branches of government.

Although not given life tenure like their American counterparts, Australian High Court Justices still maintain judicial independence.100 One of the most prominent sources of this independence is Parliament’s inability to alter judicial compensation despite a desire to hold judges accountable.101 Regarding salary, beyond the constitutional requirement not to lower salaries while a justice is on the bench, the Parliament has further delegated the power to determine the judicial compensation and other benefits to the Remuneration Tribunal.102 For 2007, the base salary is AU$ 377,230 for Associate Justices and AU$ 415,690 for the Chief

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97 Supreme Court of Canada, supra note 60.
98 See Carrington & Cramton, supra note 81, at ? (describing the high bar for judicial removal in the U.S. federal judiciary and proposing a more robust oversight function by Congress).
99 See Carrington & Cramton, supra note 81 (reviewing the historical development of judicial impeachment and proposing a more rigorous process to remove judges).
100 Leigh, supra note 91 ("Under the Constitution, judges can only be removed in particular circumstances, and their remuneration cannot be diminished.").
101 See supra notes ___–___ and accompanying text (discussing the importance of salary protection).
Justice. The High Court, however, conveys that the total for actual “remuneration and allowances” paid to the sitting Justices in 2006 was AU$ 3,042,000, which works out to be AU$ 434,571 per Justice. The 2006 Determination of the Remuneration Tribunal only provided $362,020 for Associate Justices and $398,930 for the Chief Justice, meaning that a significant amount of money is going to the Justices in compensation not considered to be “base salary.” In considering the total remuneration and allowances, the Justices’ own pay dwarfs the compensation for the larger set of administrators of the High Court. To give some comparison, the expenses for all High Court employees totals AU$ 6,544,759.

Canada, like the United States, has also struggled over the appropriate way to determine and amount of the salary of appointed judges. In Reference re Remuneration of Judges of the Provincial Court, the Supreme Court of Canada was forced into the awkward role of protecting its brethren’s compensation. The Court held that the Constitution required provincial governments to develop “independent, objective and effective” mechanisms, and that these approaches to judicial remuneration are reviewable by the courts for a “rational” basis and constitutionality. Thus, many independent

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104 HIGH COURT OF AUSTRALIA, supra note 86, at 41.
106 Id. at 67.
109 Id.
judicial compensation commissions were formed to assess the adequacy of judicial compensation, including one for federal judges.\footnote{10}

The third iteration of the Quadrennial Compensation is currently considering submissions from interested parties. For example, the Canada Superior Courts Judges Association and the Canada Judicial Council, which collectively represent 93 percent of the Canadian judiciary, wrote:

> An increase in the salaries of federally appointed judges is necessary in order to bridge the gap that persists between judicial salaries and the compensation of the most senior deputy ministers within the Government of Canada. An increase is also warranted by current income levels of senior private practitioners in Canada.\footnote{11}

Chief among its arguments for a salary increase are the government surplus Canada has enjoyed in recent years and the strong Canadian economy and dollar—\footnote{12} all phenomena missing in the United States.

For the period beginning in April 1, 2007 and March 31, 2008, a puisne judge earns $252,000 in base salary.\footnote{13} By comparison, the total average compensation of a senior deputy minister in the previous year was $288,848.\footnote{14} Judges fare even worse when compared to private practitioners: the 2005 income of self-employed attorneys at the 75th percentile was $304,276; for the

\footnote{10}{Judicial Compensation and Benefits Commission, www.qualcomm.gc.ca (last visited February 9, 2008).}
\footnote{11}{Bienvenu & Hussain., supra note 104, at 17 (requesting “phased salary increases of 3.5% as of April 1, 2008 and 2% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing” as well as retroactive salary adjustments). Professors Bienvenu and Hussain show that puisne judges’ salaries remain substantially below comparable positions in the executive branch. See id. at 64 appx. G.}
\footnote{12}{Id. at 17–20.}
\footnote{13}{Id. at 34.}
\footnote{14}{Id.}
top ten Census Metropolitan Areas, it was $362,944.\textsuperscript{115} The Parliament does, however, index judicial salaries to inflation.\textsuperscript{116}

Despite these concerns, the judicial compensation issue has not gained the primacy or purported crisis status as it has in the United States. For example, a recent address on the state of the judicial system by the Chief Justice of the Supreme Court of Canada does not even mention the issue of compensation.\textsuperscript{117} Instead, Chief Justice McLachlin focused on four challenges: “the challenge of access to justice, the challenge of long trials, the challenge of delays in the justice system, and the challenge of dealing with deeply rooted, endemic social problems.”\textsuperscript{118}

In England and Wales, salaries for the judiciary range along nine points. Because the transition has not yet been made to conform to the Constitutional Reform Act of 2005, the salaries are for November 1, 2007. The Lord Chief Justice is paid an annual salary of £230,400; the Senior Lord of Appeal in Ordinary is paid £205,700; Lords of Appeal in Ordinary (Law Lords) are paid £198,700; judges of inferior courts are paid at a minimum £98,900.\textsuperscript{119}

B. Non-salary benefits

Several non-salary benefits may also explain the pay differential between the United States federal judiciary and other countries. But, unlike the institutional variables discussed above, these factors may not be constant across the above countries and even more difficult to measure.\textsuperscript{120} Nonetheless, these non-pecuniary

\begin{itemize}
  \item \textsuperscript{115} Id. at 39.
  \item \textsuperscript{116} Judges Act, § 26(1).
  \item \textsuperscript{117} Remarks of the Right Honourable Beverley McLachlin, P.C., Presented at the Empire Club of Canada Toronto, Mar. 8, 2007.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{120} We can, however, use international indexes as proxies for many of the non-pecuniary benefits. Where that approach fails, the institutional variables which are more observable and testable seem likely to pick up many of the non-pecuniary benefits such as intellectual stimulation or social status. For example, appointments for life tenure probably confer more status than a fixed-term appointment and, because life tenure promotes judicial independence, it may also give judges more intellectual freedom than if they were laboring under the guise of re-election. Indeed, this relationship between the institutional variables and non-
elements of the overall judicial compensation “package” bear mention in any discussion of judicial quality because they enter into the calculus of judicial appointees, perhaps more so than the salary itself.

1. **Pension and other fringe benefits**

   Relevant to understanding the relationship between judicial pay and quality is whether or not federal judges are eligible for pensions upon retirement. All else equal, the salary necessary to recruit and retain the best judges would be lower if those judges are pension-eligible than if they were not. Like the other institutional variables mentioned above, pension eligibility is relatively unique to the U.S. federal judiciary and it may partially explain why our judges earn less than those in the Breyer-selected countries. Fortunately, the existence (or absence) of such characteristics is easily observable, and we can test to see whether, holding pay constant, any of them influence the quality of the judiciary.

   Salary dollars alone are not determinative: Judges also factor pensions into their employment considerations. As Justice Alan Blow of the Supreme Court of Tasmania (Australia) strongly acknowledges:

   A pension entitlement forms a significant part of a judge’s remuneration package. Nearly all appointees to judicial office who have the skills and experience needed for service as a judge will have been earning much more than a judge receives by way of salary. Without the assurance of substantial entitlements on retirement, many suitable candidates would not be willing to accept appointment to judicial office. It would involve too great a sacrifice.\(^{121}\)

   In Australia, the Judges’ Pensions Act of 1968\(^{122}\) awards a pension of 60 percent of the salary that would be earned if still on the bench for

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\(^{122}\) Judges’ Pensions Act 1968 (Cth).
judges 60 years or older and with at least 10 years experience. A judge forced out by the mandatory age requirement (70 years), and has not served 10 years but has served more than 6, is entitled to a pension calculated at the rate of 0.5 percent of the salary for each month of service. Any judge not covered by these provisions would still remain eligible for a superannuation guarantee minimum benefits. If a judge’s retirement is due to permanent disability or infirmity and this status is certified by the Attorney-General, the judge is again entitled to 60 percent of the expected salary. For judges who pass away in office or in retirement, surviving spouses may receive a 37.5 percent of the expected salary, plus 7.5 percent of the salary per child up to 22.5 percent.

Like Australia, pensions in Canada too represent a significant part of judicial compensation. The Judges Act also provides a handsome set of benefits, including: life insurance, supplementary life insurance, post-retirement life insurance, dependants’ insurance; and accidental death and dismemberment insurance; health care and dental coverage while on the bench and during retirement; an early retirement option when the judge is at least fifty-five and has served 10 years in office; reimbursement of representational costs of up to $18,750 for Chief Justice and $10,000 for each puisne judge, and the option to elect supernumerary status. The annuity is two-thirds of salary, is indexed to the Consumer Price Index, and vests (1) when the judge has served for at least fifteen years and the combined age and years of service is eighty or more, or (2) when the judge has served at least ten years and reaches the mandatory retirement age (pro-rated if years of service are less than

123 Id.
124 Id.
125 Id.; see also Superannuation (Productivity Benefit) Act 1988 (Cth).
126 Judges’ Pensions Act 1968 (Cth).
127 Id.
128 Id. § 41(2).
129 Id. § 41(3).
130 Id. § 43(1).
131 Id. § 27(6).
132 Id. §§ 28, 29. As I understand it, the “supernumerary status” functions similar to “senior status” in the United States.
If a judge dies, his or her survivor will earn an annuity worth one-third of a judicial salary. In 2004, the Commission estimated the value of the government-sponsored portion of this annuity as 22.5 percent of the judicial salary.

In the United Kingdom, judges also have a generous pension arrangement: judges who retire at 65 or older and have at least 5 years of service are entitled to one-half of their highest annual salary (for judges with at least twenty years of service) or one-fortieth of their highest annual multiplied by the number of years in office; even if they do not meet these two requirements, they will receive a pro-rated share of the pension. Surviving spouses and children are also eligible for a portion of the pension should the judge die. The Constitutional Reform Act already anticipates carrying over the pension for the Law Lords over to the Supreme Court.

In the United States, federal judges do not have to make any contributions to their defined-benefit pension plan, which equals the amount of the last paycheck plus cost-of-living adjustments. Although the benefit does not vest, judges are eligible to receive the pension once they reach age 65 and their age plus years of service equals 80 or more. Because judges will not receive a dime if they leave at age 64 and 364 days, the pension system creates “golden handcuffs” for sitting judges, penalizing judges for leaving early for other opportunities. In most arguments for pay raise, this pension benefit, which might be worth more than salary, is not mentioned.

2. Jurisdictional reach, social prestige, and outside income

Despite the fact that Justice Breyer invoked the international comparative argument as evidence that U.S. federal judges are underpaid, the comparison actually reveals just how good federal judges in the U.S. have it. After all, much of what attracts the top legal talent to the federal bench is wholly unrelated to salary:

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133 Id. § 42(1). The section also provides for an annuity if a judge suffers from a permanent disability.

134 Id. § 44.


136 Judicial Pensions and Retirement Act of 1993 (c. 8)

137 Id.

138 Constitutional Reform Act of 2005 § 37(1)–(2).

139 Thanks to Dean David Levi for making this point.
prestige among one’s peers, intellectual stimulation, a devotion to public service, and the ability to influence other peoples’ lives. These are infinitely more difficult to quantify and measure but strike us as relevant to the compensation-quality dynamic and, consequently, Breyer’s comparative argument.

For example, most federal judges in the United States enjoy an increased social status upon accepting the position. The cases they hear offer them intellectually engaging work, and this work matters. Federal judges can influence the lives of the litigants that come before them on a daily basis. Surely these characteristics make federal judicial appointments attractive to the extent that most candidates would be willing to forego some financial remuneration to obtain them.

