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TAXATION, COMPENSATION, AND JUDICIAL INDEPENDENCE

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Judicial independence is a principle central to Article III of the Constitution. Life tenure furthers independence, of course,¹ but the founders thought that life tenure by itself would not be sufficient. How independent—and therefore impartial—would a “tenured” judge be if Congress could adjust his compensation downward for not deciding a high-profile case in the desired way or if Congress could give him a bonus for coming to the right result?

It is not a perfect solution to the problem, but the Compensation Clause provides that federal judges governed by Article III “shall, at stated Times, receive for their Services, a Compensation, *which shall not be diminished during their Continuance in Office.*”² As the Supreme Court explained in 1980, making ample use of tautology:

The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges

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¹ See U.S. CONST. art. III, § 1.

² *Id.* (emphasis added). The Compensation Clause is inapplicable to Article I judges, and whether a person was an Article I or an Article III judge was a critical issue in some older litigation regarding judicial compensation. See, e.g., *O’Donoghue v. United States*, 289 U.S. 516 (1933) (holding that justices of District of Columbia courts are Article III judges whose compensation may not be diminished); *Williams v. United States*, 289 U.S. 553 (1933) (holding that the Court of Claims, as then constituted, was an Article I court, so its judges were not protected by the Compensation Clause).

who are free from potential domination by other branches of government.³

And, Justice Story wrote in 1833, the Compensation Clause was absolutely critical to this enterprise: “Without [the Compensation Clause] the other [constitutional provision], as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery.”⁴

If the concern is that Congress (and, in some special circumstances, the executive⁵) might use compensation to affect judicial behavior, the Compensation Clause is incomplete. By its terms, it does not preclude Congress from rewarding favored judges with salary *increases*.⁶ The Clause nevertheless prevents Congress from

³ *United States v. Will*, 449 U.S. 200, 217-18 (1980).

⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1622, at 490 (Da Capo Press 1970) (1833). Story also worried about the ability of Congress, aided and abetted by the president, to circumvent the life-tenure rule by abolishing courts on which tenured judges sit, which happened early in the Jefferson administration. *See id.* §§ 1627-28, at 494-97. Although the affected judges seemingly accepted Congress’s actions at that time, insofar as they did not litigate the issue, such a congressional step is almost inconceivable today.

⁵ *See infra* notes 16, 20-21 and accompanying text.

The argument has been made that the principles of judicial independence reflected in life tenure and the Compensation Clause were also intended to protect individual judges from their judicial colleagues. *See, e.g., McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52, 64-66 (D.C. Cir. 2001) (rejecting federal district judge’s challenge to power of Judicial Conference to sanction him). The Supreme Court had seemed to approve that proposition, *see N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982) (noting that constitutional guarantees “insulate[] the individual judge from improper influences not only by other branches but by colleagues as well”), but the D.C. Circuit in *McBryde* stated:

That individual judges are direct beneficiaries of the tenure and salary protections of Article III by itself hardly shows that the overarching purpose of these provisions was to insulate individual judges against the world as a whole (including the judicial branch itself), rather than . . . to safeguard the branch’s independence from its two competitors.

McBryde, 264 F.3d at 65; *see also* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 334 (1993) (“[T]he protection of judicial independence is intended to support impartial decision-making for the benefit of litigants and society, not for the benefit of individual judges.”). In any event, given that judges have no control over each other’s salaries, it is hard to see how the *Compensation Clause* could affect an intra-judiciary conflict.

The *McBryde* Compensation Clause saga continued in *McBryde v. United States*, 299 F.3d 1357 (Fed. Cir. 2002), which rejected the judge’s contention that not reimbursing him for expenses incurred in filing mandamus actions—he challenged removal of two cases from his docket—unconstitutionally diminished his compensation. In initiating the proceedings, *McBryde* was like any other plaintiff: “The government did not mandate that Judge *McBryde* incur these litigation costs, nor did it reap the benefit of the imposition of those costs . . .” *Id.* at 1369.

⁶ Part I.A discusses why the founders decided not to have the Clause work both ways. Furthermore, the Clause has nothing to say about methods unrelated to diminished compensation that Congress might use to punish the judiciary (in law school hypotheticals, at least). The Compensation Clause does not preclude Congress from limiting appropriations for the judicial branch to show unhappiness with the judiciary. *See* Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1075, 1083 (2006). For example, Congress might

showing unhappiness with the judiciary by reducing compensation—of individual judges or of the judiciary as a whole. And, as a practical matter, it prevents Congress from affecting ongoing litigation by threatening to reduce compensation. (Legislators can make threats, of course, but no threat can be carried out.)

The Compensation Clause says nothing specifically about taxation, but the Clause has always been understood to affect the taxing power as well—and with good reason.⁷ If taxation were exempt from the Clause's dictates, the Clause would be easy to circumvent. Rather than directly reducing salaries, Congress could get the same substantive result by levying a tax with a disproportionately negative impact on federal judges.⁸

At a minimum, all of this means that Congress cannot direct a tax at the judiciary (or at specific judges). And a facially neutral statute motivated by a congressional desire to influence the judiciary (if that bad motive could be demonstrated) would probably fail constitutional requirements as well.⁹

Those limitations mean something, but they do not seem to mean very much in today's world. Even with all the overheated rhetoric now common in Washington, it is almost impossible to imagine Congress's mounting a straightforward economic attack on the judiciary. With or without a Compensation Clause, a tax clearly directed at the judiciary is just not going to happen—or so one hopes.

"curtail the judiciary's physical facilities and fringe benefits as it pleases" or raise salaries of other federal employees while allowing judicial compensation to languish. Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 531 (2002).

⁷ *But see* Vermeule, *supra* note 6, at 504 (arguing that "the Compensation Clause should be read to prohibit only direct legislative decreases in the judges' statutory salary, not subtle or indirect reductions in their overall income"). Professor Vermeule's substantive understanding results from his legitimate concern about the role that judges play in interpreting the Clause: "[C]urrent doctrine ignores half of the Compensation Clause conundrum, precisely the half that the judges are most likely to ignore. The conundrum of the Clause is that enforcement of a rule protecting judicial independence is committed to judges who . . . have a financial interest in maximizing their compensation." *Id.* at 522. Cabining the Clause's scope lessens the risk of self-interested interpretation.

⁸ *Cf.* *Evans v. Gore*, 253 U.S. 245, 248-49 (1920) ("Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole?"), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001); *id.* at 254 ("Obviously, diminution may be effected in more ways than one . . . Only by subordinating substance to mere form could it be held that [a judge's] compensation was not diminished [by the imposition of an income tax].").

⁹ The Supreme Court has not yet had to resolve that issue definitively, *see* *United States v. Will*, 449 U.S. 200, 226 n.30 (1980), but the Court recently said the likelihood that a facially nondiscriminatory tax might hide an attack on the judiciary is "virtually nonexistent." *See* *United States v. Hatter*, 532 U.S. 557, 571 (2001); *infra* note 134 and accompanying text.

This article considers whether the Clause has any effect on the taxing power beyond the decidedly unrealistic situations described above.¹⁰ The effect of the Compensation Clause has been litigated often since 1920, most recently in *United States v. Hatter*¹¹—probably the Supreme Court’s last word on the relationship between the Clause and taxation. In *Hatter*, decided in 2001, the Court considered, among other things, whether Congress could subject federal judges to Social Security taxes from which they had previously been exempt.¹² When the dust had settled, the effect of the extension was generally to treat federal judges like other American taxpayers. But the Court went on to find that the extension of the tax funding the old-age, survivors, and disability insurance (OASDI) program to judges who were on the bench at the time of the extension discriminated against the judiciary and thus violated the Compensation Clause.

The Court in *Hatter* came to some defensible conclusions. The Court stated unequivocally what everyone had thought was the case anyway: a tax of general application can apply to federal judges just as it does to everyone else. (Judges must pay federal income taxes on their judicial salaries, for example.) And older cases that had held to the contrary were explicitly repudiated. That result is clearly correct.

But *Hatter*’s conclusion about the OASDI tax is not so clearly right. The concern motivating the Compensation Clause was judicial independence, not preserving the after-tax incomes of federal judges, and the extension of the OASDI tax had nothing to do with judicial independence. We will criticize the Court’s reasoning on these points at some length in Part III.E.

The faults of that part of *Hatter*, such as they are, may not do any long-term damage, however. When the decision in *Hatter* appeared, the earth seemed to move,¹³ but the case is unlikely to have signifi-

¹⁰ That the situations seem unrealistic today is not to question the legitimacy of the concerns in 1787 and long thereafter over the possibility of such an attack.

¹¹ 532 U.S. 557 (2001).

¹² We understand that some might cavil about use of the term “tax” to describe Social Security funding. Social Security was promoted as social insurance, with a sense that what a beneficiary ultimately received would be tied to what he had paid in to the system. Although that situation is different from the typical “tax”—where the connection, if any, between payment and benefit is far more tenuous—the term has been used so long to refer to Social Security exactions that we are loathe to discard it. In any event, we do not think that, under the Compensation Clause, anything serious turns on whether Social Security levies that reduce a judge’s take-home income are taxes or something else.

¹³ The conclusion about the OASDI tax surprised us, at least. See Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence: Hatter v. United States*, 90 TAX NOTES 1541 (2001); Jonathan L. Entin & Erik M. Jensen, *United States v. Hatter and the Taxation of Federal Judges*, 92 TAX NOTES 673 (2001). It is not unheard of for the Court to reject congressional exercises of the taxing power on constitutional grounds. See *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (invalidating the Harbor Maintenance Tax as applied to

cant practical consequences, except for the judges directly affected, because *Hatter* presented a set of facts that is unlikely to be duplicated, or even approached, in the future. Indeed, it is all but impossible for a similar set of facts to occur again.¹⁴

This Article begins with the original understanding of the Compensation Clause and then moves, in Part II, to nineteenth-century developments, and, in Part III, to the developments in the twentieth and twenty-first centuries, culminating with an extended discussion of *Hatter*. Part IV considers the post-*Hatter* effect of the Compensation Clause on taxation. Part V evaluates a second justification for the Compensation Clause, only tangentially tied to the founding debates but widely advanced in case law of the last ninety years, that the Clause, by improving the economic incentives for becoming and remaining a federal judge, is necessary to further the federal judiciary. Finally, Part VI contains a few thoughts on taxation, the Compensation Clause, and the turnover of federal judges.¹⁵

I. ORIGINAL UNDERSTANDING

The Compensation Clause is not mysterious. It is clear from the founding debates that the Clause was intended to help protect federal judges from external pressures that might keep the judges from acting impartially. (Although the executive could also apply economic pressure to judges, Congress was the more likely culprit—and thus the real target of the Compensation Clause.¹⁶) The founders debated

exports under the Export Clause, U.S. CONST. art. I, § 9, cl. 5); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843 (1996) (holding that the Export Clause does not allow for federal taxes on goods in export transit). But those cases are noteworthy precisely because they were unusual. See Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1 (2004); see also ERIK M. JENSEN, *THE TAXING POWER* 11, 136-46 (2005) [hereinafter JENSEN, *TAXING POWER*].

¹⁴ See *infra* Part IV.

¹⁵ This article focuses on the Compensation Clause, which applies only to federal judges governed by Article III of the Constitution. But similar issues can arise under compensation clauses contained in state constitutions. See, e.g., *Maddox v. Hayes*, 598 S.E.2d 505 (Ga. 2004) (holding that a constitutional provision prohibiting reduction in salary, allowance, or supplement of a sitting judge did not prevent reduction when the salary was determined to have been inflated erroneously); *Jorgensen v. Blagojevich*, 811 N.E.2d 652 (Ill. 2004) (holding that the state constitution was violated by a statute that prohibited judges from receiving a 2003 cost-of-living increase and by the governor's line-item veto that had the effect of removing funding for a 2004 cost-of-living increase). Moreover, these issues can arise under the constitutions or general understandings of other countries. See, e.g., *Provincial Court Judges' Ass'n of New Brunswick v. New Brunswick*, [2005] 2 S.C.R. 286 (Can.) (discussing the role of independent commissions, intended to improve processes that ensure judicial independence, including those relating to compensation); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (Can.) (same).

¹⁶ In general, the executive is not going to be able to take actions on its own to reduce judicial compensation. The President might sign legislation that would have such an effect, but the

whether the Clause went far enough or whether it went too far, but there was no disagreement about its basic purpose. This suggests that, if a taxing statute imposes no pressure on the judiciary qua judiciary or on individual judges, its application should not be limited by the Compensation Clause.¹⁷

The founders realized that guaranteed tenure would mean little if a judge's compensation could be tied to the content of his decisions. Life tenure needed a back-up. As Alexander Hamilton explained in the first sentence of *The Federalist No. 79*, "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."¹⁸

This was not a hypothetical concern for the founders. The Declaration of Independence condemned King George because he had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."¹⁹ That history pointed to the importance of both life tenure and the Compensation Clause in protecting judges from the sovereign's commands.

In 1787, the King was out of the picture, but the fundamental issue had not changed. As Alexander Hamilton noted in 1802, "From the injunction, that the compensation of the Judges shall not be diminished, it is manifest, that the Constitution intends to guard the independence of those Officers against the Legislative Department: Because, to this department *alone* would have belonged the power of diminishing their compensations."²⁰

Except for Hamilton's focus on Congress as the only body likely to apply pressure on the judiciary²¹—others thought the executive could be dangerous as well—that passage repeats what everyone was saying about the purpose of the Compensation Clause at the Constitutional Convention in 1787 and during the later ratification debates. Two questions were discussed in the founding debates: whether judi-

impetus for such a reduction—if one can imagine its happening at all—would almost certainly come from Congress. *See infra* notes 20-21 and accompanying text.

