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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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

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

No. 99–1978. Argued February 20, 2001– Decided May 21, 2001

In 1982, Congress extended Medicare to federal employees. That new law meant, *inter alia*, that then-sitting federal judges, like all other federal employees and most other citizens, began to have Medicare taxes withheld from their salaries. In 1983, Congress required all newly hired federal employees to participate in Social Security and permitted, without requiring, about 96% of the then-currently employed federal employees to participate in that program. The remaining 4%– a class consisting of the President, other high-level Government employees, and all federal judges– were required to participate, except that those who contributed to a "covered" retirement program could modify their participation in a manner that left their total payroll deduction for retirement and Social Security unchanged, in effect allowing them to avoid any additional financial obligation as a result of joining Social Security. A "covered" program was defined to include any retirement system to which an employee had to contribute, which did not encompass the noncontributory pension system for federal judges, whose financial obligations (and payroll deductions) therefore had to increase. A number of federal judges appointed before 1983 filed this suit, arguing that the 1983 law violated the Compensation Clause, which guarantees federal judges a "Compensation, which shall not be diminished during their Continuance in Office," U. S. Const., Art. III, §1. Initially, the Court of Federal Claims ruled against the judges, but the Federal Circuit reversed. On certiorari, because some Justices were disqualified and this Court failed to find a quorum, the Federal Circuit's judgment was affirmed "with the same effect as upon affirmance by an equally divided

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court." 519 U. S. 801. On remand, the Court of Federal Claims found that the judges' Medicare claims were time barred and that a 1984 judicial salary increase promptly cured any violation, making damages minimal. The Federal Circuit reversed, holding that the Compensation Clause prevented the Government from collecting Medicare and Social Security taxes from the judges and that the violation was not cured by the 1984 pay increase.

Held:

1. The Compensation Clause prevents the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees. Pp. 6–19.

(a) The Court rejects the judges' claim that the "law of the case" doctrine now prevents consideration of the Compensation Clause because an affirmance by an equally divided Court is conclusive and binding upon the parties. *United States* v. *Pink,* 315 U. S. 203, 216, on which the judges rely, concerned an earlier case in which the Court heard oral argument and apparently considered the merits before affirming by an equally divided Court. The law of the case doctrine presumes a hearing on the merits. See, *e.g.*, *Quern* v. *Jordan,* 440 U. S. 332, 347, n. 18. When this case previously was here, due to absence of a quorum, the Court could not consider either the merits or whether to consider those merits through a grant of certiorari. This fact, along with the obvious difficulty of finding other equivalent substitute forums, convinces the Court that *Pink* does not control here. Pp. 6–7.

(b) Although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges and other citizens. See *O'Malley* v. *Woodrough,* 307 U. S. 277, 282. Insofar as *Evans* v. *Gore,* 253 U. S. 245, 255, holds to the contrary, that case is overruled. See *O'Malley, supra,* at 283. There is no good reason why a judge should not share the tax burdens borne by all citizens. See *Evans, supra,* at 265, 267 (Holmes, J., dissenting); *O'Malley, supra,* at 281–283. Although Congress cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries, a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly. See *United States* v. *Will,* 449 U. S. 200, 226. And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here, where indirect taxation is at issue. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence the potential threats to judicial independence that underlie

the Compensation Clause, see *Evans, supra,* at 251–252, cannot justify a special judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats. Because the Medicare tax is nondiscriminatory, the Federal Circuit erred in finding its application to federal judges unconstitutional. Pp. 7–13.

(c) However, because the special retroactivity-related Social Security rules enacted in 1983 effectively singled out then-sitting federal judges for unfavorable treatment, the Compensation Clause forbids the application of the Social Security tax to those judges. Four features of the law, taken together, lead to the conclusion that it discriminates in a manner the Clause forbids. First, the statutory history, context, purpose, and language indicate that the category of "federal employees" is the appropriate class against which the asserted discrimination must be measured. Second, the practical upshot of defining "covered" system in the way the law did was to permit nearly every then-current federal employee, but not federal judges, to avoid the newly imposed obligation to pay Social Security taxes. Third, the new law imposed a substantial cost on federal judges with little or no expectation of substantial benefit for most of them. Inclusion meant a deduction of about $2,000 per year, whereas 95% of the then-active judges had already qualified for Social Security (due to private sector employment) before becoming judges. And participation would benefit only the minority of judges who had not worked the quarters necessary to be fully insured under Social Security. Fourth, the Government's sole justification for the statutory distinction between judges and other high-level federal employees– *i.e.,* equalizing the financial burdens imposed by the noncontributory judicial retirement system and the contributory system to which the other employees belonged– is unsound because such equalization takes place not by offering all current federal employees (including judges) the same opportunities but by employing a statutory disadvantage which offsets an advantage related to those protections afforded judges by the Clause, and because the two systems are not equalized with any precision. Thus, the 1983 law is very different from the nondiscriminatory tax upheld in *O'Malley, supra,* at 282. The Government's additional arguments– that Article III protects judges only against a reduction in stated salary, not against indirect measures that only reduce take-home pay; that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them; and that the law disfavored not only judges but also the President and other high-ranking federal employees– are unconvincing. Pp. 13–19.

2. The Compensation Clause violation was not cured by the 1984 pay increase for federal judges. The context in which that increase

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took place reveals nothing to suggest that it was intended to make whole the losses sustained by the pre-1983 judges. Rather, everything in the record suggests that the increase was meant to halt a slide in purchasing power resulting from continued and unadjusted-for inflation. Although a circumstance-specific approach is more complex than the Government's proposed automatic approach, whereby a later salary increase would terminate a Compensation Clause violation regardless of the increase's purpose, there is no reason why such relief as damages or an exemption from Social Security would prove unworkable. *Will, supra,* distinguished. Pp. 19–22.

203 F. 3d 795, affirmed in part, reversed in part, and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, SOUTER, and GINSBURG, JJ., joined, and in which SCALIA, J., joined as to Parts I, II, and V. SCALIA, J., filed an opinion concurring in part and dissenting in part. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part. STEVENS, J., and O'CONNOR, J., took no part in the consideration or decision of the case.