A judiciary’s breadth of function and its jurisdiction certainly influence the amount its judges should earn in remuneration, but in arguably uncertain ways. On one hand, as a high court’s jurisdiction expands, so too does the requisite legal acumen—and the pay—of its judges. Contrast the federal district judge whose docket, because of geographic location, consists almost entirely of immigration cases with the Supreme Court justice who, in a single day, hears oral argument on First Amendment, Clean Water Act, and federal income tax cases. The latter possesses and employs a unique mastery of the law, and should receive compensation commensurate with that ability.

On the other hand, as a court’s breadth of societal function expands, so too do the prestige, challenge, and other non-pecuniary benefits of occupying that particular judicial post. So, looking at judicial salary as compensation for important but sometimes monotonous public service, we might need to pay the district judge in San Diego more than we pay the Supreme Court justice in Washington, D.C., in order to induce the same level of effort and commitment to the job. The high courts of Australia, Canada, and the U.K. all have different societal functions and jurisdictions. Thus, these differences might explain a portion of the salary disparity compared to the United States.

140 David S. Clarke, The Organization of Lawyers and Judges, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 144, 144 (1982).
Take Australia. In 1903, three years after the federalization of Australia and formation of the Commonwealth, Australia established its High Court with the power of constitutional review and the ability to hear appeals from state and lower federal courts.\textsuperscript{141} Sections 71 through 78 of the Australian Constitution create and define the High Court of Australia.\textsuperscript{142} Today, the High Court exercises appellate jurisdiction over all other federal, state, and tribunal courts\textsuperscript{143} and retains original jurisdiction.\textsuperscript{144} Section 76 also grants the High Court the power of constitutional review.\textsuperscript{145} Despite the breadth of its appellate and original jurisdiction, the Australian High Court has typically not been viewed as a national policymaker. Recently, however, the High Court has taken on a broader role in Australian political culture. As former Justice Anthony Mason observes:

\begin{quote}
[\text{A}spects of the Court’s jurisprudence includ[ing] the move from literal interpretation of the Constitution towards a more progressive interpretation, the implication of rights (albeit limited in a range) in the Constitution, the acknowledgement that judges engage in incidental law-making, native title and the separation of powers [may lead to] consequential external perceptions of the Court and the possible impact of those perceptions on the Court.\textsuperscript{146}
\end{quote}

These changes in jurisprudence may point to a 105-year-old judiciary still in search of its appropriate role in law and society. These dynamics are also likely to alter the market of the judiciary in coming years, making any assessment more difficult. If the Australian high court’s role as a national policy maker continues to

\begin{footnotes}
\item[141] Australian Judiciary Act of 1903.
\item[142] \textsc{Austl. Const.} § 72. “The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.” \textit{Id.}
\item[143] \textit{Id.} § 73.
\item[144] \textit{Id.} § 75–76.
\item[145] \textit{Id.} § 76.
\end{footnotes}
grow, then these non-pecuniary benefits of prestige, sense of value or public service will also increase, meaning that the total compensation will increase. But as of now, given that the U.S. Supreme Court plays a more dominant role relative to its Australian counterpart, the greater non-pecuniary benefits might explain the salary disparity.

Similar to Australia, the highest court in Canada performs a different societal function than the Supreme Court of the United States. Specifically, the Supreme Court of Canada serves not only as a federal court of last resort but also as a national one with the ability to hear appeals from the highest-level provincial courts of appeal. Section 53 of the Supreme Court Act also authorizes the Governor-in-Council to refer to the Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution, the constitutionality or interpretation of any federal or provincial legislation, or the powers of Parliament or of the provincial legislatures or their respective governments or any other important question of law or fact concerning any matter.

Thus, the Supreme Court is the court of last resort for criminal, civil, constitutional, administrative, but also providential matters (including Quebec’s civil law and other province’s common law). This means that the Canadian court has a tremendous amount of prominence, and thus this prestige might serve as another form of compensation. It might also mean that the Supreme Court of Canada

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147 The Constitution Act of 1867 created a federal structure with the federal government having the ability to establish “a General Court of Appeal for Canada and any Additional Courts for the better Administration of the Laws of Canada” while maintaining local judicial power in ten provincial governments. These provincial courts have “jurisdiction over ‘the administration of justice’ in the provinces, which includes ‘the constitution, organization and maintenance’ of the courts, both civil and criminal, in the province, as well as civil procedure in those courts.” Supreme Court of Canada, The Canadian Judicial System, http://www.scc-csc.gc.ca/aboutcourt/system/index_e.asp (last visited February 7, 2008).

148 Id.

has a greater workload, meaning that the Court might have to work harder.

Turning to the United Kingdom, this country enjoys the oldest legal system in our comparative analysis but, surprisingly, the one with the least established societal function. The United Kingdom has never had a unified judicial system: Instead, England and Wales have had one system, Scotland has had its own, and Northern Ireland a separate one. The Constitutional Reform Act of 2005, however, christens a Supreme Court of the United Kingdom, which will relieve the Appellate Committee of the House of Lords (Law Lords) from its adjudicatory role,\footnote{Technically, appeals that the Appellate Committee hears are formally made to the Queen-in-Parliament. The Appellate Jurisdiction Act of 1876 grants only Law Lords the power to hear these appeals so that peers without legal training are not eligible to sit in the Committee.} as well as some of the work of the Privy Council.\footnote{Constitutional Reform Act of 2005 §§ 23, 40. For a background on the impetus for this large-scale reform, see DEP’T OF CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM (2003), available at http://www.dca.gov.uk/consult/supremecourt/supreme.pdf, and CONSTITUTIONAL INNOVATION: THE CREATION OF A SUPREME COURT FOR THE UNITED KINGDOM (Derek Morgan, ed. ___.)}. As such, the new Supreme Court will serve as the court of last rest for all courts of England and Wales, Northern Ireland, and, for civil cases only, Scotland.\footnote{Constitutional Reform Act of 2005 § 40. Scotland’s High Court of Justiciary will continue to be the highest court of appeal for criminal cases.} In addition to these duties, it will also address issues related to the Human Rights Act of 1998 and issues related to three devolved governments.\footnote{Id. § 41.} Still, the United Kingdom will maintain the doctrine of parliamentary sovereignty, meaning that the courts lack the power of judicial review—except for where mandated by European law.\footnote{See DEP’T OF CONSTITUTIONAL AFFAIRS, supra note 62.}

These new justices, unlike their predecessors, will no longer be members of the House of Lords nor will they receive peerages. Additionally, beneath this new Supreme Court will remain a
complex, multi-tiered judicial structure as detailed in the chart attached as Figure A.\(^{155}\)

Though similar in some respects, the high courts in Australia, Canada, and certainly the United Kingdom play markedly different roles in their respective governments and national societies than does the United States Supreme Court. If judges receive less power or prestige from an appointment because the judiciary in that country is not as highly regarded or because it does not exercise jurisdiction over some of the society’s most pressing issues, then these judges might need to be paid more in salary to make up for this difference. On the other hand, broader jurisdiction and more power also likely translates to more work and more pressure, hazards of the job that some judges might need to be paid more to endure. Of course, offering a lower salary might screen out judges who equate more power with more stress and thus select for judges who equate more power with more responsibility and pleasure.

The prestige of the judicial post may also affect the extent to which judges may generate outside income, particularly speaker fees and book royalties. First, a country must allow these types of income outside of the judicial salary; second, a country’s judge must have the requisite level of prestige to warrant interest in a judge’s speech and writing. For example, in 2006, Justice Breyer made over $90,000 in book royalties alone.\(^ {156}\) In fact, when considering this outside income and their oft-paid-for travel, *CNN Money* dubs being a Supreme Court justice one of the top 80 jobs in America.\(^ {157}\)

According to its ranking article, “[o]nly Justices Anthony Kennedy and Clarence Thomas reported assets under $1 million, not including

\(^{155}\) For a detailed explanation of the various levels, see Judiciary of England and Wales, Roles, Types, and Jurisdictions, http://www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/index.htm (last visited February 7, 2008).


homes;''\textsuperscript{158} Justice Antonin Scalia made twenty-five expense-paid trips in 2006.\textsuperscript{159}

How differences in jurisdiction, let alone the prestige of the respective appointments, influence the market clearing salary level for these judicial posts is not clear; however, this discussion demonstrates that factors other than judicial independence or quality might explain the differences in judicial pay across these countries.

3. Workload and Clerical Support

On the other side of the employment relationship is what will be required of the Justice, that is, how hard they have to work, to earn their respective salaries. To get at this question, the recent caseload of the High Court of Australia is relevant. 1,054 and 873 matters were filed in the High Court in 2005 and 2006, respectively. Of these, 527 (in year 2005) and 426 (in year 2006) were heard (meaning considered for review) by a full court. The overwhelming majority of these matters were not accepted for review by the High Court. In the 2005–06 term, of the 677 civil special leave applications decided, only 50 were granted. Of the 90 criminal special leave applications, only 8 were granted. Of the 79 civil appeals decided, 43 were allowed. Of the 19 criminal appeals, 9 were allowed. In total, 110 cases were determined in the 2005–06 term.\textsuperscript{160}

Justices, of course, do not shoulder all of this work by themselves. Associates (the equivalent of clerks) have historically provided administrative as well as legal support.\textsuperscript{161} Because of this varied work demand, it was not uncommon for justices to hire associates without any legal qualifications and for indefinite period.\textsuperscript{162} Currently, the norm is for Justices to hire young, promising lawyers for one to two years. Unlike their Canadian and American peers, Justices are only allocated two associates.\textsuperscript{163} These associates perform research, analysis, proofreading, and citation-
checking, but, although “an associate may be asked by his or her judge to prepare a memorandum or draft judgment, . . . it is rare for this draft to be recognisable in the final judgment.”\textsuperscript{164} Associates must also screen special leave applications, but the volume is only one-tenth as large as the certiorari pool U.S. clerks must evaluate.\textsuperscript{165} Because of this smaller pool, fewer associates per judge, greater reliance on oral argument, a less political judicial culture, and a cultural reluctance to delegate, associates have not been accused of excessive influence in the judicial decisionmaking process as they have in the United States.\textsuperscript{166}

The Supreme Court of Canada considers between 550 and 650 special leave applications and hears approximately 80 appeals a year.\textsuperscript{167} More specifically, in 2006, 506 complete applications for leave to appeal were filed, and only 80 appeals were heard; the most applications in any one year in the past decade was 642 (2000), and the most appeals heard in this same time range was 118 (1996).\textsuperscript{168} Only three judges are assigned to deal with these applications.\textsuperscript{169} Although quorum for the Court requires five members, panels ordinarily consist of seven or nine Justices.\textsuperscript{170}

Each justice on the Supreme Court hires three clerks for a one-year term.\textsuperscript{171} These clerkships mirror the United States in their selectivity and prestige, with more clerks graduating from the University of Toronto than any other law school. The clerks in the Supreme Court of Canada also appear to have similar duties:

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} See Andrew Leigh, \textit{Behind the Bench: Associates in the High Court of Australia}, 25 ALT. L. J. 295, 296–97 (2000) (“Although High Court associates clearly have a measure of influence over the work of that Court, the above factors make it difficult to argue, as has been suggested in the United States, that their influence is excessive.”).