¹⁷ The history of the Clause's application in the real world is not, however, always consistent with this proposition. *See infra* Part III.

¹⁸ THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁹ THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). Some of the history of this issue, including English antecedents to the Compensation Clause, can be found in *United States v. Will*, 449 U.S. 200, 217-21 (1980).

²⁰ ALEXANDER HAMILTON, THE EXAMINATION, No. 12 (1802), reprinted in 4 THE FOUNDERS' CONSTITUTION 175, 175 (Philip B. Kurland & Ralph Lerner eds., 1987).

²¹ Hamilton stressed the danger of *legislative* encroachments on judicial prerogatives: "[W]e can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter." THE FEDERALIST NO. 79, *supra* note 18, at 472.

cial compensation should be absolutely fixed for any sitting judge so as to protect his independence, and (an Anti-Federalist concern) whether the Clause helped give *too much* independence to federal judges.²² We will discuss those two questions to demonstrate that, despite some strong disagreements on other matters affecting the judiciary, no one at the time of the founding had any doubt about the purpose of the Clause.

A. *The Debate About the Permissibility of Raises in Compensation*

Some founders thought the Compensation Clause did not go far enough to protect judicial impartiality. James Madison, for a very important example, wanted to make sure Congress could not change a judge's compensation at all. Indeed, the resolution that was the basis for the first debate on judicial compensation at the Constitutional Convention, a resolution introduced by Edmund Randolph of Virginia and sponsored by the Virginia delegation, which included Madison, provided that the National Judiciary should "receive punctually at stated times fixed compensation for their services, in which *no increase* or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution."²³ That is, *all* adjustments in compensation, upward as well as downward, would have been forbidden for any sitting judge.²⁴

When this provision of the Virginia plan was first debated at the Convention, on July 18, Gouverneur Morris (representing Pennsylvania) moved that the words "or increase" should be struck because "the Legislature ought to be at liberty to increase salaries as circumstances might require, and . . . this *would not create any improper*

²² The founders did not discuss a related question: whether leaving courts to resolve Compensation Clause questions might call judicial impartiality into question. See Vermeule, *supra* note 6, at 504 (arguing that Compensation Clause "doctrine should be restructured to take into account the complementary risk of judicial self-dealing that arises when judge-plaintiffs file suits to increase their compensation, suits that are heard by judge-adjudicators who have a direct or indirect financial interest in the proceedings").

²³ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22 (Max Farrand ed., rev. ed. 1966) (May 29, 1787) (emphasis added) [hereinafter FARRAND]. Charles Pinckney of South Carolina presented a similar proposal. See *id.*, app. D, at 600 ("Judges . . . shall . . . receive [sic] a compensation which shall not be increased or diminished during their continuance in office.").

²⁴ The founders were not, however, oblivious to inflation. See *infra* notes 29-31 and accompanying text. How could they have been, after the runaway inflation of the Revolution? See Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 313 (1976). Under the original Virginia proposal, new judges could have been hired at salaries higher than those paid to already sitting judges. See *infra* note 33 and accompanying text. But then new judges would have been locked in to that compensation in perpetuity—unless they could figure out how to game the system. See *infra* note 36 and accompanying text.

dependence in the Judges."²⁵ Benjamin Franklin agreed that increases in compensation should be permitted: "Money may not only become plentier, but the business of the [judicial] department may increase as the Country becomes more populous."²⁶ Judges might actually have to work hard in the future, and, if so, they should be paid accordingly—as long as independence was not compromised.

Avoiding "improper dependence" was the universally acknowledged goal. Madison understood that preventing a reduction in compensation was more important than preventing an increase, but he was still bothered by the prospect of judges interested in higher compensation trying to curry favor with Congress:

The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to [be] suffered, if it can be prevented.²⁷

But there was an obvious practical problem with capping compensation. Inflation could erode the economic position of sitting judges, and good judges might therefore leave for greener pastures. Life tenure is not much protection if few can afford to serve for long.²⁸ Rather than setting compensation at a specific dollar figure, Madison therefore suggested, why not tie fixed compensation to some always valuable commodity? He proposed that "variations in the value of money, may be guarded [against] by taking for a standard wheat or some other thing of permanent value."²⁹ (He added that a dramatic increase

²⁵ 2 FARRAND, *supra* note 23, at 44 (July 18, 1787) (emphasis added). If Madison reported the language of the resolution correctly, the motion should have been to delete "*increase or*," but nothing in our argument turns on the placement of the "or."

²⁶ *Id.* at 44-45.

²⁷ *Id.* at 45.

²⁸ The President's situation is different. While his compensation "shall neither be increased nor diminished during the Period for which he shall have been elected," U.S. CONST. art. II, § 1, cl. 7, the presidency was not expected to be a lifetime position and, in fact, had a fixed term. *See id.* cl. 1; THE FEDERALIST NO. 79, *supra* note 18, at 473 ("As the President is to be elected for no more than four years, it can rarely happen that an adequate salary, fixed at the commencement of that period, will not continue to be such to the end of it."); *see also* Vermeule, *supra* note 6, at 512-13 (accepting the historical explanation for differences between the President "who may neither be threatened nor bribed" and judges "who may be bribed but not threatened").

²⁹ 2 FARRAND, *supra* note 23, at 45 (July 18, 1787).

in the judicial caseload in the future—another justification given for not capping judicial compensation—did not require increasing judicial salaries: “The increase of business will be provided for by an increase of the number who are to do it.”³⁰)

Linking judicial compensation to the value of wheat is an interesting idea—think of all those judicial computers with the Chicago Board of Trade’s Web site bookmarked!—but Gouverneur Morris pointed out the difficulty:

The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country.³¹

Economic understanding may have been rudimentary in eighteenth-century America, but some founders had the good sense to see that nothing, not even wheat, has “permanent value.” Morris prevailed on this point, and the prohibition against any “increase” was struck from the draft Clause by a substantial vote.³²

Madison did not give up. In late August, he and James McHenry of Maryland tried to reinstate the prohibition against increases in judicial compensation, and, after Morris repeated how unlikely it was that any particular asset would maintain a constant value as conditions changed, George Mason spoke in favor of the Madison-McHenry motion. Maybe new judges would have to be paid more for the country to maintain a quality judiciary, but that did not mean sitting judges were entitled to more. He explained that “this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.”³³

Madison and supporters lost again.³⁴ General Charles Cotesworth Pinckney of South Carolina responded to Mason, questioning the

³⁰ *Id.* Madison might have been correct in one sense though not in another: having more district or appellate judges might help deal with large caseloads, but having more Supreme Court justices would not necessarily make that Court function more efficiently.

³¹ *Id.*

³² The vote was six in favor of striking (Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, and South Carolina); two against (Virginia and North Carolina); and one absent (Georgia). *Id.*

³³ *Id.* at 429 (Aug. 27, 1787).

³⁴ Madison ultimately conceded that there was some merit to the argument that it ought to be possible to increase salaries should caseloads increase. At the Virginia ratifying convention, he said:

I wished myself, to insert a restraint on the augmentation as well as diminution of their compensation But I was over-ruled. I must state the reasons which were

desirability of a multi-tiered compensation system, particularly if the more senior judges were likely to be paid less:

The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.³⁵

Gouverneur Morris added that a prohibition on increases for sitting judges would be easy to circumvent: “[T]he expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.”³⁶ The Madison-McHenry motion was defeated, as was another motion made by Madison and Randolph that would have added the following words to the Compensation Clause: “nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof.”³⁷

Throughout the debates at the Convention no one questioned that the goal of the Compensation Clause was to protect judicial impartiality. The founders knew that the Clause was imperfect, but it was a lot better than nothing. The most extensive discussion of the Clause in its final form is found in Hamilton’s *The Federalist No. 79*, which explained why a fixed salary would not work if the country was going to keep good people in office:

It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might

urged.—They had great weight.—The business must increase. If there was no power to increase their pay, according to the increase of business, during the life of the judges, it might happen, that there would be such an accumulation of business, as would reduce the pay to a most trivial consideration.

3 *id.* at 332 (June 20, 1788).

³⁵ 1 *id.* at 429-30. And except in periods of deflation, the salaries for newer judges would always have been higher (obviously) than those for the older ones.

³⁶ *Id.* at 430. As the judicial nomination process has developed in our time, however, getting through a second (or third) confirmation would not necessarily be easy at all—even if a presidential reappointment were forthcoming in such a case.

³⁷ *Id.*

be extravagant today might in half a century become penurious and inadequate.³⁸

But it was still necessary to restrict the power of the legislature “to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.”³⁹ Congress should not be able even to contemplate a reduction in the compensation of individual judges. The threat of such a reduction might deter a judge from his duty, and “*a power over a man’s subsistence amounts to a power over his will.*”⁴⁰

B. The Anti-Federalist Fear of Excessive Judicial Independence

The Anti-Federalists raised a different question about the Compensation Clause and the other provisions protecting judicial impartiality. Unlike James Madison, they worried that the Constitution provided *too much* independence for the judiciary. For example, Anti-Federalist “Brutus” complained in 1788 that “they have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature.”⁴¹

Another Anti-Federalist, known as the “Federal Farmer,” while more restrained than Brutus, also concluded that the Convention had gone overboard. The Clause prevented the legislature from taking the sensible step of reducing judicial salaries across the board should economic conditions warrant:

The same judge may frequently be in office thirty or forty years; there may often be times, as in cases of war, or very high prices, when his salary may reasonably be increased one half or more; in a few years money may become scarce again, and prices fall, and his salary, with equal reason and propriety be decreased and lowered: not to suffer this to be done by

³⁸ THE FEDERALIST No. 79, *supra* note 18, at 473.

³⁹ *Id.* Hamilton’s focus in *The Federalist* on diminution in compensation was not new. In the so-called “Hamilton Plan,” basically his notes for a speech at the Constitutional Convention on June 18, 1787, Hamilton had said that judges should “have competent salaries to be paid at stated times and not to be diminished during their continuance in office,” with no mention of a prohibition against increases. See 1 FARRAND, *supra* note 23, app. F, at 626.

⁴⁰ THE FEDERALIST No. 79, *supra* note 18, at 472; *see also id.* at 473 (“The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect of him.”).

⁴¹ ESSAY OF BRUTUS No. 15 (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 437, 438 (Herbert J. Storing ed., 1981) [hereinafter STORING].

consent of all the branches of the legislature, is, I believe, quite a novelty in the affairs of government.⁴²

In short, in a *deflationary* economy—more possible in the late eighteenth century than seems to be the case today—why should an across-the-board reduction in judicial compensation not be possible?

These Anti-Federalist concerns were not reflected in the final version of the Compensation Clause, but even the most ardent Anti-Federalists supported the proposition that the judiciary should be protected to some extent. Brutus approvingly referred to the British practice of having “fixed salaries” for judges, for example.⁴³ The real danger—the danger that a well-crafted Compensation Clause should protect against—was legislative and executive action directed specifically at the judiciary.

C. *The Original Understanding in the Supreme Court*

The original understanding that the Compensation Clause prevented the reduction of judicial salaries in order to protect judicial independence was so clear that it took nearly two centuries for a case that squarely presented the issue to reach the Supreme Court. That case, *United States v. Will*,⁴⁴ has attracted more attention for its discussion of the propriety of the Supreme Court’s addressing the merits of a lawsuit about judicial salaries than for its discussion of the Compensation Clause.⁴⁵

For four consecutive years beginning in 1976, Congress sought to eliminate cost-of-living pay increases for federal judges. The Court invalidated the congressional action for the two years in which the increases had already gone into effect, including one when the measure repealing the increase was signed into law on the first day of the fiscal year.⁴⁶ The other two measures were upheld because the cost-

⁴² LETTER NO. 15 FROM THE FEDERAL FARMER TO THE REPUBLICAN (Jan. 18, 1788), reprinted in 2 STORING, *supra* note 41, at 315, 318-19.

⁴³ ESSAY OF BRUTUS No. 15, *supra* note 41, at 438.

⁴⁴ 449 U.S. 200 (1980).

⁴⁵ See, e.g., John T. Noonan, Jr., Symposium, *Judging Judicial Review: Marbury in the Modern Era—Foreword: A Silk Purse?*, 101 MICH. L. REV. 2557, 2560-61 (2003) (“A judge who has a financial interest in a case is no longer a judge *United States v. Will* in 1980 was decided ignoring this principle, and there are other examples.” (citing, *inter alia*, *United States v. Hatter*, 532 U.S. 557 (2001)). Professor Vermeule has made a related point. Although courts may have to deal with Compensation Clause issues, because no other disinterested tribunal exists, he argues that doctrine under the Clause should reflect the courts’ peculiar position: “Constitutional compensation rules should dampen conflicts of interest and self-dealing by ensuring, as far as possible, that official decisions are not distorted by the officeholder’s financial interests” Vermeule, *supra* note 6, at 505.

⁴⁶ *Will*, 449 U.S. at 225-26, 230.

of-living increases had not yet taken effect when the legislation rescinding the pay raises was adopted.⁴⁷ In reaching these conclusions, the Court emphasized the framers' concern with protecting judicial independence.⁴⁸

Will resolved almost all issues relating to judicial salaries under the Compensation Clause.⁴⁹ On the other hand, *Will* was not a tax case and did not directly address the taxation of judicial salaries. We next inquire into the original understanding about that subject.

D. The Founding, Taxation of Income, and Taxes of General Application

The founding debates contain nothing about the relationship between income taxes and the Compensation Clause because there was no original understanding that *anyone's* income or wages might be taxed.⁵⁰ Accordingly, we cannot say for sure what the founders would have thought about taxing the income or wages of federal judges.

