SUPREME COURT OF THE UNITED STATES

No. 99–1978

UNITED STATES, PETITIONER *v.* TERRY J. HATTER, JR., JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[May 21, 2001]

JUSTICE SCALIA, concurring in part and dissenting in part.

I agree with the Court that extending the Social Security tax to sitting Article III judges in 1984 violated Article III's Compensation Clause. I part paths with the Court on the issue of extending the Medicare tax to federal judges in 1983, which I think was also unconstitutional.[1]

I

As an initial matter, I think the Court is right in concluding that *Evans* v. *Gore,* 253 U. S. 245 (1920)– holding that new taxes of general applicability cannot be applied to sitting Article III judges– is no longer good law, and should be overruled. We went out of our way in *O'Malley* v. *Woodrough,* 307 U. S. 277, 280–281 (1939), to catalog criticism of *Evans*, and subsequently recognized, in *United States* v. *Will,* 449 U. S. 200, 227, and n. 31 (1980), that *O'Malley* had "undermine[d] the reasoning of *Evans*." The

[1] I agree with the Court, see Part II, *ante*, that the law-of-the-case doctrine does not bar our consideration of the merits. I also join the Court in holding, see Part V, *ante*, that any constitutional violation was not remedied by subsequent salary increases.

Court's decision today simply recognizes what should be obvious: that *Evans* has not only been undermined, but has in fact collapsed.

II

My disagreement with the Court arises from its focus upon the issue of discrimination, which turns out to be dispositive with respect to the Medicare tax. The Court holds "that the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax . . . upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect." *Ante*, at 12. Since "the Medicare tax is just such a nondiscriminatory tax," the Court concludes that "application of [that] tax law to federal judges is [c]onstitutional." *Ante*, at 12–13.

But we are dealing here with a "Compensation Clause," not a "Discrimination Clause." See U. S. Const., Art III, §1 ("The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). As we have said, "the Constitution makes no exceptions for 'nondiscriminatory' reductions" in judicial compensation, *Will*, *supra*, at 226. A reduction in compensation is a reduction in compensation, even if all federal employees are subjected to the same cut. The discrimination criterion that the Court uses would make sense if the only purpose of the Compensation Clause were to prevent invidious (and possibly coercive) action against judges. But as the Court acknowledges, the Clause "'promote[s] the public weal' . . . by helping to induce 'learned' men and women to 'quit the lucrative pursuits' of the private sector," *ante*, at 9 (quoting *Evans*, *supra,* at 248; 1 J. Kent, Commentaries on American Law *294). That inducement would not exist if Congress could cut judicial salaries so long as it did not do so discriminatorily.

What the question comes down to, then, is (1) whether exemption from a certain tax can constitute part of a judge's "compensation," and (2) if so, whether exemption from the Medicare tax was part of the judges' compensation here. The answer to the more general question seems to me obviously yes. Surely the term "compensation" refers to the entire "package" of benefits— not just cash, but retirement benefits, medical care, *and exemption from taxation if that is part of the employment package*. It is simply unreasonable to think that "$150,000 a year tax-free" (if that was the bargain struck) is not higher compensation that "$150,000 a year subject to taxes." Ask the employees of the World Bank.

The more difficult question— though far from an insoluble one— is *when* an exemption from tax constitutes compensation. In most cases, the presence or absence of taxation upon wages, like the presence or absence of many other factors within the control of government— inflation, for example, or the rates charged by government-owned utilities, or import duties that increase consumer prices— affects the *value* of compensation, but is not an element of compensation itself. The Framers had this distinction well in mind. Hamilton, for example, wrote that as a result of "the fluctuations in the value of money," "[i]t was . . . necessary to leave it to the discretion of the legislature to vary its provisions" for judicial compensation. The Federalist No. 79, p. 473 (C. Rossiter, ed. 1961); see also *Will*, *supra*, at 227 (the Constitution "placed faith in the integrity and sound judgment of the elected representatives to enact increases" in judicial salaries to account for inflation). Since Hamilton thought that the Compensation Clause "put it out of the power of [Congress] to change the condition of the individual [judge] for the worse," The Federalist No. 79, at 473, he obviously believed that inflation does not diminish compensation as that term is used in the Constitution.