\textsuperscript{167} Supreme Court of Canada, \textit{supra} note 60.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Frederick Lee Morton & Rainer Knopff, \textit{The Role of Clerks in the Supreme Court of Canada, in LAW, POLITICS AND THE JUDICIAL PROCESS IN CANADA} 556, 556 (Frederick Lee Morton, ed., 2002).
evaluating appeal requests, briefing the judge prior to oral argument, and drafting opinions (or at least portions of it). Unlike Australia, some Canadian legal scholars are concerned with the clerk’s influence in the Supreme Court’s jurisprudence.\footnote{Id. at 556–58.}

Work conditions in the United Kingdom are a little murkier. No one can yet predict what the new Supreme Court’s caseload will be: the Court will inherit the work done by the Appellate Committee of the House of Lords and the Privy Council, along with cases arising from devolution issues and new European Community laws. In 2005 (the most recent year for which statistics are available), the Judicial Committee of the Privy Council entered 6 appeals from the United Kingdom and allowed 2.\footnote{SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS & LORD CHANCELLOR, JUDICIAL STATISTICS (REVISED): ENGLAND AND WALES FOR THE YEAR 2005, 9 tbl. 1.1 (2006).} The House of Lords was presented with 240 petitions for leave to appeal and allowed 79.\footnote{Id. at 13 tbl. 1.3.}

Finally, there is no provision in the Constitutional Reform Act of 2005 for the hiring of clerks. Although the new Supreme Court does move towards the American model, it has not yet adopted this practice. Generally, the United Kingdom’s dramatic reconfiguration of judicial responsibilities will not only shape the jurisprudence of its citizens, it will also alter how these citizens view the judiciary and how the judiciary views itself. Although this makes the comparative exercise more challenging, the fact that such a significant alteration to judicial decisionmaking is occurring does suggest some dissatisfaction with the current judiciary. Thus, Justice Breyer’s allusion to England may have been mistimed.

C. \textit{Take-home Lessons}

The three judiciaries surveyed have much in common with each other and the United States. Much of this has to do with their mutual heritage and similar democratic structures. Justice Breyer might have offered a more interesting comparative question if, for example, he had chosen the case of Japan.

Professors Ramseyer and Rasmusen explore the Japanese judiciary to gauge the extent to which institutional constraints affect
judicial independence. Japan has only a national court system (as opposed to the others with federal structures). College students in Japan seeking a seat on the bench Japan take an exam to be admitted to the Legal Research and Training Institute (LTRI), a two-year program, after which graduates select a career path, including the judiciary. Judges are frequently appointed immediately out of LTRI for ten-year terms, must retire by age 65, and serve as the finders of fact as Japan has no jury system. More interesting to this Article’s aims, judges face a wide-ranging pay scale that goes from 190,600 to 1,115,000 yen per month. “Although the [Japanese] Constitution protects judges from explicit pay cuts (Art. 79), the Secretariat [the one who holds the power to appoint judges] need not promote judges at the same rate. If unhappy with a judges [sic] work, it need not promote him at all.”

The Supreme Court of Japan is somewhat different in its makeup and mechanisms, as well. The fifteen Justices are not bound by ten-year terms, and, although they still have a mandatory requirement age, it is 70 instead of 65. Despite the Constitution providing that the electorate may remove a Justice from office with a vote of no confidence, no one ever has been removed by this process. Justices tend to be appointed later in life, with the mean age of appointment for the fifteen Justices on the Court in 2001 being 63. Because of its departure from the common institutional

175 See J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE 4 (2003) (taking up the positive question: “Under what circumstance will politicians maintain judges who are independent from themselves?”).
176 Id. at 8.
177 Id.
178 Id. at 4, 9.
179 These are 1989 figures.
180 RAMSEYER & RASMUSEN, supra note 150, at 37.
181 Id. at 37–38.
182 Id. at 15.
183 CONST. OF JAPAN Art. 79.
184 RAMSEYER & RASMUSEN, supra note 150, at 15.
185 Id. Professors Ramseyer and Rasmusen note that Japanese prime ministers do this, in part, to prevent the “Harry Blackmun problem.” Id.; see also J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN’S POLITICAL MARKETPLACE(1997) (reporting the mean age of appointment for justices in 1990 as 64).
arrangements of the Commonwealth countries, Japan may actually be a far more interesting case for comparative study. In Part III, we expand our analysis to include Japan and other developed democracies.

<table>
<thead>
<tr>
<th>Country</th>
<th>Selection Process/Pool</th>
<th>Tenure/Mandatory Retirement</th>
<th>Salary Protection</th>
<th>Pension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Governor-General appoints after consultation with State attorneys-general. Candidate must have served as a barrister or solicitor for at least five years; and been a judge of a federal, state, or territorial court.</td>
<td>Mandatory retirement at 70; removal for proved misbehavior or incapacity.</td>
<td>Yes</td>
<td>Pension equals 60% of current high court salary for judges over 60 with 10 years of experience.</td>
</tr>
<tr>
<td>Canada</td>
<td>The Governor-in-Council may appoint any member of the legal profession who has been a member of the provincial or territorial bar for at least ten years.</td>
<td>Mandatory retirement at age 70; removal for incapacity or misconduct.</td>
<td>Yes.</td>
<td>CPI indexed annuity equal to two-thirds of retirement salary vests after fifteen years of service and the combined age and years of service is eighty or more, or (2) mandatory retirement age and ten years of service (pro-rated if years of service are less than ten).</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Queen appoints upon the judges may be</td>
<td>Life tenure, but judges may be</td>
<td>Yes.</td>
<td>Judges who retire at 65 or</td>
</tr>
<tr>
<td>Country</td>
<td>Process</td>
<td>Selection Criteria</td>
<td>Pensions</td>
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<tr>
<td>United States</td>
<td>Nomination by President, confirmation by Senate.</td>
<td>Candidates must have served on another high judicial office for at least two years and have at least 15 years of experience practicing law; most are members of Queen’s Counsel.</td>
<td>older and have at least 5 years of service are entitled to one-half of their highest annual salary (for judges with at least twenty years of service) or one-fortieth of their highest annual multiplied by the number of years in office; even if they do not meet these two requirements, they will receive a pro-rated share of the pension.</td>
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</tbody>
</table>

Still, Part II does shed some light on the institutional variations across the four countries, which may play a role in the relationship between judicial compensation and judicial quality. The United States is the only one of these countries that does not have a
mandatory age requirement, meaning that justices may hold tenures two or three times as long as others. U.S. Justices also appear to be appointed to the bench at an earlier age. Although Supreme Court justices seem to have weeded through the most matters to determine what to hear, their actual caseload per member of the Court is roughly the same as other countries. Furthermore, U.S. Justices have more clerks than any of their peers, and they also appear to use them for more substantive tasks, such as opinion-drafting. And although Justice Breyer does correctly note that these other countries offer larger salaries to their High Court Justices, the United States seems to offer a more favorable pension. Finally, the judges in the United States may also receive higher levels of non-pecuniary compensation than their foreign brethren. Although difficult to quantify, the established prominence of the judiciary in our legal and political culture—as well as its regard by other countries—suggests that the United States may pay judges in the form of prestige and impact on society, things that may be more valuable than the money in a judge’s checking account. Thus, the United States differs from Australia, Canada, and the United Kingdom in ways that might be relevant to the judicial compensation-quality relationship.

None of this is to discount entirely Justice Breyer’s comparison: we only suggest that these other variables be taken into consideration when making such an assessment. Part III begins with this hypothesis, that variables other than judicial salary influence judicial independence and performance, and then attempts an objective comparison of what few statistical measures are available.

Part III explores the available data to begin a more comprehensive examination of the comparative argument for increasing judicial salaries. Although the data is too underinclusive to draw generalizable conclusions, it does not show a strong connection between judicial compensation and what proxies can be used for judicial performance. Thus, we conclude that the data from other countries insinuate a far murkier relationship between judicial pay and performance.

III. BEYOND THE CHERRIES: A COMPARATIVE ANALYSIS OF JUDICIAL COMPENSATION, QUALITY, AND PERFORMANCE

186 See supra note 23 and accompanying text.
By arguing that our federal judiciary will improve if judges are paid higher salaries, and by directly comparing the salaries of United States Supreme Court Justices to their counterparts in other countries, judicial pay advocates invite an empirical assessment of the correlation of judicial compensation on judicial quality and performance. If, indeed, the data show that countries with “better” judiciaries tend to pay their judges more, ceteris paribus, it may support the argument that U.S. salaries are inadequate. Unfortunately, however, an empirical analysis of this relationship is ridden with methodological and data collection issues: the data is not available for a large enough sample of countries to draw meaningful conclusions and, even when data is available, methodological questions remain regarding the appropriate measures for judicial quality, performance, and opportunity costs.

As such, Part III explores what little data is available, not to declare the final word in the judicial pay debate, but to motivate more data collection such that we can test whether judicial pay improves judicial quality or performance. Because the data is so sparse that traditional regression techniques are inappropriate, we run pair-wise correlation coefficients between the various measures of judicial compensation and the proxies for judicial quality and performance. Consequently, we can say nothing definitive about the causal relationships between pay and quality or performance. All we can observe from the correlation coefficients is the strength and direction of the linear relationship between these variables. Nonetheless, we can test whether the popular pay raise argument—those countries that pay their judges the most enjoy more and better justice—withstanding even the most cursory scrutiny. From the limited data we found and the crude empirical techniques we use to study them, only one thing is clear: the relationship between judicial pay and performance is far murkier than many pay advocates suggest.

Compensation appears correlated to judicial quality and performance in conflicting ways: diffuse support for the judiciary by the public and confidence in the judiciary by firms are lower, while the average resolution time is longer, in countries that pay their judges large salaries compared to the rest of the economy. On the other hand, corruption and the number of unresolved cases are higher in countries that pay their high court judges smaller salaries relative
to the rest of the economy. Hence, our results appear mixed. Admittedly, these findings are susceptible to criticism on several grounds. We use crude empirical methods to study incomplete and potentially misleading measures of judicial quality and performance. Moreover, the results, themselves, are in some respects contradictory. Nonetheless, we report these findings because they demonstrate what little is actually known about the correlation of judicial pay on quality and performance. We begin by summarizing the salary data available for OECD countries; we then report variables that might be used as proxies for judicial quality; finally, we run correlations of these proxy variables on the judicial salary to evaluate the relationship between pay and quality.

A. Judicial Salary Comparison in OECD Countries

Our first objective is to compare salaries of federal judges in the United States against a larger sample of countries than has previously been made. To do this, we look to the average salaries of high court judges and justices in countries belonging to the Organization for Economic Co-operation and Development (OECD). We focus our analysis on the high courts in OECD countries for several reasons. OECD countries present a larger sample for comparison, as desired, but one that seems reasonable given their common acceptance of representative democracy and free market principles. And, although limiting our analysis to OECD countries does not eliminate the institutional and job-specific

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187 The OECD consists of 30 member groups “committed to democracy and the market economy,” Organisation for Economic Co-operation and Development (PowerPoint presentation), available at http://www.oecd.org/dataoecd/29/23/2397890.ppt#257,2,OECD. We attempted to collect information for the following OECD countries: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. For an interesting discussion on judicial pay in the context of developing countries, see James H. Anderson, David S. Bernstein & Cheryl W. Gray, World Bank, Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future, 39 (2005). In developing countries, there is weak evidence that judicial salaries relative to lawyers’ salaries have a positive relationship to the perceived fairness of the courts. Id. at 42 fig.3.14.
variation between their respective judiciaries—indeed, the interaction of these variables with judicial quality and performance is what interests us most—the OECD limitation does exclude those judiciaries that are so different from the United States’ that comparison would be meaningless.