But we have a pretty good idea. It is hard to see how a tax that reached everyone's income, including that of judges, would have raised any serious concern about judicial independence. Nothing in the founding debates suggests that federal judges were to be exempt from the taxes that the founders did expect to be imposed, such as

⁴⁷ *Id.* at 228-29.

⁴⁸ *See id.* at 217-20. The opinion also suggested that the Clause furthers the goal of encouraging qualified candidates to serve on the bench. *See id.* at 220-21. For criticism of this judicial-recruitment rationale, see *infra* Part V.

⁴⁹ For discussion of one potentially significant issue that *Will* might not have resolved, see *infra* note 115.

⁵⁰ The Articles of Confederation had effectively given the central government no revenue power, other than requisitioning funds from the states. *See* JENSEN, TAXING POWER, *supra* note 13, at 17-22; Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENT. 355 (1998). For this reason, merely permitting the government to levy duties on imports was such a major increase in the national taxing power that a tax on income was almost unimaginable.

In any event, if an income tax had been imagined, it would have been understood to be subject to the direct-tax apportionment rule, U.S. CONST. art. I, § 2, cl. 3; *id.* § 9, cl. 4—or so one of us believes. In Jensen's view, the Supreme Court was right in 1895 when it struck down an income tax on the ground that it was a direct tax that had not been properly apportioned among the states on the basis of population. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *on reh'g*, 158 U.S. 601 (1895); *see* JENSEN, TAXING POWER, *supra* note 13, at 45-49; Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2366-75 (1997) [hereinafter Jensen, *Apportionment*]. Under this understanding, it was only the Sixteenth Amendment, which exempted "taxes on incomes" from apportionment, that made an unapportioned income tax possible. U.S. CONST. amend. XVI. *But see generally* CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005) (arguing, among other things, that the founders intended a basically unlimited taxing power, that the direct-tax clauses were not intended to have significant effect, that *Pollock* was wrongly decided, and that the Sixteenth Amendment was unnecessary).

duties on imports.⁵¹ And the national direct taxes on real estate that were enacted from 1798 until 1861—and apportioned to meet the requirements of the direct-tax clauses of the Constitution⁵²—contained no exemptions for federal judges, even though such taxes would obviously have “diminished” the economic position of any judge subject to them.⁵³ As the Supreme Court wrote in 1920, “If [a federal judge] has a home or other property, it may be taxed just as if it belonged to another.”⁵⁴

To be sure, the founders might have understood a generally applicable real-estate tax or duty on imports to be fundamentally different from an income tax. The real-estate tax or duty should not be limited by the Compensation Clause, one might argue, because it does not directly relate to “compensation,” as that term is generally understood—salary, fringe benefits, that sort of thing—while the base of an income tax will be measured, at least in part, by compensation.⁵⁵ But surely the founders would have thought that the Constitution would forbid a tax directed at the judiciary in a discriminatory way, even if in form not imposed on compensation.⁵⁶ Under these circumstances, maybe some general principles of due process or equal

⁵¹ The founders thought the burden of such indirect taxes would be borne by purchasers. See Jensen, *Apportionment*, *supra* note 50, at 2393-97. As far as we know, no one thought a judge purchasing imported goods should be immune from a generally applicable impost.

⁵² See U.S. CONST. art. I, § 2, cl. 3; *id.* § 9, cl. 4; see also Jensen, *Apportionment*, *supra* note 50, at 2355-56 (discussing direct taxes on real estate enacted between 1798 and 1861). The statutes were as follows: Act of Aug. 5, 1861, ch. 45, 12 Stat. 292 (amended and made obsolete 1864); Act of Mar. 5, 1816, ch. 24, 3 Stat. 255 (obsolete); Act of Feb. 27, 1815, ch. 60, 3 Stat. 216 (repealed 1816); Act of Jan. 9, 1815, ch. 21, 3 Stat. 164 (repealed 1816); Act of Aug. 2, 1813, ch. 37, 3 Stat. 53 (obsolete); Act of July 14, 1798, ch. 75, 1 Stat. 597 (obsolete).

⁵³ See, e.g., Act of July 14, 1798, ch. 75, 1 Stat. 597 (obsolete).

⁵⁴ *Evans v. Gore*, 253 U.S. 245, 263 (1920), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001).

⁵⁵ For that matter, one might argue that even an *income* tax does not affect “compensation,” as that term is used in many contexts. An income tax affects after-tax income; it does not affect the level of salary paid by employer to employee, at least not directly. See 31 Op. Att’y Gen. 475, 488 (1919); *infra* text accompanying note 78; cf. *McBryde v. United States*, 299 F.3d 1357, 1368 (Fed. Cir. 2002) (“[L]itigation expenses—like most expenses of life—do not reduce compensation . . . [E]xpenses simply claim a portion of the judge’s compensation *after* it has been paid.”). Nevertheless, the Supreme Court in *Evans v. Gore* wrote that a judicial salary could not be taxed: “*Apart from his salary*, a federal judge is as much within the taxing power as other men are.” 253 U.S. at 263 (emphasis added). (As is discussed in Part III.E, *Evans*’s conclusion about income taxation of judicial salaries is no longer the law.) And taxes have been treated as potentially more dangerous to judicial independence than other “expenses” because they are mandated by the government. See *McBryde*, 299 F.3d at 1369 (noting that the taxing power “provides a unique opportunity for the government to target the judiciary”).

⁵⁶ If a real-estate tax remains a direct tax, such a tax would have to satisfy the apportionment requirement for direct taxes, so that a state with, say, one-twentieth of the national population would have to bear one-twentieth of the aggregate tax liability. See *supra* note 50; JENSEN, TAXING POWER, *supra* note 13, at 90-91. That would complicate the implementation of a real-estate tax directed only at federal judges (just as it complicates *any* direct tax), but it would not by itself make the tax impossible.

protection—or a broader conception of judicial independence implicit in Article III—would apply, rather than the Compensation Clause. Whatever the source of the prohibition, however, the result should be the same: Congress cannot impose a discriminatory tax on federal judges. To do so would be inconsistent with the core idea of judicial independence.⁵⁷

In contrast, the reason that judges should not be constitutionally exempt from nondiscriminatory real-estate taxes, duties on imports, and taxes on incomes is that taxes of general application do not affect judicial independence. With a nondiscriminatory tax, neither the Compensation Clause nor any other constitutional prohibition should come into play.⁵⁸

II. NINETEENTH-CENTURY DETOURS

Some nineteenth-century developments do not reflect an understanding that the Compensation Clause was directed at judicial independence. They instead show confusion about the purposes of the Clause, and they also evidence self-serving judicial behavior—similar to that which would occur in later centuries as well.

There was nineteenth-century sentiment that the Clause limited Congress's power to tax the income of federal judges, but the question was not specifically ruled on by any court. When Congress enacted the Civil War income tax, which applied to persons with income over certain threshold levels (and specifically applied to federal officials⁵⁹), Chief Justice Roger Taney protested to Secretary of the Treasury Salmon P. Chase about applying the tax to judges:

⁵⁷ We recognize that a similar position has been characterized as “lame.” As Professor Vermeule noted:

Many constitutional lawyers will have the instinct that even if a discriminatory tax on federal judicial salaries does not violate the Compensation Clause it must violate something—even if only “fundamental principles of Articles III” (as the government lamely posited during the oral argument of *Hatter*). But the instinct is wrong. Article III, and the Constitution generally, protect judicial salaries within the domain, but only within the domain, that the Compensation Clause covers.

Vermeule, *supra* note 6, at 530 n.119 (citation omitted).

⁵⁸ We are ignoring, for these purposes, specialized prohibitions like the Export Clause. U.S. CONST. art. I, § 9, cl. 5. We could probably come up with a hypothetical about a federal judge involved in exporting, but we both try to connect our hypotheticals with the real world (most of the time anyway). In any event, if a proposed tax were to fall on “Articles exported,” it would be forbidden, whether or not it discriminated against the judiciary. See JENSEN, TAXING POWER, *supra* note 13, at 137-38 (pointing out that the Export Clause imposes an “absolute prohibition” on taxing exports).

⁵⁹ A tax, initially set at 3 percent, was applied to “all salaries of officers, or payments to persons in the . . . service of the United States.” Act of July 1, 1862, ch. 119, § 86, 12 Stat. 432, 472.

The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.⁶⁰

Taney would have been irritated anyway, but his irritation was presumably exacerbated by Civil War inflation that ate into judicial salaries.⁶¹

Taney conceded the impropriety of litigating his objections to the tax—what federal judge could impartially hear the case?⁶²—and he received no answer from Secretary Chase.⁶³ But his position received a sympathetic response soon afterward. In 1869, Attorney General Ebenezer R. Hoar issued an opinion stating that a tax on judicial salaries would violate the Compensation Clause (as would a tax on the president, protected by his own clause in Article II⁶⁴), and that the income tax statute should therefore be interpreted so as to exclude persons whose income could not constitutionally be taxed.⁶⁵ In 1872, as the Civil War tax was about to expire, Secretary of the Treasury George S. Boutwell ordered that the tax no longer be imposed on ju-

⁶⁰ Letter from R.B. Taney to Hon. S.P. Chase (Feb. 16, 1863), *reprinted in* 157 U.S. 701, 701 (1895), *and in* SAMUEL TYLER, *MEMOIR OF ROGER BROOKE TANEY, LL.D.* 432-34 (2d ed. 1876) [hereinafter *Taney Letter*]. The letter is also quoted and discussed in *Evans v. Gore*, 253 U.S. 245, 258-59 (1920), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001). At Taney's request, this letter was made part of the Court's records by an order dated March 10, 1863. *See* 157 U.S. 701; *see also* TYLER, *supra*, at 435 ("The letter was, by this order, preserved, to testify to future ages that, in war no less than in peace, Chief-Justice Taney strove to protect the Constitution from violation."). Although it was included in Tyler's *Memoir*, the letter was not officially published until 1895—in the same volume of *U.S. Reports* that contains the first decision in the *Income Tax Cases*, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *on reh'g*, 158 U.S. 601 (1895). We do not know whether this was coincidental.

⁶¹ *See* Rosenn, *supra* note 24, at 320; *infra* notes 164-66 and accompanying text.

⁶² *See* *Taney Letter*, *supra* note 60, 157 U.S. at 702, and TYLER, *supra* note 60, at 433 (observing that "all the Judges of the Courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it"). Twentieth-century judges have been less reluctant to entertain Compensation Clause claims by their brethren, even in situations in which they have a financial stake in the outcome. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 211-17 (1980) (invoking the Rule of Necessity). *But see* Vermeule, *supra* note 6, at 513-14 (noting "troubling institutional blindness to the risk of self-dealing" in cases like *Will*).

⁶³ TYLER, *supra* note 60, at 434. The Lincoln administration "preferred to avoid direct confrontation with the Chief Justice." DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 575 (1978).

⁶⁴ *See supra* note 28.

⁶⁵ 13 Op. Att'y Gen. 161 (1869). A 1919 opinion by Attorney General A. Mitchell Palmer found the objections to such taxes unpersuasive after a more thorough review than Hoar had undertaken. *See* 31 Op. Att'y Gen. 475 (1919); *infra* note 78 and accompanying text. The Supreme Court nonetheless reaffirmed Attorney General Hoar's opinion the following year. *See* *Evans v. Gore*, 253 U.S. 245, 258-59 (1920), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001); *infra* Part III.A.

dicial salaries.⁶⁶ And in 1873, the government refunded the taxes previously paid by federal judges and presidents.⁶⁷

Judges and presidents were presumably happy with that result. In lectures published two decades later, Justice Samuel Freeman Miller, who joined the Court in 1862 and who had thus been subject to the tax, noted that the affected parties “naturally thought [this] was a very fair judicial construction of the constitutional provisions relating to that subject.”⁶⁸ Miller’s longtime colleague Justice Stephen Field also subsequently questioned the validity of taxing judicial salaries in his opinion in the first of the two 1895 *Income Tax Cases*.⁶⁹

Despite Taney’s self-serving claim that the indirect effects of an income tax on judicial salaries might create “the suspicion of [undue] influence”⁷⁰—a claim underlying the other objections as well—we do not see how those suspicions could have developed or why the judges deserved a refund. The Civil War income tax did not fall only, or primarily, on judges. It applied to everyone with income above a certain level, including federal officials generally. Where was the tax’s possible influence on the judiciary? No one who condemned the tax provided a convincing answer to that question. Indeed, no one really tried to be convincing. Each assumed that the impropriety of a tax on judicial compensation was self-evident.

III. TWENTIETH-CENTURY JURISPRUDENCE AND BEYOND

In this part we examine the high (and low) points of twentieth- and twenty-first-century jurisprudence on the Compensation Clause, beginning with *Evans v. Gore*⁷¹ in 1920 and *Miles v. Graham*⁷² in 1925, and culminating in the 2001 decision in *United States v. Hatter*.⁷³

⁶⁶ TYLER, *supra* note 60, at 435.

⁶⁷ SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 248 (Fred B. Rothman & Co. 1980) (1891).

⁶⁸ *Id.* (footnote omitted).

⁶⁹ Justice Miller had died by that time, but Field concurred in the invalidation of the 1894 income tax, pointing to the application of the tax to federal judges as one of many reasons the tax had to fall. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 604-06 (Field, J., concurring), *on reh’g*, 158 U.S. 601 (1895). Miller, who served on the Court until 1890, also thought the Civil War income tax was unconstitutional as it applied to federal judges and the chief executive. See MILLER, *supra* note 67, at 247-48 (“It is very clear that when Congress, during the late war, levied an income tax, and placed it as well upon the salaries of the President and the judges of the courts as those of other people, that [sic] it was a diminution of them to just that extent.”).