This distinction between Government action affecting compensation and Government action affecting the *value* of compensation was the basis for our statement in *O'Malley*, 307 U. S., at 282, that "[t]o subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government . . . ." I agree with the Court, therefore, that *Evans* was wrongly decided— not, however, because in *Evans* there was no discrimination, but because in *Evans* the universal application of the tax *demonstrated* that the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax.

But just as it is clear that a federal employee's sharing of a tax-free status that all citizens enjoy is not compensation (and elimination of that tax-free status not a reduction in compensation), so also it is clear that a tax-free status conditioned on federal employment *is* compensation, and its elimination a reduction. The Court apparently acknowledges that if a tax is *imposed* on the basis of federal employment (an income tax, for example, payable only by federal judges) it would constitute a *reduction* in compensation. It is impossible to understand why a tax that is *suspended* on the basis of federal employment (an exemption from federal income tax for federal judges) does not constitute the *conferral* of compensation— in which case its elimination is a *reduction*, whether or not federal judges end up being taxed just like other citizens. Only converting the Compensation Clause into a Discrimination Clause can explain a contrary conclusion.

And this, of course, is what has been achieved by the targeted extension of the Medicare tax to federal employees who were previously exempt. It may well be that, in some abstract sense, they are not being "discriminated

against," since they end up being taxed like other citizens; but this does not alter the fact that, since exemption from the tax was part of their employment package— since they had an employment expectation of a preferential exemption from taxation— their *compensation* was being reduced. One of the benefits of being a federal judge (or any federal employee) had, prior to 1982, been an exemption from the Medicare tax. This benefit Congress took away, much as a private employer might terminate a contractual commitment to pay Medicare taxes on behalf of its employees. The latter would clearly be a cut in compensation, and so is the former.[2] Had Congress simply imposed the Medicare tax on its own employees (including judges) at the time it introduced that tax for other working people, no benefit of federal employment would have been reduced, because, with respect to the newly introduced tax, none had ever existed. But an extension to federal employees of a tax from which they had previously been exempt *by reason of their employment status* seems to me a flat-out reduction of federal employment compensation.

III

As should be clear from the above, though I agree with the Court that the extension of the Social Security tax to federal judges runs afoul of the Compensation Clause, I disagree with the Court's grounding of this holding on the

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[2]As the Court explains, the purpose of the Medicare tax extension was to ensure that federal workers "bear a more equitable share of the costs of financing the benefits to which many of them eventually became entitled" by reason of their own or their spouses' private-sector employment. *Ante*, at 2 (internal quotation marks and citation omitted). As with the Social Security tax, therefore, the Medicare tax aspect of this case does not present the situation in which a tax exemption has been eliminated in return for some other benefit, different in kind but equivalent in value. Cf. *ante*, at 14 ("[P]articipation in Social Security as judges would benefit only a minority").

discriminatory manner in which the extension occurred. In this part of its opinion, however, the Court's antidiscrimination rationale is slightly different from that which appeared in its discussion of the Medicare tax. There, the focus was on discrimination compared with ordinary citizens; here, the focus is on discrimination vis-à-vis other federal employees. (As the Court explains, federal judges, unlike nearly all other federal employees, were not given the opportunity to opt out of paying the tax). On my analysis, it would not matter if every federal employee had been made subject to the Social Security tax along with judges, so long as one of the previous entitlements of their federal employment had been exemption from that tax. Federal judges, unlike all other federal employees except the President, see Art. II, §1, cl. 7, cannot, consistent with the Constitution, have their compensation diminished. If this case involved salary cuts to pay for Social Security, rather than taxes to pay for Social Security, the irrelevance of whether other federal employees were covered by the operative legislation would be clear.

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I join in the judgment that extension of the Social Security tax to sitting Article III judges was unconstitutional. I would affirm the Federal Circuit's holding that extension of the Medicare tax was unconstitutional as well.