Although the members of the OECD all tend to have strong economies and established democracies, there is a tremendous variation in the strength of the economies, the development of the democracies, the non-pecuniary benefits of judging as discussed in Part II, the age of the judiciary, its role in law and society, and other factors that might influence the levels of judicial salaries. Admittedly, our empirical analysis of these countries’ judiciaries is not as expansive as the qualitative comparison discussed in Parts I and II. A study of that depth is beyond the scope of this initial inquiry and currently impossible given the dearth of quantitative data available.

We further focus our analysis on the highest national courts in these countries because (1) data on lower court salaries is sparse and less reliable, and (2) this limitation eliminates the possibility of incorrectly comparing salaries across different court levels. Ideally, our analysis would take some type of weighted composite of judicial salaries across the different court levels or perhaps treat each salary level as a separate data point and then control for court level by using a dummy variable of court levels below the highest court. But Justice Breyer focuses his attention on the high courts, and thus we do the same as an initial step to further exploring the empirical question he raises. Using these different salaries as separate points also only works if we have distinct performance measures for each court. All of our performance measures are generic to each country.

Table I reports the judicial salaries for the high courts in OECD countries. The data is generated from two primary sources:

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188 In the United States, for example, the Supreme Court would be a zero, circuit courts would be a one, and district courts would be a two. Complicating the picture further would be how to treat the different state court systems and their multiple levels.

189 Because the high courts are not the only contributors to the outputs we use to measure judicial quality, this also creates a mismatch in the scope of the compensation and the scope of the quality measure.
the World Bank\footnote{Id. (using 2003 and 2005 data).} and the European Commission for the Efficiency of Justice.\footnote{EUR. COMM’N FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS (2006) (using 2004 data and 1.25x U.S. dollar to euro conversation factor).} Because countries do not always report their changed salary schedules immediately, we use 2004 and 2005 figures. As this is a prescient issue in many countries, it is possible—and even likely—that these salaries have increased, if nothing else because of cost-of-living and/or inflation adjustments. Still, the figures provide some sense of how much judges take home in these countries relative to one another.

The numbers reported represent the average salary for a high court judge in each country, and so do not take into consideration any additional amount that might be paid based on seniority or status, such as to a Chief Justice. The figures do not include other pecuniary forms of compensation, which, as the stories in Parts I and II suggest,\footnote{In particular, see infra Part II.B.} might be considerable in the judicial labor market. And, in fact, some European judiciaries listed below have moved to a performance pay system.\footnote{See European Association of Judges, Resolution at the Meeting in Vilnius, May 20, 2006 (noting “with concern the practice in some jurisdictions of subjecting the remuneration of Judges to a discretionary element in the form of a performance bonus” and taking objection to the practice because “it conflicts with European standards and presents a real threat to the independence of judges . . . the criteria by which the eligibility of a particular judge for a performance bonus is assessed are not objective and transparent [and] the practice creates a temptation to give greater weight to quantity rather than to quality”).} The figures have all been converted into U.S. dollars using the exchange rate on January 1, 2005. In addition to the salary statistics, we also report each country’s rank among OECD countries and later use that rank to analyze the correlation of pay on proxies for judicial quality and performance.

\begin{table}
\centering
\caption{Judicial Salaries of National High Courts, 2004/2005\footnote{Figures for Mexico and Switzerland are not included.}}
\begin{tabular}{ll}
\textbf{Country} & \textbf{2004/05 Judicial salary (in U.S. dollars)} & \textbf{Rank} \\
United Kingdom & $331,738 & 1 \\
\end{tabular}
\end{table}
<table>
<thead>
<tr>
<th>Country</th>
<th>Salary</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>$248,678</td>
<td>2</td>
</tr>
<tr>
<td>Australia</td>
<td>$241,498</td>
<td>3</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>4</td>
</tr>
<tr>
<td><strong>United States</strong></td>
<td>$203,000</td>
<td>5</td>
</tr>
<tr>
<td>France</td>
<td>$198,201</td>
<td>6</td>
</tr>
<tr>
<td>Japan</td>
<td>$172,346</td>
<td>7</td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8</td>
</tr>
<tr>
<td>Iceland</td>
<td>$156,250</td>
<td>9</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$141,606</td>
<td>10</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$137,500</td>
<td>11</td>
</tr>
<tr>
<td>Spain</td>
<td>$135,686</td>
<td>12</td>
</tr>
<tr>
<td>Finland</td>
<td>$131,250</td>
<td>13</td>
</tr>
<tr>
<td>Austria</td>
<td>$125,225</td>
<td>14</td>
</tr>
<tr>
<td>Belgium</td>
<td>$117,073</td>
<td>15</td>
</tr>
<tr>
<td>Denmark</td>
<td>$115,568</td>
<td>16</td>
</tr>
<tr>
<td>Sweden</td>
<td>$110,520</td>
<td>17</td>
</tr>
<tr>
<td>Germany</td>
<td>$108,098</td>
<td>18</td>
</tr>
<tr>
<td>Portugal</td>
<td>$96,979</td>
<td>19</td>
</tr>
<tr>
<td>Norway</td>
<td>$94,000</td>
<td>20</td>
</tr>
<tr>
<td>Greece</td>
<td>$70,500</td>
<td>21</td>
</tr>
<tr>
<td>Italy</td>
<td>$58,245</td>
<td>22</td>
</tr>
<tr>
<td>Poland</td>
<td>$46,521</td>
<td>23</td>
</tr>
<tr>
<td>Hungary</td>
<td>$43,033</td>
<td>24</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$37,464</td>
<td>25</td>
</tr>
<tr>
<td>Turkey</td>
<td>$33,948</td>
<td>26</td>
</tr>
<tr>
<td>Korea</td>
<td>$33,600</td>
<td>27</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>$11,856</td>
<td>28</td>
</tr>
</tbody>
</table>

What is immediately apparent is that the United States pays its judges relatively well. Of the four countries that pay their judges more, Justice Breyer chose two of them for one of his comparisons with the U.S. salaries. For his other comparison, he uses a country—Canada—that actually pays its *high court* judges less (#8 on the list) than the United States (#5). Another interesting observation is the range of pay across countries: the United Kingdom pays its Law Lords over $330,000 and the Slovak Republic only pays

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its judges a little over $10,000. Yet seven countries have salaries within $50,000 of the United States.

But a different impression from the table that gives credence to Justice Breyer’s argument is that the common law countries tend to be clustered at the top, with the civil law countries lower in the list. This may be common-law countries tend not to view their judges as civil servants who are modestly paid. Civil law countries do put them judges in the same category as civil servants, thereby limiting their compensation. These also tend to be career judiciaries, meaning that their opportunity costs are also different than in common-law countries where it is common for a judge to begin in private practice before appointment.

There are two dangers in pouring too deeply over these numbers: First, it gives the impression that these judges participate in the same market. This is not the case. Despite the increasing internationalization of the law, each judiciary requires a specific background, knowledge in the nation’s jurisprudence and, in some countries, domestic citizenship. The authors know of no example where a judge moved from one nation’s high court to another. Second, these figures, although converted into U.S. dollars, do not take into consideration that these salaries have different purchasing powers. Therefore, Table II reports the judicial salaries after cost-of-living adjustments have been made.197

196 See Posner, supra note 79, at 129 (“As the term “career judiciary” implies, they are systems manned by lawyers who make an entire career of being a judge. In contrast, most Anglo-American judges become judges only after a career in another branch of the legal profession.” (citation omitted)); see also Richard O. Faulk, Armageddon through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution, 37 Torts & Insur. L.J. 999, 1011 (2002) (calling the civil law judge “a kind of expert clerk” who is “presented with a fact situation to which a ready legislative response will be readily found in all except the extraordinary case”).

197 The COLA figures are taken from the March 2006 Mercer Worldwide Cost of Living Survey (US = 100). Mercer's annual Cost of Living Survey covers 143 cities across six continents and measures the comparative cost of over 200 items in each location, including housing, transport, food, clothing, household goods and entertainment. It is the world’s most comprehensive cost of living survey and is used to help multinational companies and governments determine compensation allowances for their expatriate employees.
### TABLE II: Judicial Salaries of National High Courts, 2004/2005 with COLA

<table>
<thead>
<tr>
<th>Country</th>
<th>Judicial salary (in U.S. dollars)</th>
<th>2004/05 Rank</th>
<th>COLA index*</th>
<th>Salary with COLA</th>
<th>Rank after COLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>$331,738</td>
<td>1</td>
<td>110.6</td>
<td>$299,943</td>
<td>1</td>
</tr>
<tr>
<td>Ireland</td>
<td>$248,678</td>
<td>2</td>
<td>91.8</td>
<td>$270,891</td>
<td>2</td>
</tr>
<tr>
<td>Australia</td>
<td>$241,498</td>
<td>3</td>
<td>91.3</td>
<td>$264,510</td>
<td>3</td>
</tr>
<tr>
<td>France</td>
<td>$198,201</td>
<td>6</td>
<td>93.1</td>
<td>$212,891</td>
<td>4</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>4</td>
<td></td>
<td>$211,900</td>
<td>5</td>
</tr>
<tr>
<td>United States</td>
<td>$203,000</td>
<td>5</td>
<td>100.0</td>
<td>$203,000</td>
<td>6</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$141,606</td>
<td>10</td>
<td>81.2</td>
<td>$174,392</td>
<td>7</td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8</td>
<td>100.0</td>
<td>$166,800</td>
<td>8</td>
</tr>
<tr>
<td>Spain</td>
<td>$135,686</td>
<td>12</td>
<td>81.6</td>
<td>$166,282</td>
<td>9</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$137,500</td>
<td>11</td>
<td>83.4</td>
<td>$164,868</td>
<td>10</td>
</tr>
<tr>
<td>Iceland</td>
<td>$156,250</td>
<td>9</td>
<td></td>
<td>$156,250</td>
<td>11</td>
</tr>
<tr>
<td>Finland</td>
<td>$131,250</td>
<td>13</td>
<td>87.8</td>
<td>$149,487</td>
<td>12</td>
</tr>
<tr>
<td>Belgium</td>
<td>$117,073</td>
<td>15</td>
<td>79.5</td>
<td>$147,261</td>
<td>13</td>
</tr>
<tr>
<td>Japan</td>
<td>$172,346</td>
<td>7</td>
<td>119.1</td>
<td>$144,707</td>
<td>14</td>
</tr>
<tr>
<td>Austria</td>
<td>$125,225</td>
<td>14</td>
<td>89.8</td>
<td>$139,449</td>
<td>15</td>
</tr>
<tr>
<td>Germany</td>
<td>$108,098</td>
<td>18</td>
<td>79.2</td>
<td>$136,487</td>
<td>16</td>
</tr>
<tr>
<td>Sweden</td>
<td>$110,520</td>
<td>17</td>
<td>84.8</td>
<td>$130,330</td>
<td>17</td>
</tr>
<tr>
<td>Portugal</td>
<td>$96,979</td>
<td>19</td>
<td>79.2</td>
<td>$122,448</td>
<td>18</td>
</tr>
<tr>
<td>Denmark</td>
<td>$115,568</td>
<td>16</td>
<td>101.1</td>
<td>$114,311</td>
<td>19</td>
</tr>
<tr>
<td>Norway</td>
<td>$94,000</td>
<td>20</td>
<td>100.0</td>
<td>$94,000</td>
<td>20</td>
</tr>
<tr>
<td>Greece</td>
<td>$70,500</td>
<td>21</td>
<td>81.1</td>
<td>$86,930</td>
<td>21</td>
</tr>
<tr>
<td>Italy</td>
<td>$58,245</td>
<td>22</td>
<td>89.8</td>
<td>$64,861</td>
<td>22</td>
</tr>
</tbody>
</table>


*The figures in italics did not have the COLA index available and therefore were not adjusted.*
This adjustment does not move the cardinal rankings much but it does move most of the salaries closer together. For example, instead of the United States paying its Supreme Court justices half of what is paid in the United Kingdom, as Justice Breyer described—with the cost-of-living adjustment—the justices are paid two-thirds. Another way, however, of considering the adequacy of judicial salaries may be to think of it in relation to the average annual gross salaries in those countries. Judges are competing in a labor market though certainly not one so broad as to include median pay for the entire country as the proper measure for the relevant market. Because people make decisions at many points that could exclude them from the judicial candidate pool, knowing what other professions get paid might be relevant. And relative pay also signals a greater prominence of judges in society, though by itself would not necessarily affect productivity. We use individual country’s census and labor data to include what the average person makes in a year in the country. Although, we would expect judges, given their specialized training and experience, to make more than the average person, it still gives some rough perspective on the labor market in any given country. This gives some sense of how much the judiciary is valued relative to other professions. Table III reports these results.