⁷⁰ Taney Letter, *supra* note 60, 157 U.S. at 702; TYLER, *supra* note 60, at 433. It was self-serving in that it supported exemption from taxation. It was hardly self-serving in the image it presented of the judiciary.

⁷¹ 253 U.S. 245 (1920).

⁷² 268 U.S. 501 (1925).

⁷³ 532 U.S. 557 (2001).

Across that eighty-one-year period, the Court moved from seeing the Compensation Clause as an absolute prohibition against taxing judicial compensation—the Court in *Evans* effectively blessed Taney’s complaint about taxing judicial salaries—to interpreting the Clause as restricting only those taxes that might affect judicial independence.

A. *Evans v. Gore*

In the first post-Sixteenth Amendment income tax statute, in 1913, the compensation of federal judges was exempted.⁷⁴ Only eighteen years earlier the Supreme Court had invalidated an unapportioned income tax,⁷⁵ and the boundaries of the Amendment, which eliminated the apportionment requirement for “taxes on incomes,” were unclear. Feeling its way and wishing to avoid constitutional challenge, Congress drafted the Income Tax Law of 1913 conservatively, excluding many items from the tax base that might have been within its power to include.⁷⁶

Wartime revenue needs overcame congressional conservatism, however, and, in the Revenue Act of 1918, Congress extended the tax base, “including in the case of the President of the United States [and] the judges of the Supreme and inferior courts of the United States . . . the compensation received as such.”⁷⁷ Disagreeing with what his predecessor Ebenezer Hoar had concluded fifty years earlier, Attorney General A. Mitchell Palmer, in a 1919 opinion, concluded

⁷⁴ See Income Tax Law of 1913, ch. 16, § II.B., 38 Stat. 114, 168 (excluding from taxable income “the compensation . . . of the judges of the supreme and inferior courts of the United States now in office”). It was only the compensation of judges *as judges* that was exempted. Congress apparently had no doubt that a judge’s income from other sources—interest, dividends, compensation for nonjudicial activities—could be taxed. The Compensation Clause, by its terms, prevents diminution only of “a Compensation” that was “receive[d] for [the judges’] Services.” U.S. CONST. art. III, § 1. And the Supreme Court later agreed. See *Evans*, 253 U.S. at 263 (“Apart from his salary, a federal judge is as much within the taxing power as other men are If he has an income other than his salary, it also may be taxed in the same way.”).

⁷⁵ The 1894 income tax was held to have been a direct tax that was not apportioned among the states on the basis of population, as required by the direct-tax clauses. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, *on reh’g*, 158 U.S. 601 (1895); see JENSEN, TAXING POWER, *supra* note 13, at 45-49.

⁷⁶ After the Court rejected the 1894 income tax, the Sixteenth Amendment removed “taxes on incomes, from whatever source derived,” from the direct-tax apportionment requirement. U.S. CONST. amend. XVI. But early post-Amendment Congresses took a restrained view of what could be included in “income.” For example, Congress did not try to tax dividends representing distribution of pre-1913 corporate earnings, although the Supreme Court later suggested that would have been permissible. See *Eisner v. Macomber*, 252 U.S. 189, 204 (1920). And Congress did not try to tax appreciation in the value of property from the pre-1913 period, even if realization of the appreciation occurred after ratification of the Amendment. See Revenue Act of 1918, ch. 18, § 202(a)(1), 40 Stat. 1057, 1060 (providing that basis of “property acquired before March 1, 1913, [would be] the fair market price or value of such property as of that date”).

⁷⁷ Act of February 24, 1919, ch. 18, § 213(a), 40 Stat. 1057, 1065.

that there should be no constitutional problem when an income tax of general application happened to reach judges as well:

[A tax] diminishes the amount which the official has for other uses after discharging the obligations which, in common with other citizens, he owes the Government This results, however, not because Congress has diminished the amount of his compensation, but because . . . there has merely been an increase in the purposes to which that compensation, when received, must be devoted.⁷⁸

Not everyone was convinced, however. Walter Evans, who was appointed to the United States District Court for the Western District of Kentucky in 1899,⁷⁹ long before the effective date of the Act—and, for that matter, long before the Sixteenth Amendment began its move through state legislatures in 1909—challenged the application of the Revenue Act to him. That dispute culminated in the Supreme Court’s 1920 decision in *Evans v. Gore*.⁸⁰

The Supreme Court concluded that, because of the Compensation Clause, the tax was invalid as it applied to Judge Evans. Despite a dissent from Justice Oliver Wendell Holmes, in which Justice Louis Brandeis concurred,⁸¹ the majority opinion reads as if the case were a no-brainer. No diminution in compensation means no income tax, wrote Justice Willis Van Devanter; it means “the judge shall have a

⁷⁸ 31 Op. Att’y Gen. 475, 487-88 (1919).

⁷⁹ Judge Evans was initially appointed to the United States District Court for the District of Kentucky and was reassigned to the Western District when it was created in 1901. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited May 19, 2006).

⁸⁰ 253 U.S. 245 (1920).

⁸¹ Holmes thought the tax would have been valid anyway, *see id.* at 265 (Holmes, J., dissenting), but he also suggested that the ratification of the Sixteenth Amendment should have removed all doubt, by permitting an unapportioned tax on incomes “from whatever source derived.” *Id.* at 267. We doubt the significance of Holmes’s alternative argument. As Justice Van Devanter pointed out in the majority opinion, there was substantial evidence that the Amendment was not intended to overturn preexisting immunities from taxation. *Id.* at 260-63. New York Governor Charles Evans Hughes raised just such a question, in initially resisting his state’s ratification of the Amendment, because he feared the Amendment might have overturned the understanding that state and local bond interest could not be reached by an unapportioned income tax. The *Evans* Court noted that Hughes’s concern “promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose . . . that the apprehension was effectively dispelled and ratification followed.” *Id.* at 261. Such interest could be taxed today (although Congress has not done so, *see* I.R.C. §103 (2000)) because of a change in intergovernmental immunity law, not because the Court changed its view of what the Amendment did: “The legislative history . . . shows that . . . the sole purpose of [the Amendment] was to remove the apportionment requirement for whichever incomes were otherwise taxable.” *South Carolina v. Baker*, 485 U.S. 505, 522 n.12 (1988); *see* JENSEN, TAXING POWER, *supra* note 13, at 177-78 (discussing the development of the intergovernmental immunity doctrine and its relationship to taxes on state and municipal bonds).

sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office, so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage.”⁸² That was so regardless of whether the tax reached officials in the other branches of government and regardless of whether it was a tax that applied generally: “The prohibition is general, contains no excepting words and appears to be directed against all diminution”⁸³

At no point did the Court make a serious effort to explain what the danger to the judiciary was from an income tax of general application. The Court quoted extensively from many of the usual suspects concerning judicial independence, but it did not tie that discussion to the particulars of the case before it.⁸⁴ The fact that there was no discrimination against the judiciary or particular judges was deemed irrelevant: “If the tax in respect of his compensation be prohibited, it can find no justification in the taxation of other income as to which there is no prohibition; for, of course, doing what the Constitution permits gives no license to do what it prohibits.”⁸⁵

B. *Miles v. Graham*

In *Evans*, the Court had not seemed to rely on the fact that Judge Evans was already sitting when the Revenue Act of 1918 went into effect, but some suggested that might have been crucial to the result. The Court had said in *Evans* that all laws, including taxing statutes, “which by their necessary operation and effect withhold or take from the judge *a part of which has been promised by law for his services* must be regarded as within the prohibition.”⁸⁶ If a judge assumes office after a tax is already on the books, however, what possible claim is there that his compensation has been diminished by the tax?⁸⁷ In deciding whether to take the job, the prospective judge could have considered the effect of the tax in calculating his future economic position. He should have known what he was getting into, that is, and tax-free compensation would not have been “promised by law” to him.

⁸² *Evans*, 253 U.S. at 249.

⁸³ *Id.* at 245.

⁸⁴ *See id.* at 249-53 (highlighting, among other things, Alexander Hamilton’s statements on the need for judicial independence).

⁸⁵ *Id.* at 244-45.

⁸⁶ *Id.* at 254 (emphasis added).

⁸⁷ *See* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 1.2.7 (3d ed. 1999).

In 1925, the Supreme Court, in *Miles v. Graham*,⁸⁸ dealt with this leftover question, and did so in a questionable way. Judge Samuel Graham's appointment to the old United States Court of Claims was effective September 1, 1919, after the Revenue Act of 1918 was in place. So, asked Justice James McReynolds, "Does the circumstance that [Graham's] appointment came after the taxing Act require a different view concerning his right to exemption?"⁸⁹ The answer (for all but Justice Louis Brandeis, who dissented without opinion⁹⁰) was no:

The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with the amount specified becomes the compensation which is protected against diminution during his continuance in office.⁹¹

One might ask: What words? What history? The evidence was not there, but Justice McReynolds nevertheless concluded that, because the applicable statute said Judge Graham was to have been paid \$7,500, Graham should have been left with \$7,500 *after taxes*. All Article III judges, whether or not they were on the bench when the income tax went into effect, were exempted from application of the income tax.

As events unfolded, *Miles v. Graham* was "the law," at least for a while, but the Supreme Court had not addressed an important threshold question (which the government had not raised): Was the Court of Claims an Article III court to which the Compensation Clause applied? If it was not—if it was an Article I court, as the Supreme Court determined a few years later⁹²—the Clause was irrelevant, compensation could be diminished without constitutional problems, and no legal issue should have remained.

⁸⁸ 268 U.S. 501 (1925).

⁸⁹ *Id.* at 508.

⁹⁰ *Id.* at 509. Justice Brandeis was presumably adhering to Justice Holmes's dissenting opinion in *Evans*, in which he had concurred. We do not know why Justice Holmes departed from his position in that case and acquiesced in *Miles*.

⁹¹ *Id.* at 508-09.

⁹² See *Williams v. United States*, 289 U.S. 553 (1933) (holding that the Compensation Clause does not apply to Court of Claims judges). In *Williams*, the Court noted, as it had in another case considering the constitutional status of the Court of Claims, that the issue had not been raised in *Miles*. *Id.* at 568-69 (citing *Ex Parte Bakelite Corp.*, 279 U.S. 438, 454-55 (1929), which held that a case or controversy was not a requirement for an Article I court like the Court of Claims). It was not until 1953 that Congress made the Court of Claims officially an Article III court. See Act of July 28, 1953, ch. 253, § 1, 67 Stat. 226, 226.

One of the peculiar, but predictable, effects of the holdings in *Evans* and *Miles* was that judges had an incentive to stay on the bench longer than would otherwise have been the case.⁹³ If a judge completely retired from the bench, he lost the tax exemption and other benefits of the Compensation Clause, as the Clause had been interpreted in those cases. We can illustrate the point with reference to Justice Oliver Wendell Holmes's experience, although we do not mean to suggest that tax considerations actually influenced his thinking about retirement. Holmes resigned on January 12, 1932, at age 91. His retirement income then became subject to the income tax,⁹⁴ and shortly thereafter, in an economy move, Congress reduced retirement compensation for judges.⁹⁵ Had Holmes remained on the bench, his compensation could not have been lowered.⁹⁶

For those concerned about an out-of-touch judiciary, this was not a good signal to send to judges whose retirement would have freed up judicial slots. With that consideration in mind, legislation was introduced, before President Franklin Roosevelt resorted to his Court-

⁹³ A similar incentive had existed during the time, before 1869, when federal judges were provided no pension upon retirement. See Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 419 (1938) ("To make no provision for salary after resignation in the case of a judge enjoying tenure for life was precisely the way to keep him on the bench to the end.").

⁹⁴ Holmes was not immune from tax incentives—and from tax hypocrisy as well. He is known for stressing the relationship between taxation and civilization. See, e.g., Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (May 12, 1930), in 2 HOLMES-LASKI LETTERS 316, 319 (Mark De Wolfe Howe ed., Atheneum ed. 1963) (1953) ("I always say that I pay my tax bills more readily than any others—for whether the money is well or ill spent I get civilized society for it."). However, because of *Evans v. Gore*, Holmes was not required to pay taxes on his judicial income. He thus received a discount on his bill for civilization, and other American taxpayers had to make up the difference. To his credit, Holmes had dissented in *Evans*—he thought he should be taxed on his judicial income—but he did not contribute his tax savings attributable to *Evans* to the federal treasury.

⁹⁵ See Legislative Appropriations Act of June 30, 1932, ch. 314, § 107(a)(5), 47 Stat. 382, 401-02 (reducing "salaries and retired pay" of judges earning over \$10,000 annually, but exempting those "whose compensation may not, under the Constitution, be diminished during their continuance in office").

⁹⁶ See THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON 163 n.9 (Dennis J. Hutchinson & David J. Garrow eds., 2002) [hereinafter KNOX]. It was assumed that retirement income was not constitutionally protected. See Independent Offices Appropriation Act of 1934, ch. 101, § 13, 48 Stat. 283, 307 (1933) (reducing "the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished)" by fifteen percent). The "retirement or resignation" language in the Act was intended to distinguish between what we would today call a senior judge, someone who has "retired" but still performs judicial duties, and a judge who has entirely left the bench (i.e., "resigned"). The 1933 reduction was aimed at the "retired pay" of both. Soon afterward, however, the Supreme Court ruled that Congress could not reduce the income of a "retired" judge who still performed judicial duties. *Booth v. United States*, 291 U.S. 339 (1934). Implicit in the decision was the proposition that a reduction in retired pay would be constitutionally permissible for a judge who had totally resigned. *But see infra* note 198 and accompanying text (suggesting that deferred compensation perhaps might be subject to the Compensation Clause).

packing plan, to provide a guaranteed income, tax-free, for any retiring justice.⁹⁷ The goal was to create openings on the Supreme Court that could be filled with New Deal-friendly justices. Other events sidetracked the Court-packing plan, of course. And the guaranteed-income legislation also became unnecessary after the Court's 1939 decision in *O'Malley v. Woodrough*,⁹⁸ which eliminated any basis for a constitutional distinction between the nondiscriminatory taxation of pre-retirement compensation of federal judges and the similar taxation of post-retirement compensation. We return to taxation and retirement in the final part of this article.

C. *O'Malley v. Woodrough*

In 1939, the Court revisited the Compensation Clause in *O'Malley*. In the Revenue Act of 1932, Congress had provided—*Miles v. Graham* notwithstanding—that the statutory term “gross income” would include compensation of “judges of courts of the United States taking office after [June 6, 1932].”⁹⁹ (It was not until 1954 that statutory provisions specifically taxing judicial salaries were eliminated as surplusage.¹⁰⁰) Judge Joseph Woodrough, fitting within that defined category,¹⁰¹ brought suit, reasonably arguing that, under *Miles v. Graham*, the tax could not be applied to federal judges.

The difference between the Court's analysis in the two cases from the 1920s and that in 1939 is the difference between night and day. Justice Felix Frankfurter reexamined the Compensation Clause, concluding that the *Evans* Court had gotten it wrong: “[T]he meaning which *Evans v. Gore* imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other English-speaking courts.”¹⁰² The tax at issue did not affect judicial independence, which is what the Clause is about:

To suggest that [the tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by mak-

⁹⁷ See KNOX, *supra* note 96, at 163 & n.9.

⁹⁸ 307 U.S. 277 (1939).

⁹⁹ Ch. 209, § 22(a), 47 Stat. 169, 178, *reenacted by* Revenue Act of 1936, ch. 690, § 22(a), 49 Stat. 1648, 1657.

¹⁰⁰ See S. REP. No. 1622, 83d Cong., 2d Sess. 168 (1954); 1 BITTKER & LOKKEN, *supra* note 87, ¶ 1.2.7.

¹⁰¹ Woodrough had become a judge on the United States District Court for the District of Nebraska in 1916 and was named to the United States Court of Appeals for the Eighth Circuit in 1933, after the effective date of the Revenue Act of 1932. Federal Judicial Center, Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited May 19, 2006).

¹⁰² *O'Malley*, 307 U.S. at 281.

ing them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1.¹⁰³

Furthermore, it obviously irritated the Court (other than dissenting Justice Pierce Butler¹⁰⁴ and presumably Justice James McReynolds, the author of *Miles*, who did not participate in *O'Malley*) that Judge Woodrough was trying to avoid the obligations of ordinary citizens. Judges ought to pay their "aliquot share" of the costs of civilization: "To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."¹⁰⁵

To be sure, one sentence quoted above alludes to the fact that Judge Woodrough was appointed after the tax was extended to members of the judiciary,¹⁰⁶ and the Court in *O'Malley* could conceivably have left *Evans* intact while repudiating only *Miles*. The Court could have decided, that is, that an income tax could reach judges who took office after the tax's enactment, while reserving reconsideration of whether the tax might also apply to already sitting judges. But that was not what the Court did. A fair reading of Justice Frankfurter's opinion shows that the allusion to the time of Woodrough's appointment merely reflected the particulars of the lawsuit. Nothing in *O'Malley* supported a constitutional distinction, for tax purposes, between incumbent judges and new judges. Justice Frankfurter began his discussion by condemning the approach taken in *Evans*, and the rest of his analysis applied to all judges—whenever they were appointed.

The reasoning in *O'Malley* was totally inconsistent with that in *Evans* and *Miles*, but Justice Frankfurter said nothing directly about the continuing vitality of *Evans*, and he could not even bring himself to say that *Miles* had been entirely overturned. Frankfurter wrote only that "to the extent that what the Court now says is inconsistent with

¹⁰³ *Id.* at 282.

¹⁰⁴ Justice Butler filed a lengthy dissent, citing the nineteenth-century history as well as the two earlier twentieth-century cases. *Id.* at 277. One of his primary arguments, derived from *Evans v. Gore*—an argument we take up in Part V—was that judicial independence was only one of the purposes of the Compensation Clause. The Clause was also intended, Butler argued, as an economic incentive to attract talent to the federal bench. *Id.* at 292.

¹⁰⁵ *Id.* at 282.

¹⁰⁶ See *supra* text accompanying note 103.

what was said in *Miles v. Graham*, the latter cannot survive.”¹⁰⁷ *Miles* was clearly rejected in its entirety, however, and Frankfurter’s logic could not be limited to that decision. Because *Miles* rested exclusively on *Evans*, the repudiation of *Miles* necessarily eviscerated *Evans* as well.¹⁰⁸

D. United States v. Will

This interpretation of *O’Malley* was confirmed in 1980, in *United States v. Will*.¹⁰⁹ Pointing to Justice Frankfurter’s statement in *O’Malley* that “to the extent *Miles v. Graham* was inconsistent, it ‘cannot survive,’” the *Will* Court noted the obvious: “Because *Miles* relied on *Evans v. Gore*, *O’Malley* must also be read to undermine the reasoning of *Evans*”¹¹⁰

As mentioned earlier, *Will* was not a tax case. The Court in *Will* held that certain retroactive cancellations of scheduled (and already effective) cost-of-living raises for federal judges violated the Compensation Clause, even though the cancellations affected members of other governmental branches as well. The Court wrote: “The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges’ salaries from the clear mandate of that Clause; the Constitution makes no exceptions for ‘nondiscriminatory’ reductions.”¹¹¹

Thus, in the nontax context, when a “direct diminution” is involved, it is irrelevant to Compensation Clause analysis whether Congress discriminated against the judiciary: *any* diminution is impermissible. But with taxes, discrimination seemed to be crucial to a claim under the Clause. As the Court explained, *Will* was “quite different from the situation in *O’Malley*. There the Court held that the Compensation Clause was not offended by an income tax levied on Article III judges as well as on all taxpayers; there was no discrimina-

¹⁰⁷ *O’Malley*, 307 U.S. at 282-83 (citation omitted).

¹⁰⁸ If *Evans* had remained good law after *O’Malley*, the Compensation Clause might have required the maintenance of the real, rather than the nominal, value of judicial salaries. But the Court of Claims, relying heavily on *O’Malley*, rejected this argument in a case brought by a group of Article III judges whose salaries had declined in real terms by 34.4 percent over a six-year period. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977); see Rosenn, *supra* note 24 (discussing *Atkins* and the decline of judicial salaries in real terms); cf. Ronald D. Rotunda, *A Few Modest Proposals To Reform the Law Governing Federal Judicial Salaries*, PROF. LAW., Fall 2000, at 1, 4 (arguing that “even if Article III does not mandate cost of living increases as a matter of constitutional law, still, as a matter of policy and fairness, judicial salaries should be adjusted for inflation automatically”).

¹⁰⁹ 449 U.S. 200 (1980).

¹¹⁰ *Id.* at 227 n.31 (citation omitted).

¹¹¹ *Id.* at 226.

tion against the plaintiff judge.”¹¹² Judges are citizens, too: “In *O’Malley* this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges.”¹¹³

Congress may not directly reduce judicial salaries, but it can eliminate planned raises that have not yet taken effect. Were Congress to provide for automatic cost-of-living increases, for example, it should not be locked in to the adjustment formula for decades. If the Compensation Clause altogether precluded a downward adjustment, a formula would presumably have to apply to judges sitting when the formula was enacted until they leave the bench. In *Will*, the Supreme Court said that tying Congress’s hands in that way would be absurd.¹¹⁴ In *Will* itself, the Court upheld *prospective* cancellation of other pay raises for judges, as well as high-level executive officials and members of Congress, that had not yet vested.¹¹⁵

¹¹² *Id.* (citation omitted).

¹¹³ *Id.* at 227 n.31 (citation omitted).

¹¹⁴ *Id.* at 228 (“To say that Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.”).

¹¹⁵ *Id.* at 229. Deciding when an increase in compensation has vested depends on the particulars of the situation. In several appropriation acts—in 1995, 1996, 1997, and 1999—Congress blocked otherwise automatic, annual adjustments in judicial salary that had been provided for in the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716. Vermeule, *supra* note 6, at 524. Under the original scheme, “once Congress decided in any particular year to award a COLA to employees on the ‘General Schedule’—essentially Civil Service employees—then a COLA would automatically become payable to federal judges as well.” *Id.* But Congress then blocked the raises that would have applied to judges in the years in question. Several judges who had been sitting when the Ethics Reform Act was enacted brought suit. Although a district court judge granted summary judgment in their favor, the Federal Circuit reversed, distinguishing *Will*. *Williams v. United States*, 48 F. Supp. 2d 52 (D.D.C. 1999), *rev’d*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002). The Federal Circuit characterized the required analysis as looking to the “*timing* of the repeal action rather than the ‘automatic’ or ‘discretionary’ nature of the planned pay raise.” *Williams*, 240 F.3d at 1029. Thus, “if Congress and the President wish to prevent a planned increase in judicial compensation, they must do so before the date that the pay increase becomes actually ‘due and payable’ as part of the judges’ compensation package.” *Id.*; see Vermeule, *supra* note 6, at 524-27 (discussing *Williams* and when pay raises should be treated as having vested).

This is not the place for a detailed analysis of differences between *Will* and *Williams*. Suffice it to say that, while the congressional actions at issue in *Williams* were suspect under *Will*, the Supreme Court refused to hear the case. *Williams*, 535 U.S. 911. Justice Breyer (who in 2001 had written the majority opinion in *United States v. Hatter*, 532 U.S. 557 (2001)—to be discussed in Part III.E) wrote a vigorous dissent from the denial of *certiorari*, in which two other justices joined. *Id.* at 911-22 (Breyer, J., dissenting). Breyer insisted that the judges had raised a serious argument that, because of the different procedures used to determine cost-of-living adjustments in the two situations, judicial expectations about compensation were stronger in *Williams* than in *Will*. *Id.* at 917. If Breyer was right, *Williams* might have presented a stronger case than *Will* for invoking the Compensation Clause.

E. United States v. Hatter

As was true in *O'Malley*, the Supreme Court in *Will*—although it had nothing good to say about *Evans*—forwent the opportunity to state unequivocally that the old case had been overruled. That brings us to *United States v. Hatter*,¹¹⁶ in which the status of *Evans* could no longer be ignored.

Judge Terry Hatter of the United States District Court for the Central District of California and several other federal judges sued in 1989, challenging the application to them of the wage taxes that fund the Social Security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance program. Prior to 1983, most federal employees, including judges, were exempt from Social Security taxes because of the retirement systems established by the federal government on their behalf. But the Tax Equity and Fiscal Responsibility Act of 1982 subjected basically all federal employees, including federal judges, to the Medicare tax,¹¹⁷ and the Social Security Amendments of 1983 imposed the OASDI wage tax on judges and a few other select governmental officials.¹¹⁸ Hatter and the other judges party to the suit were already on the bench when the wage taxes became effective—hence the claim that their compensation was being unconstitutionally diminished.

The suit focused on the effect of the Social Security taxes on federal judges, but the statutory changes were not intended to subject the judges to any special, deleterious treatment. Congress was trying to increase revenue for the Social Security system, and the changes also imposed the wage taxes for the first time on many other federal officials, including the president, the vice president, cabinet members, and members of Congress. The statutory changes had the effect of treating most federal officials, including judges, in the same way other American citizens had been treated for decades—nothing like the discrimination that *Will* had implied was necessary for a Compensation Clause claim involving taxation. Furthermore, if Congress could have included judges in the Social Security system to begin with—and *O'Malley* should have removed any doubt on that score—surely Congress should not have been precluded from legislating to correct its earlier excess of caution. Or should it?

¹¹⁶ 532 U.S. 557 (2001).

¹¹⁷ Pub. L. No. 97-248, § 278, 96 Stat. 324, 559-63 (amending I.R.C. § 3121).

¹¹⁸ Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 65, 69 (amending I.R.C. § 3121).

1. Why Did the Supreme Court Bother to Hear Hatter?

A threshold question was whether any issue in *Hatter* was serious enough to justify an expenditure of Supreme Court time. Yes, there was some plausibility to the judges' Compensation Clause claim because the legislation extending the OASDI tax singled out a set of government officials, including judges, for unhappy consequences, and that action was superficially discriminatory. Furthermore, *Evans v. Gore* had not been formally overruled. Nevertheless, many commentators, including the two of us, thought that *O'Malley* and *Will* pointed to only one possible conclusion: of course these taxes were permissible!¹¹⁹

Everything Justice Frankfurter had said in *O'Malley* about the purposes of the Compensation Clause suggested that the intellectual foundation for *Evans* had been destroyed, and the Court in *Will* seemed to have agreed. *Evans* and *O'Malley* were irreconcilable, and Frankfurter's failure in *O'Malley* to state explicitly that *Evans* had been overruled reflected judicial caution, nothing more.¹²⁰ Besides, several lower courts had remarked on the apparent demise of *Evans* despite the Supreme Court's failure to repudiate the case explicitly.¹²¹

¹¹⁹ See *supra* note 13.

¹²⁰ A similar situation occurred when the Supreme Court did not expressly overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Brown* Court simply "rejected" statements in *Plessy* that were contrary to "modern [psychological] authority." *Brown*, 347 U.S. at 494-95, and "conclude[d] that in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495. Nevertheless, many subsequent cases have said what everyone thinks was the case, that *Brown* really did overrule *Plessy*. *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion); *id.* at 960 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Patterson v. McLean Credit Union*, 491 U.S. 164, 191 (1989) (Brennan, J., concurring in the judgment in part and dissenting in part); *Florida Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 152 n.6 (1981) (Stevens, J., concurring); *Oregon v. Mitchell*, 400 U.S. 112, 133 (1970). *Brown* did to *Plessy* what *O'Malley* did to *Evans*.