**TABLE III: Ranking of High Court Judicial Salaries as a Factor of Average Annual Gross Salaries**

<table>
<thead>
<tr>
<th>Country</th>
<th>Salary</th>
<th>Cost-of-Living</th>
<th>Adjusted Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poland</td>
<td>$46,521</td>
<td>23</td>
<td>$46,521</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$37,464</td>
<td>25</td>
<td>$45,632</td>
</tr>
<tr>
<td>Hungary</td>
<td>$43,033</td>
<td>24</td>
<td>$43,033</td>
</tr>
<tr>
<td>Turkey</td>
<td>$33,948</td>
<td>26</td>
<td>$36,463</td>
</tr>
<tr>
<td>Korea</td>
<td>$33,600</td>
<td>27</td>
<td>$27,609</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>$11,856</td>
<td>28</td>
<td>$14,388</td>
</tr>
</tbody>
</table>

---

199 We use individual country’s census and labor data to include what the average person makes in a year in the country. Although, we would expect judges, given their specialized training and experience, to make more than the average person, it still gives some rough perspective on the labor market in any given country. Gross salaries not available for Australia, New Zealand, Japan, Canada, Denmark, and Korea.
<table>
<thead>
<tr>
<th>Country</th>
<th>2004/05 Judicial salary</th>
<th>Average gross annual salary</th>
<th>Judicial salary as a factor of average annual salary</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>$331,738</td>
<td>$46,125</td>
<td>7.19</td>
<td>1</td>
</tr>
<tr>
<td>Ireland</td>
<td>$248,678</td>
<td>$34,725</td>
<td>7.16</td>
<td>2</td>
</tr>
<tr>
<td>Poland</td>
<td>$46,521</td>
<td>$7,773</td>
<td>5.98</td>
<td>3</td>
</tr>
<tr>
<td>Portugal</td>
<td>$96,979</td>
<td>$16,865</td>
<td>5.75</td>
<td>4</td>
</tr>
<tr>
<td><strong>United States</strong></td>
<td><strong>$203,000</strong></td>
<td><strong>$36,764</strong></td>
<td><strong>5.52</strong></td>
<td><strong>5</strong></td>
</tr>
<tr>
<td>Hungary</td>
<td>$43,033</td>
<td>$8,730</td>
<td>4.93</td>
<td>6</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$37,464</td>
<td>$8,479</td>
<td>4.42</td>
<td>7</td>
</tr>
<tr>
<td>Spain</td>
<td>$135,686</td>
<td>$31,325</td>
<td>4.33</td>
<td>8</td>
</tr>
<tr>
<td>France</td>
<td>$198,201</td>
<td>$48,651</td>
<td>4.07</td>
<td>9</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$137,500</td>
<td>$38,303</td>
<td>3.59</td>
<td>10</td>
</tr>
<tr>
<td>Turkey</td>
<td>$33,948</td>
<td>$9,729</td>
<td>3.49</td>
<td>11</td>
</tr>
<tr>
<td>Greece</td>
<td>$70,500</td>
<td>$20,970</td>
<td>3.36</td>
<td>12</td>
</tr>
<tr>
<td>Iceland</td>
<td>$156,250</td>
<td>$48,375</td>
<td>3.23</td>
<td>13</td>
</tr>
<tr>
<td>Finland</td>
<td>$131,250</td>
<td>$41,250</td>
<td>3.18</td>
<td>14</td>
</tr>
<tr>
<td>Belgium</td>
<td>$117,073</td>
<td>$39,883</td>
<td>2.93</td>
<td>15</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$141,606</td>
<td>$49,484</td>
<td>2.86</td>
<td>16</td>
</tr>
<tr>
<td>Sweden</td>
<td>$110,520</td>
<td>$39,883</td>
<td>2.77</td>
<td>17</td>
</tr>
<tr>
<td>Austria</td>
<td>$125,225</td>
<td>$48,300</td>
<td>2.59</td>
<td>18</td>
</tr>
<tr>
<td>Germany</td>
<td>$108,098</td>
<td>$49,769</td>
<td>2.17</td>
<td>19</td>
</tr>
<tr>
<td>Italy</td>
<td>$58,245</td>
<td>$27,818</td>
<td>2.09</td>
<td>20</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>$11,856</td>
<td>$6,246</td>
<td>1.90</td>
<td>21</td>
</tr>
<tr>
<td>Norway</td>
<td>$94,000</td>
<td>$51,524</td>
<td>1.82</td>
<td>22</td>
</tr>
</tbody>
</table>
Again, the United States remains in the top five, but a number of the other countries shift. For example, Polish judges get almost six times the salary of the average Polish citizen, even though their average salary on Poland’s highest court is less than $50,000. On the other hand, Norwegian high court judges earn only 1.82 times the average Norwegian salary, despite the fact that they are paid a healthy $94,000.

But federal judges tend to be far from average, at least in terms of educational attainment and earning potential, in most OECD countries. When judicial candidates accept a nomination to the bench, most give up lucrative financial opportunities in the private sector. The most difficult information to access—and, inconveniently, the most important—is some proxy for the opportunity cost that attorneys undergo when they become members of the judiciary and decline the financial promise of an equity partner in a private firm. In addition to the concerns already mentioned, attempting to compare private salaries complicates the picture. These opportunities should not be seen as equivalent as they do not involve the lengthy tenure, the income protection, and other non-pecuniary benefits that being a judge does. Still, using the salary of partners in private law firms might provide a proxy for the opportunity costs of serving on the judiciary. In Table IV, we begin to do this.

Until recently, no data source published partner salaries by country. Firms were somewhat guarded about these figures, and it was difficult to aggregate these figures by country much less compare them. In 2006, Martindale-Hubbell conducted a survey of European firms to determine, inter alia, their productivity. Although the survey does not break down how much an attorney takes home, it reports the median income per equity partner by country.

<table>
<thead>
<tr>
<th>TABLE IV: Ranking of High Court Judicial Salaries as a Percentage of Median Income per Equity Partner</th>
</tr>
</thead>
<tbody>
<tr>
<td>200 Martindale-Hubbel.</td>
</tr>
<tr>
<td>201 We are reluctant to include the United States in this ranking, because the country’s data is not included in the Martindale-Hubbel European survey from which the median income per equity partner is drawn. There is a similar survey that is done on this side of the Atlantic by Altman Weil. Altman Weil, New</td>
</tr>
</tbody>
</table>
Using this as a substitute for salary would overestimate how much attorneys in the private sector actually make because it does not take into consideration overhead costs and support staff pay. Still, it is more reliable than other data sources that attempt to estimate pay for a partner at a private firm. The data in Table IV is too limited to draw strong conclusions, but it shows promise as a means to determining the opportunity cost. It also supports the suggestion that the United Kingdom still pays its judges well even relative to pay in the private sector. For example, Finland pays its judges less than half of what the United Kingdom does. But these judges would also make less than half were they to leave the bench. Accounting for the lower opportunity helps explain much of the disparity.

The United States is not included in the survey from which Table III results were generated. But a similar study conducted by Altman Weil\textsuperscript{202} shows average revenue per lawyer in the United

\begin{tabular}{|c|c|c|c|c|c|}
\hline
Country & 2004/05 Judicial salary & Median Income per Partner & Salary / Income per partner & Rank & Factor rank \\
\hline
United Kingdom & $331,738 & $3,293,905 & 0.101 & 1 & 1 \\
Finland & $131,250 & $1,517,422 & 0.086 & 2 & 4 \\
Sweden & $110,520 & $1,474,854 & 0.075 & 3 & 6 \\
Spain & $135,686 & $1,839,703 & 0.074 & 4 & 3 \\
Belgium & $117,073 & $1,632,763 & 0.072 & 5 & 5 \\
Germany & $108,098 & $2,185,447 & 0.049 & 6 & 7 \\
Poland & $46,521 & $1,204,131 & 0.039 & 7 & 2 \\
Italy & $58,245 & $2,974,574 & 0.020 & 8 & 8 \\
\hline
\end{tabular}


States at $419,826.\textsuperscript{203} American Lawyer reports the 2006 median profits per partner of the top 200 law firms at $777,500.\textsuperscript{204} These numbers cannot be directly compared to the ones in Table III, but it does foreshadow the possibility that that part of the disparity in judicial salaries may be due to different opportunity costs for sitting on the bench.

Overall, the U.S. Supreme Court Justices appear to be doing quite well compared to their judicial counterparts in other developed countries. Although there is some variation across the high courts of these countries, the comparison shows there are very few outliers, that is, no countries appear to pay their judges exorbitant salaries compared to other judiciaries or to other legal positions. This fact seems to suggest that, if judicial quality and performance does vary significantly across OECD countries, judicial pay might not be the only reason. Still, proponents of judicial pay increases could take Tables II and III and suggest that the fact that the more established constitutional democracies seem to be clustering at the top and the more fledgling democracies, relatively speaking, seem to be down towards the bottom, means that pay matters. But this rough guess of which judiciaries are “good” and which ones are “bad” is a poor argument when objective criteria—albeit still far from perfect—would better support or criticize the position of those in favor of judicial pay increases.

B. The Correlation of Judicial Compensation on Performance and Quality

The next stage of our analysis explores the possibility that judicial quality and performance do not move “lock-step” with judicial pay. To test this possibility, we measure the correlation of high court salaries in OECD countries to various measures of judicial quality and performance. Here, data availability controls our choices


\textsuperscript{204} The Full Profits Picture, 29 AMER. LAWYER 151 (2007) (reporting 2006 results of the AmLaw 200).
more than theoretical and methodological desires. In fact, because there are no direct measures of judicial quality or performance, we must use proxies for these variables.\textsuperscript{205} We do not presume that all—or even any—of these proxy variables appropriately capture all that goes into making a judiciary high-quality and independent. And unfortunately, even for these proxies, we do not have data points for every OECD country. Nonetheless, we present a more complete and more objective comparison of foreign judiciaries than other commentators in the judicial pay debate. Thus, we think of our correlations as the first step in empirically evaluating this claim. If some take issue with our measures, then we hope it will lead to a discussion of what the best measures and a more diligent job of collecting this data.