The Supreme Court's reluctance to overrule moribund precedents has not prevented lower courts from recognizing their lack of vitality. Indeed, the lower court in the case that led to the end of the Montgomery bus boycott was quite confident that *Plessy* had not survived *Brown*. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (3-judge court), *aff'd per curiam*, 352 U.S. 903 (1956); see also *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W. Va. 1942) (3-judge court) (declining to follow the two-year-old precedent of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), because of evidence that the Supreme Court no longer regarded that ruling as sound even though the Court had not formally interred it), *aff'd*, 319 U.S. 624 (1943). See generally Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53, 61-69 (1982) (providing other examples of "anticipatory overruling" by lower courts).

¹²¹ *E.g.*, *Jefferson County v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000) (noting that the Court in *O'Malley* and *Will* "came as close to overruling [*Evans*] as it could without actually uttering the word"); *Atkins v. United States*, 556 F.2d 1028, 1043 (Ct. Cl. 1977) (en banc) (characterizing *Evans* as "no longer good law"); *id.* at 1044 (observing that *O'Malley* "by force of reasoning overruled a good deal of *Evans*"); *id.* at 1045 (referring to the "overruling" of

Indeed, it was actually *because Evans* was on such shaky ground that the Supreme Court had to act in *Hatter*. For better or for worse, the Court had recently insisted that lower courts follow all high court precedents, however fragile they might appear, until the justices themselves apply the coup de grâce.¹²² The absence of “the magic word ‘overruled’”¹²³ in *O’Malley* could not have resurrected *Evans* intellectually, but the Federal Circuit was merely obeying orders in concluding that it had to follow *Evans*.¹²⁴ Under the circumstances, the Supreme Court had to hear *Hatter* if only to utter the magic word and to remove all doubt about the continuing vitality of *Evans*.

2. The Merits

Overruling *Evans* is one of the things the Supreme Court did in *Hatter*. But the Court went beyond that simple, long overdue step, and it did so in a controversial way. *Hatter* turned out to involve more than simply correcting a judicial mistake of long ago.

Hatter bounced up and down in the federal judicial system for a decade, and eight opinions were issued before the Supreme Court became involved substantively.¹²⁵ Much of the case’s procedural history was complex—raising questions such as who could hear the case¹²⁶ and the implications of the Supreme Court’s inability to muster a quorum when the case had been brought there at an earlier stage¹²⁷—but the fundamental, substantive issue was straightforward.

Evans in *O’Malley*).

¹²² See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming “that ‘if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions’” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))).

¹²³ *Acker*, 210 F.3d at 1320.

¹²⁴ See *Hatter v. United States*, 64 F.3d 647, 650 (Fed. Cir. 1995), *aff’d as if by an equally divided Court*, 519 U.S. 801 (1996).

¹²⁵ For the complete procedural history, see *United States v. Hatter*, 532 U.S. 557, 564-65 (2001).

¹²⁶ At the time *Hatter* was being decided, at least 10 suits involving almost 100 other federal judges with similar claims were in the pipeline. See *Petition for Writ of Certiorari*, App. L, *United States v. Hatter*, 532 U.S. 557 (2001) (No. 99-1978). No members of the Supreme Court were parties to *Hatter* or any of the other cases. See *id.*; Linda Greenhouse, *Supreme Court Roundup: Court To Review Benefits Tax on U.S. Judges*, N.Y. TIMES, Oct. 17, 2000, at A29.

¹²⁷ Four justices recused themselves when the case reached the Court in 1996, see *United States v. Hatter*, 519 U.S. 801 (1996), apparently because they might have been “entitled to refunds if the plaintiffs’ broadest remedial theory prevail[ed].” Greenhouse, *supra* note 126 (noting that only two justices were not participating in 2001, presumably because the passage of time left them as the only members of the Court with a potential financial stake in the outcome). Because of the four recusals in 1996, the Court lacked a quorum of six participating members. See 28 U.S.C. § 1 (2000). The absence of a quorum had the effect of affirming, as if by an equally divided Court, the Federal Circuit’s 1995 ruling (64 F.3d 647) that the extension of

Under the Compensation Clause, can Congress extend an already existing tax of general application to sitting judges who had previously been exempt from the tax?

a. Nondiscriminatory Taxation and the Interment of Evans

Not surprisingly, the Supreme Court in *Hatter* tossed the last shovelful of dirt on *Evans*'s grave: "We now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax."¹²⁸ Six of the seven participating justices (O'Connor and Stevens were recused) voted to overturn *Evans*. In his opinion concurring on the OASDI tax issue but dissenting on the Medicare tax, Justice Scalia wrote, "The Court's decision today simply recognizes what should be obvious: that *Evans* has not only been undermined, but has in fact collapsed."¹²⁹ Only Justice Thomas thought *Evans* had been rightly decided.¹³⁰

Also not surprisingly, the Court, over the dissents of Justices Scalia and Thomas, upheld the application of the Medicare tax to federal judges. All Congress had done with the Medicare tax was to make almost all government officials, including judges, subject to the tax. Nothing in the process even hinted at an attempt to treat the judiciary in an especially unhappy way.

But the Court in *Hatter* provided one big surprise. The Court held that the extension of the OASDI tax to those judges sitting in 1983 was in fact discriminatory and, therefore, invalid under the Compensation Clause, even though Congress had not intended to single out the judiciary for unfavorable treatment. All seven participating justices thought the OASDI tax was constitutionally infirm as applied to

Social Security taxes to incumbent Article III judges violated the Compensation Clause. 28 U.S.C. § 2109 (2000). Although an affirmance by an equally divided Court has no precedential significance, such a disposition is said to be "conclusive and binding" on the parties. *United States v. Pink*, 315 U.S. 203, 216 (1942); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868). The Court's 1996 disposition might therefore have represented the law of the case in *Hatter*. On the other hand, the law-of-the-case doctrine applies "only with respect to issues previously determined," *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979), and the 1996 order under § 2109 was not an adjudication of the merits that would trigger that doctrine. *Cf. Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (finding that an earlier dismissal of certiorari as improvidently granted was not the law of the case); *Neil v. Biggers*, 409 U.S. 188, 192 (1972) (refusing to treat the prior affirmance of a state conviction by an equally divided Court as precluding the defendant from raising a federal habeas corpus claim).

¹²⁸ *Hatter*, 532 U.S. at 567.

¹²⁹ *Id.* at 582 (Scalia, J., concurring in part and dissenting in part).

¹³⁰ See *infra* notes 151-52 and accompanying text.

Judge Hatter and other judges sitting in 1983.¹³¹ And the infirmity of the tax, concluded the Court, was not cured by later increases in judicial compensation.¹³²

The most important part of *Hatter* was the repudiation, once and for all, of *Evans v. Gore* and the acceptance of the proposition that the Compensation Clause affects only those taxes that discriminate against the judiciary. As Justice Breyer wrote for the Court, “In our view, the Clause does not prevent Congress from imposing a ‘non-discriminatory tax laid generally’ upon judges and other citizens, but it does prohibit taxation that singles out judges for specially unfavorable treatment.”¹³³

Hatter thus confirmed that, when taxation is involved, the Compensation Clause analysis is different from that applied in *Will*. *Will* had concluded that Congress may not directly reduce vested judicial salaries, even if done as part of a nondiscriminatory cost-cutting move. With taxation, however, the only concern is whether there has been discrimination against the judiciary in a way that might damage judicial independence. As Justice Breyer wrote in *Hatter*,

There is no good reason why a judge should not share the tax burdens borne by all citizens. We concede that this Court [in *Will*] has held that the Legislature cannot *directly* reduce judicial salaries even as part of an equitable effort to reduce *all* Government salaries. But a tax law . . . affects compensation indirectly, not directly. And those prophylactic considerations that may justify an absolute rule forbidding direct salary reductions are absent here 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 Constitution’s compensation guarantee cannot justify a spe-

¹³¹ Since the Federal Circuit had also concluded that the OASDI tax was invalid in its application to Judge Hatter and friends, it might seem peculiar to characterize the result at the Supreme Court—an affirmance of a lower court decision—as a “surprise.” The result was nevertheless surprising because the Federal Circuit had relied on *Evans v. Gore* in its analysis of the Compensation Clause, see *Hatter v. United States*, 64 F.3d 647, 649-50 (Fed. Cir. 1995), *aff’d as if by an equally divided Court*, 519 U.S. 801 (1996), and nearly everyone viewed that case as a legal dead letter.

¹³² *Hatter*, 532 U.S. at 578-81.

¹³³ *Id.* at 561 (quoting *O’Malley v. Woodrough*, 307 U.S. 277, 282 (1939)). Five of the seven justices agreed with this proposition. Justices Scalia and Thomas both thought the Clause could forbid an increase in tax burdens that is nondiscriminatory in nature. See *infra* notes 148-52 and accompanying text.

cial judicial exemption from a commonly shared tax, not even as a preventive measure to counter those threats.¹³⁴

If a tax does not discriminate against the judiciary, there should be no constitutional problem.¹³⁵

b. Was the Extension of the OASDI Tax Discriminatory?

We agree that the Compensation Clause should be irrelevant to nondiscriminatory taxes, but the Court also concluded that the extension of the OASDI tax to sitting judges—the elimination of a tax exemption to which judges had previously been entitled—was in fact discriminatory. As Justice Breyer’s majority opinion explained, “In our view, the Clause . . . prohibit[s] taxation that singles out judges for specially unfavorable treatment”¹³⁶—and this was a case of “specially unfavorable” treatment.¹³⁷

The conclusion that discrimination was involved came as the result of a complicated, four-step analysis presented by Justice Breyer. First, because of retirement plans already in place, federal employees had been outside the Social Security system before enactment of the 1983 changes. Second, the 1983 changes did not increase the financial obligations of nearly all (96 percent) of the federal employees in office at that time because those employees were given the choice whether to enter the Social Security system or not. (Newly hired employees had no option.) While in form the remaining 4 percent of the federal employees seemed to have no such choice, it was in fact only the federal judges and a few insignificant other officials (like the president¹³⁸)—people whose government retirement plans were noncontributory—who were hurt financially by the 1983 changes in the law.¹³⁹ Third, the federal judges had to pay more, and got nothing

¹³⁴ *Hatter*, 532 U.S. at 571 (citations omitted).

¹³⁵ *But see infra* Part V (discussing second possible justification for Compensation Clause).

¹³⁶ *Hatter*, 532 U.S. at 561.

¹³⁷ Justice Scalia thought discrimination was unnecessary to invalidate a tax under the Compensation Clause, *see infra* notes 148-49 and accompanying text, and Justice Thomas apparently thought that *any* income tax unconstitutionally diminishes judicial compensation. *See infra* notes 151-52 and accompanying text.

¹³⁸ As Justice Breyer wrote for the Court:

The President’s pension is noncontributory. And the President himself, like the judges, is protected against diminution in his “[c]ompensation.” These facts may help establish congressional good faith. But, as we have said, we do not doubt that good faith. And we do not see why, otherwise, the separate and special example of that single individual, the President, should make a critical difference here.

Hatter, 532 U.S. at 577-78 (citations omitted). That single individual indeed!

¹³⁹ The retirement plan for judges is noncontributory, wrote Justice Breyer, because the Constitution permits judges to “draw a salary for life simply by continuing to serve. That fact means that a contributory system, in all likelihood, would not work.” *Id.* at 574 (citation omit-

in return. Because of pre-judicial employment, nearly all were already fully insured under the Social Security system. Finally, said the Court, the changes did not serve to “‘equaliz[e]’ the retirement-related obligations that pre-1983 law imposed upon judges with the retirement-related obligations that pre-1983 law imposed upon other current high-level federal employees.”¹⁴⁰

To put the Court’s position more simply: federal judges, and (with an exception or two, like the president) only federal judges, had increased tax obligations from the 1983 changes, with no compensating benefits. That was discriminatory, concluded the Court, and therefore inconsistent with the Compensation Clause.

This is unconvincing. The Court’s analysis required a lengthy series of steps, and suppositions, to come to the counterintuitive determination that the statutory effects were discriminatory. The level of detail presented by Justice Breyer was extraordinary when, as he admitted, there was no evidence whatsoever that Congress was acting to single out the judiciary for unfortunate consequences, and the effect of the legislation was merely to bring the judiciary into the broadly applicable Social Security system.¹⁴¹

Justice Breyer had an answer to these points, of course. He suggested that, if the rules were otherwise, Congress could secretly punish judges while professing high-minded goals:

The Government also argues that there is no evidence here that Congress singled out judges for special treatment in order to intimidate, influence, or punish them. But this court has never insisted upon such evidence. To require it is to invite legislative efforts that embody, but lack evidence of, some such intent, engendering suspicion among the branches and consequently undermining that mutual respect that the Con-

ted). That likelihood, said Breyer, gave a constitutional dimension to the plan arrangements: “The 1983 statute consequently singles out judges for adverse treatment solely because of a feature required by the Constitution to preserve judicial independence.” *Id.* We are not sure why it would not have “worked” to have a contributory system for judges; some judges do in fact really want to “retire.” In any event, whatever the difficulties with a contributory plan, we do not see how a noncontributory plan is “required” by the Constitution.

¹⁴⁰ *Id.* at 573.

¹⁴¹ As Professor Vermeule explained:

Hatter . . . illustrates that distorted judgments and obscurely complex rulings can occur when the nondiscrimination test is applied with free choice of baselines and comparisons. The legislation imposing a Social Security tax treated judges exactly as other citizen earners are treated—and was, thus, nondiscriminatory in precisely the sense required by precedent. Yet the Court said that other federal employees were the appropriate comparison group . . .

Vermeule, *supra* note 6, at 532.

stitution demands. Nothing in the record discloses anything other than benign congressional motives. If the Compensation Clause is to offer meaningful protection, however, we cannot limit that protection to instances in which the Legislature manifests, say, direct hostility to the Judiciary.¹⁴²

The posited concern about a vast congressional conspiracy cannot be taken seriously. The decision represents formalism—and judicially self-serving formalism at that—at its worst.¹⁴³ It is inconceivable that Congress—a group of 535 very independent, very public people—could ever take an action motivated by such hostility without leaving traces along the way. With no evidence at all that judicial hostility motivated extension of the OASDI tax, judicial independence was not affected one whit by this congressional action. That should have been enough to decide the case.

c. Who Was Responsible for the “Problem” That Implicated the Compensation Clause?

Justice Breyer’s emphasis on the possibility of hidden hostility was strange enough, but there was an even more peculiar aspect to the Court’s OASDI tax analysis. The congressional step that was held to be inconsistent with the Compensation Clause was almost certainly related to the *Court’s* own decisions.

Now that *Hatter* has been decided, we know that the OASDI tax could have been imposed on federal judges at the same time it was imposed on other Americans in 1935. Judicial income can be reached by a generally applicable, nondiscriminatory tax, and the OASDI tax could have been structured in a nondiscriminatory way.

But the Congress that established the Social Security system knew nothing of the sort. In 1935, *Evans v. Gore* was the law, and Congress legislated accordingly, with every reason to doubt that taxing judicial salaries was permissible.¹⁴⁴ When the Court’s understanding of the

¹⁴² *Hatter*, 532 U.S. at 577 (citation omitted).

¹⁴³ The seven justices sitting in the case apparently did not benefit personally from the result, but their colleagues did. If we are going to conjure conspiracy theories, *Hatter* seems to present a pretty good example of a few justices acting to help their judicial friends. In any event, the case illustrates the concerns Professor Vermeule and others have written about—with judges responsible for reviewing decisions that affect their own, and their colleagues’, take-home pay. See *supra* note 45.

¹⁴⁴ It was not until 1939 that the Court eviscerated *Evans* without overruling it. *O’Malley v. Woodrough*, 307 U.S. 277 (1939). Although *Miles v. Graham* was also still on the books when the Social Security system was created, Congress obviously thought it had the power to impose a tax that would reach new judges and it had done just that in the Revenue Act of 1932, the statute involved in *O’Malley*. See *supra* note 99 and accompanying text. Congressional aggressiveness was limited to new judges, however. After 1932, and until *O’Malley* was de-

Compensation Clause changed dramatically, Congress apparently had no way to adjust in a constitutionally acceptable way. Once judges were deemed exempt, because the Court had misunderstood the Compensation Clause, Congress could not extend the taxes to sitting judges without having the Court characterize the extension as discriminatory.¹⁴⁵

In short, the Supreme Court had put Congress in a Catch-22 situation—to the benefit of some members of the judiciary. In a very real sense, the Court was responsible for the exemption that it said Congress could not eliminate without affecting judicial independence.

IV. THE EFFECT OF THE COMPENSATION CLAUSE ON TAXATION AFTER *HATTER*

Does any of this matter for the future? Will the Compensation Clause constrain the national taxing power in any meaningful way? We think not.¹⁴⁶ Whatever the merits of the *Hatter* Court's consideration of the OASDI tax, that analysis should have no effect on the subsequent treatment of taxation under the Compensation Clause.

As Justice Breyer noted in *Hatter*, the likelihood that a facially nondiscriminatory tax could represent an attack on the judiciary is “virtually nonexistent.”¹⁴⁷ And a *Hatter*-like set of facts, involving the repeal of a tax exemption for federal judges, is unlikely ever to arise again: as far as we know, no similar exemptions remain on the books, and Congress is not going to exempt federal judges from any other generally applicable tax in the future. We doubt there would be political support for such an exemption to begin with, and the result in *Hatter*, making it difficult for Congress to get rid of an exemption once it is on the books, should be an additional deterrent to creating new, special treatment for judges.

Justice Scalia's partial dissent in *Hatter*, which concluded that application of the Medicare tax as well as the OASDI tax to sitting judges violated the Compensation Clause, also appears to be irrelevant to future analysis. Scalia criticized the Court's emphasis on

cided, Congress acted as if taxing already sitting judges were impermissible.

¹⁴⁵ Cf. Vermeule, *supra* note 6, at 533-34 (noting how a “constitutional” problem was created solely because Congress took two steps rather than one to bring judges into the Social Security system).

¹⁴⁶ The judges who were sitting when the OASDI tax was extended to the judiciary will benefit from the result in *Hatter* as long as they remain on the bench. In that respect, there are future effects from the decision—effects that could continue for two or three more decades. But judges taking office after the “discriminatory” extension of the OASDI tax are subject to the tax without constitutional problem.

¹⁴⁷ *Hatter*, 532 U.S. at 571.

discrimination, which the Compensation Clause does not mention. Instead, he would seek to determine whether a tax exemption has become part of judges' "compensation."¹⁴⁸ Scalia reasoned that "a tax-free status conditioned on federal employment is compensation,"¹⁴⁹ so subjecting sitting judges subject to the Medicare tax was impermissible—regardless of the lack of discrimination.¹⁵⁰ But since judges no longer have such arguably "compensatory" tax exemptions—and are unlikely to have new ones established—none of this should matter for the future.

With *Evans* overruled, no longer can anyone seriously argue that federal judges are exempt from a generally applicable income tax or from, say, an increase in rates under a generally applicable income tax. Although Justice Thomas, in a two-sentence opinion in *Hatter*, wrote that the "Court was correct in *Evans v. Gore* when it held that any tax that reduces a judge's net compensation violates Article III of the Constitution,"¹⁵¹ that statement is far removed from the common understanding of the last sixty-six years;¹⁵² it does not conform to the original understanding of the Compensation Clause;¹⁵³ and it was rejected by the six other justices sitting in *Hatter*.

All of this leaves the Compensation Clause to prohibit only those taxes that clearly discriminate against judges, and serious congressional consideration of discriminatory taxes would be difficult to imagine (except for purposes of classroom hypotheticals) even if

¹⁴⁸ *Id.* at 583-85 (Scalia, J., concurring in part and dissenting in part).

¹⁴⁹ *Id.* at 584.

¹⁵⁰ *Id.* at 584-85. Professor Vermeule too is unhappy with the *Hatter* majority's emphasis on discrimination: "If Congress may resort to substitutes other than discriminatory taxes, it is hard to view the nondiscrimination test as a critical bulwark of judicial independence." Vermeule, *supra* note 6, at 531-32; *see id.* (describing forms of apparently permissible discrimination). But Vermeule's take is very different from Scalia's. Vermeule argues that only direct reductions in salary are impermissible under the Clause, so that even a discriminatory tax directed at judges would be constitutional. *Id.* at 527-35. In any event, we cannot be comfortable with judges determining what is acceptable and what is not:

The conceptual mistake [in *Hatter*] is that the Court has taken into account only one half of the problem: the need to protect judicial independence from legislative encroachment. But the converse risk . . . is that a Compensation Clause enforced by judges with personal stakes in the law of judicial compensation will be interpreted in excessively judge-protecting ways.

Id. at 529.

¹⁵¹ *Hatter*, 532 U.S. at 586-87 (Thomas, J., concurring in part and dissenting in part) (citation omitted).

¹⁵² In the context of *Hatter*, that position meant only that, like Justice Scalia, Justice Thomas thought the Medicare tax should have been struck down as well as the OASDI tax. But the implications of Justice Thomas's statement are astonishing. He seems to be suggesting that federal judges are constitutionally exempt from all income tax obligations. One of us has stronger originalist leanings than the other, but we both think the idea that the Compensation Clause bars application of a tax of general application to federal judges is totally inconsistent with the original understanding of the Clause.

¹⁵³ *See supra* Part I.

there were no Compensation Clause. The Clause therefore seems unlikely ever again to constrain the national taxing power.

Unless

V. BEYOND JUDICIAL INDEPENDENCE: COMPENSATION AND
JUDICIAL RECRUITMENT

There is always an “unless,” of course. If we are correct, constraining the taxing power so as to protect judicial independence should never again be necessary. But it is possible that, if the Compensation Clause has another purpose behind it, that other purpose could be implicated by a tax on judicial salaries—even if the tax does not affect judicial independence.

No one, we think, questions the proposition that the Compensation Clause was intended to further judicial independence. And, as we argued above, unless there are tax rules favoring federal judges that we are unaware of (or unless Congress were to create some special tax benefit for judges and then later try to take it away), the Compensation Clause should not constrain Congress’s power to tax in the future. Judicial independence is quite simply not going to be implicated by any tax that we can reasonably expect to be imposed.¹⁵⁴

But the Supreme Court has suggested that the Compensation Clause serves another purpose as well. By protecting the economic position of judges, the Clause helps attract financially driven people away from “lucrative pursuits” and to the bench. For example, the Court said in *Will*:

This Court has recognized that the Compensation Clause also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice—more often than not more lucrative than the bench—the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice.¹⁵⁵

That echoes Justice Van Devanter’s statement in *Evans*, hidden among the grand pronouncements about judicial independence, that

¹⁵⁴ Yes, the Clause continues to prohibit discriminatory taxation but, because we think that openly discriminatory taxation would be inconceivable anyway, we do not think that prohibition has any serious effect on real-world behavior.

¹⁵⁵ *United States v. Will*, 449 U.S. 200, 220-21 (1980) (citing *Evans v. Gore*, 253 U.S. 245, 253 (1920), *overruled by Hatter*, 532 U.S. 557; 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1826)).

“the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, *to attract good and competent men to the bench* and to promote that independence of action and judgment which is essential.”¹⁵⁶ Judicial headhunters need the Compensation Clause to further recruiting.

We do not think this point about recruiting has been decisive in resolving any case,¹⁵⁷ but the Court has continued to restate it as if it were important. For example, although *Hatter* overruled *Evans*, Justice Breyer wrote,

Evans properly added that these guarantees of compensation and life tenure exist, “not to benefit the judges,” but “as a limitation imposed in the public interest.” They “*promote the public weal,*” in part by helping to induce “*learned*” men and women “*to quit the lucrative pursuits*” of the private sector, but more importantly by helping to secure an independence of mind and spirit necessary if judges are “to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.”¹⁵⁸

Judicial independence may be a “more important” consideration, but we all benefit, Breyer thought, by having the bench financially attractive to well-heeled lawyers.

In his separate opinion in *Hatter*, Justice Scalia rejected the proposition that the Compensation Clause focuses only on discriminatory taxation: “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.”¹⁵⁹ But he went on to endorse the recruitment rationale as well. The “public weal” requires that the Clause protect an incentive to “‘quit the lucrative pursuits’ of the private sector. That inducement would not exist if Congress could cut judicial salaries so long as it did not do so discriminatorily.”¹⁶⁰

¹⁵⁶ *Evans*, 253 U.S. at 253 (emphasis added). Dissenting in *O’Malley v. Woodrough*, Justice Butler quoted this passage from *Evans*. *O’Malley*, 307 U.S. 277, 292 (1939) (Butler, J., dissenting).

¹⁵⁷ Because *Evans* and *Miles* really had nothing to do with judicial independence, those two cases might be considered instances in which another rationale for the Compensation Clause must have been controlling. But the Court acted as if judicial independence were in jeopardy in both of those cases.

¹⁵⁸ *Hatter*, 532 U.S. at 568 (emphasis added) (quoting *Evans*, 253 U.S. at 253, 248; 1 KENT, *supra* note 155, at 294; WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 143 (1911)).

¹⁵⁹ *Id.* at 582-83 (Scalia, J., concurring in part and dissenting in part).

¹⁶⁰ *Id.* at 583 (quoting *Evans*, 253 U.S. at 248; 1 KENT, *supra* note 155, at 294).

Judges and potential judges have been complaining about judicial salaries since the founding,¹⁶¹ of course, and we assume such complaints will continue until the end of time.¹⁶² And, although Professor Paul Bator wrote in 1985 that “[f]ederal judges, as a group, complain more about their pay than any other group I have ever encountered,”¹⁶³ it is not just whining that is involved. The complaints have always had some justification.

In the early years of the Republic, for example, Joseph Story had been reluctant to accept his appointment to the Supreme Court because the judicial salaries in 1811 were exactly what they had been in 1789.¹⁶⁴ Furthermore, Story almost resigned his position, as Professor Rosenn noted, “after Congress failed to increase salaries to offset the sharp increase in prices caused by the War of 1812.”¹⁶⁵ Things did not improve as the nineteenth century continued. By 1864, Supreme Court justices were earning, in real terms, about three-fourths of what justices had been paid in 1789—even though nominal compensation had risen over 70 percent during that period.¹⁶⁶ And, like other citizens with income above a threshold level, the justices were subject to the Civil War income tax, further eroding their economic positions.¹⁶⁷

In the modern era, the complaints about compensation continue to have a basis in fact. Between 1969 and 2002, salaries of Supreme Court justices declined by 37.3 percent in real terms, and salaries of circuit court and district court judges declined by 23.5 percent.¹⁶⁸ The problem was serious enough that during the 1970s a group of Article III judges brought suit claiming that their compensation had been

¹⁶¹ Van Tassel, *supra* note 5, at 356.