In the following pages, we report several proxies for judicial quality and performance in every OECD country for which we found data. We also report the average high court judicial salary in U.S. dollars, adjusted for cost of living in each country; the rank order of both judicial salary statistics across OECD countries; as well as the value and rank order of each proxy statistic. We use the values of the various salary statistics and measures of judicial quality and performance to calculate correlation coefficients. Our motivation is straightforward: if Justice Breyer and the other pay raise advocates are correct in that increasing judicial pay improves judicial quality and performance, then we should observe some degree of correlation between pay and the various measures of quality and performance.\textsuperscript{206}

Because the correlation coefficient discussed above is a parametric statistic,\textsuperscript{207} and because we have no reason to assume the

\textsuperscript{205} Two of the proxies we use relate to the public perception of a country’s federal judiciary: one is lawyer-specific, the other is diffuse support. The underlying theory is that because high quality and productivity are desirable qualities in every judiciary, but difficult to measure quantitatively, the more interesting, relevant and easier question might be how public perception of judicial quality or performances is correlated to judicial pay.

\textsuperscript{206} Admittedly, correlation coefficients describe only the strength and direction of a linear relationship between two variables, not whether a causal relationship exists between judicial pay and performance or quality. However, if the correlation between pay and quality or performance is weak or has an unexpected sign, this undermines the causal relationship.

\textsuperscript{207} As the name suggests, parametric statistics assume variables are drawn from a parameterized distribution, usually a normal distribution.
salary, performance or quality statistics are drawn from a given probability distribution, we also calculate Kendall tau rank correlation coefficients between the ordinal rankings of the judicial salary statistics and the performance and quality measures. Although calculating correlation coefficients for the ordinal rank statistics may generate some small degree of error, this is offset by the use of the more clearly interpretable rank-order correlation coefficients and empirical results that correspond more closely to the comparative argument made by Justice Breyer and other pay raise advocates. That is, the rank-order correlation coefficients directly test Justice Breyer’s claim that the countries that pay their judges the most have the best judiciaries. Moreover, because we have no reason to assume either the salary or performance/quality statistics are drawn from a given probability distribution, or that a linear relationship exists between them, calculating the Kendall tau rank correlation coefficients likely introduces less error than any other statistical method.

We divide the data into four groups: (1) independence proxies—the separation of judiciaries from other political actors and corruption; (2) system confidence proxies—support for the judiciary among practicing attorneys as well as the general public; (3) judicial efficiency—the ability of the judiciary to resolve disputes quickly; and (4) substantive rights protections—the degree to which courts enforce individual rights.

1. Independence proxies
We first consider the level of corruption in the judicial system. We have two measures for this corruption: The first is a composite index published in the 2007 version of the Global Corruption Report. This “Corruption Perceptions Index” combines data from nine different sources to arrive at what is supposed to surrogate for “the degree to which corruption is

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209 LARRY WASSERMAN, ALL OF NONPARAMETRIC STATISTICS ___ (2007).
perceived to exist among public officials and politicians.”

Hence, a large value on the corruption perceptions index means a higher perceived level of corruption. One problem with this measure is that includes all government officials, not just the judiciary. Still, it might help approximate the level of bad actors as public servants. The second corruption measure is one of the Worldbank’s Governance Indicators called “Control of Corruption.” The indicators are an aggregate of “the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries.”

Control of corruption “measures the extent to which public power is exercised for private gain, including petty and grand forms of corruption, as well as “capture” of the state by elites and private interests.” Table V reports the results as well as a coefficient of correlation between the salary rank and corruption rank values for each country.

**TABLE V: Salary and Corruption**

<table>
<thead>
<tr>
<th>Country</th>
<th>COLA Salaries</th>
<th>Corruption Index</th>
<th>Control of Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>$299,943</td>
<td>8.6</td>
<td>95</td>
</tr>
<tr>
<td>Ireland</td>
<td>$270,891</td>
<td>7.4</td>
<td>93</td>
</tr>
<tr>
<td>Australia</td>
<td>$264,510</td>
<td>8.7</td>
<td>95</td>
</tr>
<tr>
<td>France</td>
<td>$212,891</td>
<td>7.4</td>
<td>91</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>9.6</td>
<td>99</td>
</tr>
<tr>
<td>United States</td>
<td>$203,000</td>
<td>7.3</td>
<td>92</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$174,392</td>
<td>8.6</td>
<td>93</td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8.5</td>
<td>94</td>
</tr>
</tbody>
</table>

---

211 Id. at 324.


Spain    $166,282    9    6.8    20    90    18
Netherlands $164,868    10    8.7    8    96    7
Iceland     $156,250    11    9.6    1    100    1
Finland     $149,487    12    9.6    1    100    1
Belgium     $147,261    13    7.3    18    91    16
Japan       $144,707    14    7.6    15    85    19
Austria     $139,449    15    8.6    10    96    7
Germany     $136,487    16    8    14    94    11
Sweden      $130,330    17    9.2    5    97    5
Portugal    $122,448    18    6.6    21    84    20
Denmark     $114,311    19    9.5    4    98    4
Norway      $94,000     20    8.8    7    97    5
Greece      $86,930     21    4.4    27    67    25
Italy       $64,861     22    4.9    24    67    25
Poland      $46,521     23    3.7    29    61    27
Czech Republic   $45,632    24    4.8    25    68    23
Hungary     $43,033     25    5.2    22    70    21
Turkey      $36,463     26    3.8    28    60    28
Korea       $27,609     27    5.1    23    69    22
Slovak Republic  $14,388    28    4.7    26    68    23

*Italicized numbers reported without COLA adjustment.

In further considering judicial independence, we borrow three variables from the 2007 Economic Freedom of the World annual report.\(^{215}\) The first is “judicial Independence,”\(^{216}\) which originates from the Global Competitiveness Report. The survey question asks: “Is the judiciary in your country independent from political influences of members of government, citizens, or firms? No—heavily influenced (= 1) or Yes—entirely independent (= 7).”\(^{217}\) The second is “impartial courts,”\(^{218}\) which is from the same report and reports responses to the following question: “The legal


\(^{216}\) Id.


\(^{218}\) Id.
framework in your country for private businesses to settle disputes and challenge the legality of government actions and/or regulations is inefficient and subject to manipulation (\(= 1\)) or is efficient and follows a clear, neutral process (\(= 7\)).\(^{219}\)

The third variable is “integrity of the legal system,”\(^{220}\) which is taken from the International Country Risk Guide’s Political Risk Component I for Law and Order.\(^{221}\) “Two measures comprising one risk component. Each sub-component equals half of the total. The ‘law’ sub-component assesses the strength and impartiality of the legal system, and the ‘order’ sub-component assesses popular observance of the law.”\(^{222}\) Table VI reports these findings.

**TABLE VI: Salary and Independence**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>$299,943</td>
<td>1</td>
<td>8.74</td>
<td>7</td>
<td>9.17</td>
<td>13</td>
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<tr>
<td>Ireland</td>
<td>$270,891</td>
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<td>8.57</td>
<td>9</td>
<td>10.1</td>
<td>1</td>
</tr>
<tr>
<td>Australia</td>
<td>$264,510</td>
<td>3</td>
<td>8.8</td>
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<td>9.79</td>
<td>11</td>
</tr>
<tr>
<td>France</td>
<td>$212,891</td>
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<td>6.77</td>
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<td>14</td>
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<td>11.96</td>
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<td>United States</td>
<td>$203,000</td>
<td>6</td>
<td>6.6</td>
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<td>1</td>
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<td>7.91</td>
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</tr>
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<td>4.49</td>
<td>25</td>
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<td>14</td>
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<td>1</td>
</tr>
<tr>
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</tr>
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<td>$149,487</td>
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<td>8.59</td>
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<td>6.98</td>
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<td>7.6</td>
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<td>11</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
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<td>9.18</td>
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<td>8.33</td>
<td>14</td>
</tr>
<tr>
<td>Sweden</td>
<td>$130,330</td>
<td>17</td>
<td>8.11</td>
<td>12</td>
<td>10</td>
<td>1</td>
</tr>
</tbody>
</table>

\(^{219}\) *Id.* at 185 (quoting World Economic Forum, Global Competitiveness Report (various issues), http://www.weforum.org/en/initiatives/gcp/index.htm). The source also noted that where unavailable the “Rule of Law” ratings from the WorldBank’s Governance Indicators have filled the gaps.

\(^{220}\) *Id.*

\(^{221}\) *Id.* at 185.

The first variable we use is the confidence level that law firms, the primary users of the legal system, have in the judiciary. The survey data used asks whether the firm agrees with the following statement: “I am confident that the judicial system will enforce my contractual and property rights in business disputes.”

The second variable, diffuse support, is similar to the confidence value in trying to get a sense of the reputation of the judiciary within each country. Its scope is broader, however, because it asks of the support of the judiciary from the general public. It focuses on those that are familiar with the court system and the overall satisfaction with it. Table VII reports the results for both support measures.

**TABLE VII: Salary and Confidence**

<table>
<thead>
<tr>
<th>Country</th>
<th>COLA Salaries</th>
<th>Rank</th>
<th>Confidence Rank</th>
<th>Diffuse Support</th>
<th>Rank</th>
</tr>
</thead>
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<td>58</td>
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<td></td>
</tr>
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<td>71.67</td>
<td>5</td>
<td>54.5</td>
</tr>
</tbody>
</table>

*Italicized numbers reported without COLA adjustment.


224 Id.


226 Id.
<table>
<thead>
<tr>
<th>Country</th>
<th>Salary</th>
<th>Rank</th>
<th>Efficiency</th>
<th>COLA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>$264,510</td>
<td>3</td>
<td>55</td>
<td>12</td>
</tr>
<tr>
<td>France</td>
<td>$212,891</td>
<td>4</td>
<td>58</td>
<td>8</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>5</td>
<td>62.2</td>
<td>6</td>
</tr>
<tr>
<td>United States</td>
<td>$203,000</td>
<td>6</td>
<td>69.9</td>
<td>1</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$174,392</td>
<td>7</td>
<td>58.8</td>
<td>8</td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8</td>
<td>52.2</td>
<td>15</td>
</tr>
<tr>
<td>Spain</td>
<td>$166,282</td>
<td>9</td>
<td>65.4</td>
<td>3</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$164,868</td>
<td>10</td>
<td>69.9</td>
<td>1</td>
</tr>
<tr>
<td>Iceland</td>
<td>$156,250</td>
<td>11</td>
<td>52.2</td>
<td>15</td>
</tr>
<tr>
<td>Finland</td>
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<td>12</td>
<td>52.2</td>
<td>15</td>
</tr>
<tr>
<td>Belgium</td>
<td>$147,261</td>
<td>13</td>
<td>65.4</td>
<td>3</td>
</tr>
<tr>
<td>Japan</td>
<td>$144,707</td>
<td>14</td>
<td>66.6</td>
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<tr>
<td>Austria</td>
<td>$139,449</td>
<td>15</td>
<td>66.6</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>$136,487</td>
<td>16</td>
<td>52.5</td>
<td>10</td>
</tr>
<tr>
<td>Sweden</td>
<td>$130,330</td>
<td>17</td>
<td>52.5</td>
<td>10</td>
</tr>
<tr>
<td>Portugal</td>
<td>$122,448</td>
<td>18</td>
<td>52.3</td>
<td>11</td>
</tr>
<tr>
<td>Denmark</td>
<td>$114,311</td>
<td>19</td>
<td>52.3</td>
<td>11</td>
</tr>
<tr>
<td>Norway</td>
<td>$94,000</td>
<td>20</td>
<td>65.4</td>
<td>4</td>
</tr>
<tr>
<td>Greece</td>
<td>$86,930</td>
<td>21</td>
<td>65.4</td>
<td>4</td>
</tr>
<tr>
<td>Italy</td>
<td>$64,861</td>
<td>22</td>
<td>57.8</td>
<td>10</td>
</tr>
<tr>
<td>Poland</td>
<td>$46,521</td>
<td>23</td>
<td>62.5</td>
<td>5</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$45,632</td>
<td>24</td>
<td>46.8</td>
<td>13</td>
</tr>
<tr>
<td>Hungary</td>
<td>$43,033</td>
<td>25</td>
<td>50.17</td>
<td>12</td>
</tr>
<tr>
<td>Turkey</td>
<td>$36,463</td>
<td>26</td>
<td>71.53</td>
<td>6</td>
</tr>
<tr>
<td>Korea</td>
<td>$27,609</td>
<td>27</td>
<td>62.76</td>
<td>7</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>$14,388</td>
<td>28</td>
<td>55.56</td>
<td>9</td>
</tr>
</tbody>
</table>

*italicized salary statistics reported without COLA adjustment*

3. Judicial efficiency

The next two measures approximate the productivity of the judiciary. The first variable examines the efficiency of the court system. It uses the average amount of time in weeks (with one being the smallest) that it usually takes to resolve an overdue payment for
those firms who have had at least one court resolution.\textsuperscript{227} The value of this measure rests on the adage that “justice delayed is justice denied.”\textsuperscript{228} The second variable—no resolutions in courts for overdue payments (\%)—uses the percentage of firms that have had at least one resolution in courts and have overdue payments from private or public adversaries.\textsuperscript{229} The idea is again one of efficiency and also integrity: courts that are not able to collect overdue payments may not command the same respect as those that can. It might also hint at some corruption in the works. Table VIII reports the results.

\textbf{TABLE VIII: Salary and Efficiency.}

<table>
<thead>
<tr>
<th>Country</th>
<th>COLA Salaries</th>
<th>Rank (Sub)</th>
<th>Time</th>
<th>Rank</th>
<th>Resolution</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>$270,891</td>
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<td>13.27</td>
<td>9</td>
<td>76.95</td>
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</tr>
<tr>
<td>Spain</td>
<td>$166,282</td>
<td>9</td>
<td>19.39</td>
<td>3</td>
<td>63</td>
<td>5</td>
</tr>
<tr>
<td>Germany</td>
<td>$136,487</td>
<td>16</td>
<td>6.75</td>
<td>12</td>
<td>62.39</td>
<td>6</td>
</tr>
<tr>
<td>Portugal</td>
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<td>18</td>
<td>19.78</td>
<td>2</td>
<td>46.88</td>
<td>11</td>
</tr>
<tr>
<td>Greece</td>
<td>$86,930</td>
<td>21</td>
<td>15.2</td>
<td>7</td>
<td>67.05</td>
<td>4</td>
</tr>
<tr>
<td>Poland</td>
<td>$46,521</td>
<td>24</td>
<td>13.69</td>
<td>8</td>
<td>42.68</td>
<td>13</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>$45,632</td>
<td>24</td>
<td>9.13</td>
<td>10</td>
<td>51.79</td>
<td>9</td>
</tr>
<tr>
<td>Hungary</td>
<td>$43,033</td>
<td>26</td>
<td>17.27</td>
<td>5</td>
<td>55.15</td>
<td>8</td>
</tr>
<tr>
<td>Turkey</td>
<td>$36,463</td>
<td>27</td>
<td>8.08</td>
<td>11</td>
<td>48.82</td>
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</tr>
<tr>
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<td>28</td>
<td>19.21</td>
<td>4</td>
<td>46.67</td>
<td>12</td>
</tr>
<tr>
<td>Slovak Republic</td>
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<td>28</td>
<td>21.24</td>
<td>1</td>
<td>56.12</td>
<td>7</td>
</tr>
</tbody>
</table>

\*Italicized numbers reported without COLA adjustment.

4. \textit{Substantive rights protections}

\textsuperscript{227} Id.
\textsuperscript{228} William Gladstone.
\textsuperscript{229} Id.
The next set takes advantage of indices that actually attempt to measure the amount of certain substantive rights in a given country. The first two come from the 2006 Cingranelli and Richards (CIRI) Human Rights dataset. The Physical Rights Index adds up “Torture, Extrajudicial Killing, Political Imprisonment, and Disappearance indicators.” The scoring “ranges from 0 (no government respect for these four rights) to 8 (full government respect for these four rights)).” The second index looks at “empowerment rights” constructed by adding scores for “the Freedom of Movement, Freedom of Speech, Workers’ Rights, Political Participation, and Freedom of Religion indicators.” It also ranges from 0 to 8. It ranges from 0 (no government respect for these five rights) to 10 (full government respect for these five rights)). Table IX reports these studies.

**TABLE IX: SALARY AND 2006 CIRI RIGHTS INDICES**

<table>
<thead>
<tr>
<th>Country</th>
<th>COLA Salaries</th>
<th>Rank</th>
<th>Physical Integrity Rights</th>
<th>Rank</th>
<th>Empower. Rights</th>
<th>Rank</th>
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<td>10</td>
<td>1</td>
</tr>
<tr>
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<td>2</td>
<td>7</td>
<td>9</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Australia</td>
<td>$264,510</td>
<td>3</td>
<td>7</td>
<td>9</td>
<td>9</td>
<td>19</td>
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<tr>
<td>France</td>
<td>$212,891</td>
<td>4</td>
<td>7</td>
<td>9</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>5</td>
<td>7</td>
<td>9</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>United States</td>
<td>$203,000</td>
<td>6</td>
<td>4</td>
<td>27</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td>Luxembourg</td>
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<td>7</td>
<td>8</td>
<td>1</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8</td>
<td>7</td>
<td>9</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
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<td>$166,282</td>
<td>9</td>
<td>5</td>
<td>24</td>
<td>10</td>
<td>1</td>
</tr>
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<td>8</td>
<td>1</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Iceland</td>
<td>$156,250</td>
<td>11</td>
<td>8</td>
<td>1</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Finland</td>
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<td>12</td>
<td>7</td>
<td>9</td>
<td>10</td>
<td>1</td>
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<tr>
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<td>$147,261</td>
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<td>8</td>
<td>1</td>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>Japan</td>
<td>$144,707</td>
<td>14</td>
<td>8</td>
<td>1</td>
<td>10</td>
<td>1</td>
</tr>
</tbody>
</table>

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230 CIRI Human Rights Data, http://ciri.binghamton.edu/myciri/my_ciri.asp (must register and cite)
231 *Id.*
232 *Id.*
233 *Id.*
Austria $139,449 15 7 9 10 1
Germany $136,487 16 8 1 8 24
Sweden $130,330 17 7 9 10 1
Portugal $122,448 18 6 22 10 1
Denmark $114,311 19 8 1 10 1
Norway $94,000 20 8 1 10 1
Greece $86,930 21 5 24 5 27
Italy $64,861 22 6 22 9 19
Poland $46,521 23 7 9 7 26
Czech Republic $45,632 24 7 9 8 24
Hungary $43,033 25 7 9 10 1
Turkey $36,463 26 3 28 5 27
Korea $27,609 27 5 24 9 19
Slovak Republic $14,388 28 7 9 9 19

*Italicized numbers reported without COLA adjustment.

The next set looks at specific rights: the protection of Property Rights\textsuperscript{234} and the legal enforcement of contracts.\textsuperscript{235} This data are reported in Table X.

**TABLE X: SALARY AND PROPERTY PROTECTION & CONTRACT ENFORCEMENT**

<table>
<thead>
<tr>
<th>Country</th>
<th>COLA Salaries</th>
<th>Rank</th>
<th>Property Protection</th>
<th>Rank</th>
<th>Contract Enforce.</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>United Kingdom</td>
<td>$299,943</td>
<td>1</td>
<td>9.09</td>
<td>5</td>
<td>7.25</td>
<td>19</td>
</tr>
<tr>
<td>Ireland</td>
<td>$270,891</td>
<td>2</td>
<td>9</td>
<td>8</td>
<td>7.55</td>
<td>18</td>
</tr>
<tr>
<td>Australia</td>
<td>$264,510</td>
<td>3</td>
<td>8.97</td>
<td>9</td>
<td>8.41</td>
<td>13</td>
</tr>
<tr>
<td>France</td>
<td>$212,891</td>
<td>4</td>
<td>8.47</td>
<td>15</td>
<td>9.19</td>
<td>7</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$211,900</td>
<td>5</td>
<td>8.66</td>
<td>14</td>
<td>9.71</td>
<td>1</td>
</tr>
<tr>
<td>United States</td>
<td>$203,000</td>
<td>6</td>
<td>8.05</td>
<td>18</td>
<td>8.12</td>
<td>16</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>$174,392</td>
<td>7</td>
<td>8.84</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>$166,800</td>
<td>8</td>
<td>8.16</td>
<td>17</td>
<td>7.13</td>
<td>22</td>
</tr>
<tr>
<td>Spain</td>
<td>$166,282</td>
<td>9</td>
<td>7.69</td>
<td>19</td>
<td>8.33</td>
<td>15</td>
</tr>
<tr>
<td>Netherlands</td>
<td>$164,868</td>
<td>10</td>
<td>9.21</td>
<td>4</td>
<td>8.97</td>
<td>8</td>
</tr>
</tbody>
</table>


\textsuperscript{235} *Id.*
Iceland $156,250 11 9.44 2 8.71 9
Finland $149,487 12 9.03 7 8.35 14
Belgium $147,261 13 8.2 16 9.24 6
Japan $144,707 14 8.73 12 9.48 5
Austria $139,449 15 9.08 6 7.05 23
Germany $136,487 16 9.61 1 8.51 12
Sweden $130,330 17 8.71 13 8.54 11
Portugal $122,448 18 7.43 21 6.99 24
Austria $114,311 19 9.34 3 9.52 4
Norway $94,000 20 8.83 11 9.55 3
Greece $86,930 21 7.24 23 8.55 10
Italy $64,861 22 6.79 24 3.93 27
Poland $46,521 23 4.58 28 4.47 26
Czech Republic $45,632 24 6 27 7.73 17
Hungary $43,033 25 7.44 20 7.22 20
Turkey $36,463 26 6.35 26 7.22 21
Korea $27,609 27 7.4 22 9.57 2
Slovak Republic $14,388 28 6.67 25 5.3 25

*Italicized numbers reported without COLA adjustment.

5. *General indices*

The final set of variables approaches general measures that attempt to get at the overall quality of the judiciary. The first measures the rule of law, another one of the World Bank’s governance indicators using collected survey results. The final index is from the Economic Freedom of the Report. It is called the Legal System and Property Rights Index, and it aggregates the previously discussed judicial independence, impartial courts, protection of property rights, integrity of the legal system, and legal enforcement of contracts and also includes military interference in rule of law and the political process (from the International Country Risk’s Guide Political Risk Component) and regulatory

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\(^{236}\) WorldBank, *supra* note 212.


\(^{238}\) *Id.* at 185–86.

\(^{239}\) *Id.* at 185.
restrictions on the sale of real property (from the World Bank’s Doing Business).\textsuperscript{240}

\begin{table}
\centering
\caption{Salary and Legal System Indices}
\begin{tabular}{|l|c|c|c|c|c|}
\hline
Country & COLA & Rank & Rule of Law & Rank & Legal Sys. & Prop. Rights & Rank \\
\hline
United Kingdom & $299,943 & 1 & 93 & 13 & 8.7 & 11 \\
Ireland & $270,891 & 2 & 92 & 14 & 8.3 & 15 \\
Australia & $264,510 & 3 & 95 & 9 & 8.84 & 9 \\
France & $212,891 & 4 & 90 & 17 & 7.54 & 17 \\
New Zealand & $211,900 & 5 & 97 & 6 & 9.28 & 3 \\
United States & $203,000 & 6 & 92 & 14 & 7.74 & 16 \\
Luxembourg & $174,392 & 7 & 98 & 4 & 8.74 & 10 \\
Canada & $166,800 & 8 & 95 & 9 & 8.55 & 13 \\
Spain & $166,282 & 9 & 85 & 19 & 7.09 & 21 \\
Netherlands & $164,868 & 10 & 94 & 11 & 9.15 & 5 \\
Iceland & $156,250 & 11 & 100 & 1 & 9.23 & 4 \\
Finland & $149,487 & 12 & 98 & 4 & 9 & 6 \\
Belgium & $147,261 & 13 & 91 & 16 & 7.48 & 18 \\
Japan & $144,707 & 14 & 89 & 18 & 8.31 & 14 \\
Austria & $139,449 & 15 & 97 & 6 & 8.68 & 12 \\
Germany & $136,487 & 16 & 94 & 11 & 8.92 & 7 \\
Sweden & $130,330 & 17 & 96 & 8 & 8.89 & 8 \\
Portugal & $122,448 & 18 & 85 & 19 & 7.41 & 19 \\
Denmark & $114,311 & 19 & 99 & 2 & 9.41 & 1 \\
Norway & $94,000 & 20 & 99 & 2 & 9.32 & 2 \\
Greece & $86,930 & 21 & 68 & 24 & 6.73 & 23 \\
Italy & $64,861 & 22 & 64 & 25 & 6.36 & 27 \\
Poland & $46,521 & 23 & 60 & 27 & 5.78 & 28 \\
Czech Republic & $45,632 & 24 & 70 & 22 & 6.8 & 22 \\
Hungary & $43,033 & 25 & 70 & 22 & 6.71 & 24 \\
Turkey & $36,463 & 26 & 56 & 28 & 6.64 & 26 \\
Korea & $27,609 & 27 & 72 & 21 & 7.17 & 20 \\
Slovak Republic & $14,388 & 28 & 61 & 26 & 6.71 & 25 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{240} Id. at 186 (quoting World Bank, Doing Business (various issues), http://www.doingbusiness.org (last visited March 10, 2008).
C. Correlations

Finally, we take these variables and use their raw versions along with their ranks to calculate pair-wise correlation coefficients and Kendall tau rank correlation coefficients, respectively. Our motivation, discussed above, is to test the direction and strength of the relationship between judicial pay and the performance and quality measures using both a parametric and non-parametric statistic.

Table X shows the correlation coefficients when the value of these variables is tested on the cost-of-living-adjusted judicial salary.

**TABLE X: VALUE ON VALUE CORRELATION**

<table>
<thead>
<tr>
<th>Performance Variable</th>
<th>Correlation Coefficient</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resolution</td>
<td>0.7452</td>
<td>0.0073</td>
</tr>
<tr>
<td>Control of Corruption</td>
<td>0.7435</td>
<td>0.0000</td>
</tr>
<tr>
<td>Rule of Law</td>
<td>0.7169</td>
<td>0.0000</td>
</tr>
<tr>
<td>Corruption Index</td>
<td>0.6719</td>
<td>0.0001</td>
</tr>
<tr>
<td>Property Protection</td>
<td>0.6644</td>
<td>0.0001</td>
</tr>
<tr>
<td>Judicial Independence</td>
<td>0.6604</td>
<td>0.0000</td>
</tr>
<tr>
<td>Legal System &amp; Property Rights</td>
<td>0.6017</td>
<td>0.0007</td>
</tr>
<tr>
<td>Impartial Courts</td>
<td>0.593</td>
<td>0.0009</td>
</tr>
<tr>
<td>Integrity of the Legal System</td>
<td>0.5888</td>
<td>0.001</td>
</tr>
<tr>
<td>Confidence</td>
<td>0.4985</td>
<td>0.1186</td>
</tr>
<tr>
<td>Empowerment Rights</td>
<td>0.4544</td>
<td>0.0151</td>
</tr>
<tr>
<td>Contract Enforcement</td>
<td>0.3255</td>
<td>0.0976</td>
</tr>
<tr>
<td>Diffuse Support</td>
<td>-0.2800</td>
<td>0.3121</td>
</tr>
<tr>
<td>Physical Integrity Rights</td>
<td>0.2226</td>
<td>0.2549</td>
</tr>
<tr>
<td>Time (expected negative)</td>
<td>-0.0909</td>
<td>0.7904</td>
</tr>
</tbody>
</table>

Several observations deserve mention. First, most of the coefficients move in the direction that Justice Breyer suggests, that is, the quality and performance measures improve as pay increases; and many of the coefficients are statistically significant. The one exception is diffuse support which has a negative sign despite the
fact that, according to the argument for raising judicial salaries, diffuse support and pay should be positively correlated. 241 Second, the magnitude of the coefficients is fairly high, 242 with “Resolution” the highest at 0.7452. For the correlations coefficients with lower magnitude of these correlations therefore implies increasing judicial salaries might not improve judicial quality or output in a way that is empirically significant; expenditures on faster computers or additional law clerks might be more highly correlated with these quality and performance proxies. Nonetheless, the proxies with the highest magnitude of correlation were: Resolution, Control of Corruption and Rule of Law.

Finally, Table X reports a number of very low p-values, which means many of the correlation coefficients are highly significant. The concern is that the statistical techniques employed rest on certain assumptions, such as a linear relationship between our judicial pay statistics and the various measures of judicial performance or quality, that are inappropriate given what little we know about the effects of judicial compensation. The relationship between pay and quality, for example, might be quadratic such that quality improves rapidly as judicial changes from $60,000 to $90,000 but does not improve much at all from $90,000 to $120,000. 243 Additionally, several of the more significant variables appear to suffer from multi-collinearity.

Because there is no reason to assume the data are drawn from any particular distribution and because the comparative argument is ordinal in nature, 244 we report the Kendall tau rank correlation coefficients between the salary and proxy ranks.

241 Note, however, that the correlation coefficient, with significance level of 0.3121, is not statistically significant at the 95% or 90% confidence interval.
242 Generally, positive coefficients between 0.5 and 1.0 and negative coefficients between -0.5 and -1.0 are considered “large. See, e.g., JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES (2nd ed. 1988).
243 Unfortunately, because we lack the data to run more complete regression techniques, we can only speculate at this possibility.
244 The previous set of correlations may also give too much weight to variations within the values when what we really might care about is the countries’ relation to one another.
### TABLE XI: RANK ON RANK CORRELATION COEFFICIENTS

<table>
<thead>
<tr>
<th>Performance Variable Rank</th>
<th>Correlation Coefficient</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diffuse Support</td>
<td>0.9958</td>
<td>0.0000</td>
</tr>
<tr>
<td>Resolution</td>
<td>-0.988</td>
<td>0.0000</td>
</tr>
<tr>
<td>Confidence</td>
<td>0.9207</td>
<td>0.0001</td>
</tr>
<tr>
<td>Time</td>
<td>0.9207</td>
<td>0.0001</td>
</tr>
<tr>
<td>Legal System &amp; Property Rights</td>
<td>0.6373</td>
<td>0.0003</td>
</tr>
<tr>
<td>Property Protection</td>
<td>0.5764</td>
<td>0.0013</td>
</tr>
<tr>
<td>Corruption Index</td>
<td>0.5655</td>
<td>0.0017</td>
</tr>
<tr>
<td>Control of Corruption</td>
<td>0.5558</td>
<td>0.0021</td>
</tr>
<tr>
<td>Rule of Law</td>
<td>0.555</td>
<td>0.0022</td>
</tr>
<tr>
<td>Judicial Independence</td>
<td>0.5242</td>
<td>0.0042</td>
</tr>
<tr>
<td>Integrity of the Legal System</td>
<td>0.5006</td>
<td>0.0067</td>
</tr>
<tr>
<td>Empowerment Rights</td>
<td>0.4997</td>
<td>0.0068</td>
</tr>
<tr>
<td>Impartial Courts</td>
<td>0.4481</td>
<td>0.0168</td>
</tr>
<tr>
<td>Physical Integrity Rights</td>
<td>0.2321</td>
<td>0.0235</td>
</tr>
</tbody>
</table>

The above results seem the most direct test of Justice Breyer’s and other pay raise advocates’ claims that relative quality and performance improve as judicial pay improves. Again, several observations deserve mention.

First, although the magnitude and significance of the correlations for Diffuse Support, Resolution, Confidence and Time are very high, our data set (Table VII) contained far fewer observations for these measures than the other quality and performance proxies and no observations for the countries of particular importance, i.e. the United States, Canada, Australia or the United Kingdom. Because the data contains so few countries to rank, we place less weight on these rank correlation coefficients than the other variables for which we have more observations.

Of those, the same proxies appear towards the top of the list, including: Control of Corruption and the Rule of Law indices. Also high on the list of correlation magnitude is Property Protection and the Legal System and Property Rights proxies. Here again, many of the proxies for which one would expect a high magnitude of correlation to pay appear towards the bottom of the list, including the Judicial Independence and Integrity proxies. This suggests that the
relationship between judicial pay and performance or quality is less straight-forward than many pay raise advocates suggest.

And there is no reason to believe that any of these measures accurately capture what Justice Breyer was concerned with when he discussed the possibility of the United States losing pace with other countries or what anyone looks for in a high-quality and independent judiciary.

Indeed, data collection issues may undercut the value of these statistical findings; we do not discuss or account for differences in how these indices are calculated. Some of our proxies are government-wide measures, not judiciary-specific ones. Moreover, because there exists no direct measure of judicial quality or performance, these measures are proxies (some very poor) for characteristics we set out to measure.

Nonetheless, the correlation coefficients reported in Tables X and XI are the first attempt at an international quantitative comparison between federal judiciaries. As suspected, these comparisons—our results—raise more questions than answers about the relationship judicial pay has with performance and quality measures. The countries that pay their high court judges more appear to enjoy slightly less corruption and more protection of property rights. And, while these and other correlations are positive and significant, the magnitude of those positive correlations is lower than suggested by many pay raise advocates. That is, judicial quality and performance might improve as federal judges are paid higher salaries, but our findings suggest the improvement might be marginal.

CONCLUSION

The preservation of justice largely rests on the shoulders of judges. As public servants, and towards this end, judges do many things to ensure that we live in a just society. Given the societal importance of this function, we have no qualms with paying federal judges more money, indeed, lots more money.

Rather, we take issue with the unsubstantiated claims that more money equals more justice and the anecdotal use of salary statistics from cherry-picked countries with materially different judicial structures to our own. Although comparisons to other countries could justify a judicial pay raise—indeed, the comparative
argument has significant intuitive appeal—it is incomplete as made by Justice Breyer. First, labor economics theory suggests that an increase in judicial pay might deteriorate the pool of judicial candidates rather than improve it. Second, there are many institutional factors that influence the judicial compensation-performance relationship. Third and finally, the data do not show the strong correlation between pay raises and better performance that Justice Breyer and his colleagues imply when selecting a few notable countries that pay their judges more than the United States.

Surely this is the beginning not the end of this debate. Our aims are modest: to emphasize the value of the comparative question, to suggest that other institutional variables be included when making this type of evaluation, and to propose objective measures of judicial quality or independence, particularly when making comparisons across national borders. But the most important point this Article makes is to highlight the need for more comparative data. Ultimately, Justice Breyer’s argument is an empirical one, one that can only be tested with data.