¹⁶² See Michael J. Frank, *Judge Not, Lest Yee [sic] Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary “Crisis,”* 87 MARQ. L. REV. 55, 67 (2003) (providing examples of judicial complaints).

¹⁶³ Paul M. Bator, *The Judicial Universe of Judge Richard Posner*, 52 U. CHI. L. REV. 1146, 1148 (1985).

¹⁶⁴ Frank, *supra* note 162, at 60-61.

¹⁶⁵ Rosenn, *supra* note 24, at 320.

¹⁶⁶ *Id.*

¹⁶⁷ The income taxes paid by federal judges were later refunded, but that happened long after the war was over. See *supra* notes 59-67 and accompanying text.

¹⁶⁸ Often linked to congressional compensation, judicial salaries stagnate when congressmen are unwilling to vote themselves increases. See Rosenn, *supra* note 24, at 309-10; AMERICAN BAR ASSOCIATION & FEDERAL BAR ASSOCIATION, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION 4-6 (2003) [hereinafter JUDICIAL PAY], <http://www.fedbar.org/Federal%20Judicial%20Pay.pdf>. The Ethics Reform Act of 1989 was intended, in part, to make cost-of-living allowances fairly automatic—tying judicial COLAs to COLAs provided to civil service employees—but Congress then invalidated some of the increases for federal judges. See *supra* note 115; see also JUDICIAL PAY, *supra*, at 9-10 (noting that the Ethics Reform Act has functioned poorly in practice).

unconstitutionally diminished because their salaries had declined, in real terms, by 34.4 percent over a six-year period.¹⁶⁹

No one can reasonably doubt that salary levels can have an effect, at the margin, on the composition, and thus the quality, of the federal judiciary. For that very reason, Chief Justice William Rehnquist complained about judicial compensation for years, as he unashamedly admitted. He noted that, between 1990 and May 2002, more than 70 Article III judges had left the bench, whereas in the 1960s only a “handful” had retired or resigned.¹⁷⁰ Not all resignations are for financial reasons, to be sure¹⁷¹—by far most resigning judges give other reasons for their actions¹⁷²—but some must be.¹⁷³ And inadequate compensation presumably prevents a few first-rate people from even considering a judicial position.¹⁷⁴

As real as concerns about judicial compensation may be, we remain skeptical that they should be imported into constitutional analysis. Judging is a high calling, and judges should be paid fairly.¹⁷⁵ But there is something unseemly in judges’ cloaking economic self-

¹⁶⁹ The Court of Claims, relying heavily on *O’Malley*, rejected the constitutional argument. See *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977); see also Rosenn, *supra* note 24 (discussing *Atkins* and the decline of judicial salaries).

¹⁷⁰ 2002 YEAR-END REPORT OF THE FEDERAL JUDICIARY 2-4 (2003), <http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html> [hereinafter 2002 YEAR-END REPORT]. His successor, Chief Justice John Roberts, recently stated that 92 judges had left the bench since 1990 and that 9 had done so during calendar year 2005. 2005 YEAR-END REPORT OF THE FEDERAL JUDICIARY 4 (2006), <http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf>.

¹⁷¹ Chief Justice Rehnquist recognized this but noted that several judges claimed that financial reasons played a role. 2002 YEAR-END REPORT, *supra* note 170, at 3.

¹⁷² Professor Van Tassel determined that of the 2,627 resignations between 1789 and 1992, only 7 percent were “for reasons other than health or age.” Van Tassel, *supra* note 5, at 345. “If large size and low salary are having an adverse impact on the prestige of the federal judiciary, and thus on the desire of people to serve, the negative effects of these circumstances have yet to be reflected by large-scale resignations.” *Id.* at 349.

¹⁷³ Professor Van Tassel concluded:

Over the last 200 years, relatively few judges have explicitly cited low pay as their reason for resignation . . . [O]nly twenty-one judges have actually said as much, but forty-nine additional judges returned to private practice or accepted other employment. Seventy-one judges resigned to engage in other employment, excluding those appointed or elected to other office and those who resigned to run for other office but were defeated. It is reasonable to suppose that in some instances salary was a factor . . .

Id. at 355.

¹⁷⁴ It is probably impossible to study this phenomenon in a systematic way. We hear a few stories about fabled jurists who were reluctant to take judicial appointments for financial reasons, see, e.g., *supra* note 164 and accompanying text; *infra* note 181 and accompanying text, but we have no way of learning about those who said no and did not enter public life at all. See Van Tassel, *supra* note 5, at 358.

¹⁷⁵ Judicial salaries cannot compare to those for the top tier of the practicing bar, but Justice Breyer suggested that parity with pay for top law professors would be about right. David S. Broder, *Rehnquist and Breyer Argue for Judicial Pay Increases*, WASH. POST, July 16, 2002, at A15; Frank, *supra* note 162, at 119.

interest in public-interest garb.¹⁷⁶ The Compensation-Clause-as-recruiting-tool was not part of the original understanding of the Clause, and it is not a principle worthy of constitutional status today.

The Compensation Clause perhaps can have effects on recruiting, just as life tenure does, but that was not the reason for the Clause. Chancellor James Kent, who is always quoted on this point, was not a founder, and, in a passage cited by the *Will* and *Hatter* Courts, he really did not suggest that recruitment was a purpose of the Clause:

The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business, for the duties of that important station.¹⁷⁷

It was “well calculated” to do one thing—that was the purpose—and it also “tends” to do something else. We can argue about how well that tendency is carried out, and we can discuss whether the tendency is a good thing. But Kent did not say that recruitment was a “purpose” of the Clause as originally understood. Removing the prohibition on *increases* in compensation from the first draft of what became the Compensation Clause was intended to make attracting qualified judges easier,¹⁷⁸ but that is not the same as saying the purpose of the Clause *as ratified* was to help prospective judges resist the enticements of law practice.

Original understanding may not be everything—the two of us disagree about its importance—but the recruitment rationale is also less than persuasive on its own terms. Do we seriously want people as federal judges who will have made career decisions based on whether or not they would be subject to Social Security taxes, or on similar criteria?¹⁷⁹ If the Compensation Clause is a critical part of judicial

¹⁷⁶ Unseemliness seems to be inherent in Compensation Clause cases. Consider the following from Justice Sutherland:

[I]t is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage [*no, of course not*—which, if that were all, he might willingly forego [*of course*—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people.

O’Donoghue v. United States, 289 U.S. 525, 533-34 (1933).

¹⁷⁷ 1 KENT, *supra* note 155, at 294.

¹⁷⁸ See *supra* text accompanying note 35.

¹⁷⁹ In any event, a potential judge is going to be subject to Social Security taxes whether he

recruitment, particularly as the Clause might apply to taxation, there is something seriously wrong with the process.

We are reminded of Benjamin Franklin's argument at the Constitutional Convention that the president should not be paid, because compensation would attract the wrong sort of person to the job.¹⁸⁰ Franklin's argument was overdone, and more than a little unrealistic, but there is something to the proposition that public service is its own reward and that attempts to entice those who are not interested in public service into the public arena are doomed to failure—or so we hope.

Charles Evans Hughes made a similar point in lectures given in 1910, the year in which he moved from the New York governorship to his first stint on the Supreme Court. Hughes was sensitive to matters of judicial compensation; around 1897 he had told a "White House intimate" that, for financial reasons, he did not want to be considered for a judicial appointment.¹⁸¹ He certainly did not think that judges should work for free, but, he wrote:

we should be cautious about increasing the chance of drawing men to the public service who seek it for the sake of the compensation. It is idle to suppose that emoluments can be given which can rival those obtainable by men of first rate ability in their lines of chosen effort. Attorneys-general cannot be paid what is received by leaders of the bar; heads of banking and insurance departments cannot expect the compensation paid to the presidents of banks and insurance companies; judges must be content to serve for annual pay less in amount than may be received in a single case by the lawyers arguing before them. Men of eminent ability must be found to conduct the delicate work of supervising our great public service

takes a judicial post or not.

¹⁸⁰ As Franklin put it:

And on what kind are the men that will strive for this profitable pre-eminence, through all the bustle of cabal, the heat of contention, the infinite mutual abuse of parties, tearing to pieces the best of characters? It will not be the wise and moderate, the lovers of peace and good order, the men fittest for the trust. It will be the bold and the violent, the men of strong passions and indefatigable activity in their selfish pursuits.

1 FARRAND, *supra* note 23, at 82 (statement of Benjamin Franklin) (June 2, 1787). Franklin was a proponent of what Professor Vermeule calls "currency effects": "An argument from currency effects supposes that keeping monetary compensation low, or lower than in comparable private sector opportunities, will alter the relative importance of cash compensation and in-kind compensation in ways that will select for those who enjoy the job for its own sake, rather than instrumentally." Vermeule, *supra* note 6, at 536.

¹⁸¹ MERLO J. PUSEY, CHARLES EVANS HUGHES 110 (1951).

companies for rewards which are slight in comparison with those of the managers and officers of such corporations.¹⁸²

Yes, judges should be paid decently, Hughes emphasized; no one could have thought otherwise. But “to attract good men and to secure efficiency, the honour and independence of the office are of far greater account than the emoluments that attach to it.”¹⁸³

In any event, what evidence is there that the purported recruiting purpose of the Compensation Clause has improved the federal bench? When the Court said, “*Beyond doubt*, such assurance has served to attract able lawyers to the bench”¹⁸⁴ but cited no empirical support for that conclusion, we have reason to be skeptical.¹⁸⁵ Besides, the Court’s suggestion that lawyers necessarily “abandon” lucrative private practice to assume the bench—that the movement is always along a one-way street—is contrary to present-day experience. Judges can return to private practice if they wish—many do—and their post-judicial earning power is almost certainly enhanced by the judicial experience.¹⁸⁶

Movement from the bench to private practice raises ethical questions, to be sure; maybe the street *should* be one way, in the other direction. Chief Justice Rehnquist worried that some might be using the judiciary as “a stepping stone to a lucrative private practice.”¹⁸⁷ Professor Van Tassel raised “the specter of judges giving preferential treatment to litigants who may be future employers and the perception of impropriety that such resignations raise.”¹⁸⁸ President John F. Kennedy expressed a similar concern: “I don’t think that anyone should accept a Federal judgeship unless prepared to fill it for life because I think the maintenance of the integrity of the Judiciary is so important.”¹⁸⁹ Those are valid ethical concerns, but the point nevertheless

¹⁸² CHARLES EVANS HUGHES, *CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT* 49 (1910).

¹⁸³ *Id.* at 50.

¹⁸⁴ *United States v. Will*, 449 U.S. 200, 221 (1980).

¹⁸⁵ As we discuss below, *see infra* notes 190-96 and accompanying text, Professor Vermeule has persuasively argued that the Compensation Clause may actually have *lessened* judicial compensation over time.

¹⁸⁶ For example, fourteen judges retired between 1990 and 1992. Professor Van Tassel determined that “[s]even judges have returned to private practice, three have taken full-time teaching positions, one retired completely, and two have engaged in business activities.” Van Tassel, *supra* note 5, at 399.

¹⁸⁷ Bill McAllister, *The Judiciary’s ‘Quiet Crisis’: Prestige Doesn’t Pay the Tuition*, WASH. POST, Jan. 21, 1987, at A19.

¹⁸⁸ Van Tassel, *supra* note 5, at 363; *see also* McAllister, *supra* note 187 (“This is supposed to be the last stop on the road. A judge shouldn’t be thinking about going back to work for a law firm that’s coming before him. That’s unhealthy.”) (quoting Judge Abner Mikva).

¹⁸⁹ DAVID STEIN, *JUDGING THE JUDGES* 8-9 (1974).

remains: in the world we inhabit, federal judges are not locked in to a life of squalor.

Professor Vermeule has provided another reason why the recruiting-tool rationale should be viewed with skepticism: the Clause may actually have contributed to salaries' being *lower* than would otherwise have been the case. If that is so—if the “selection effects” of the Clause actually operate to keep judicial salaries down rather than up—that is a pretty obvious reason for jettisoning the rationale.¹⁹⁰

The theory that the Clause provides an economic enticement to potential judges, argues Vermeule, “fails to take into account that Congress, like prospective judges, can anticipate the effects of the Clause’s structure.”¹⁹¹ The key part of that structure is the Clause’s ratchet effect: salaries may go up but cannot come down.¹⁹² Faced with such a restriction on compensation, a reasonable employer—and Congress is occasionally reasonable—may be leery of supporting raises that could turn out to be difficult to sustain:

[L]egislators understand the structure of the Compensation Clause as well as anyone else, and anticipate that any salary increase for the judges will be frozen into place by force of constitutional law. The predictable equilibrium reaction, one the Framers ought themselves to have anticipated but failed to, is that Congress is more reluctant to raise judicial salaries in the first instance.¹⁹³

Members of Congress operating under a “when in doubt, do not increase compensation” standard are, over time, almost certainly going to err on the side of under- rather than over-compensating judges. At the margin, therefore, “[l]egislators who anticipate the ratchet effect of any future increase will award fewer increases.”¹⁹⁴

¹⁹⁰ Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953 (2005); see Vermeule, *supra* note 6, at 535-37 (juxtaposing the “currency effects” view of the Compensation Clause with a “selection effects” analysis).

¹⁹¹ Vermeule, *supra* note 190, at 985.

¹⁹² One happy result of the ratchet effect, according to Vermeule, is that it provides a check on the judicial self-dealing that can otherwise occur in Compensation Clause cases. Vermeule, *supra* note 6, at 522 (“The judges have no power to initiate increases; they can only block legislative actions that are claimed to effect unconstitutional decreases in judicial compensation.”).

¹⁹³ Vermeule, *supra* note 190, at 985.

¹⁹⁴ *Id.* With the “selection effects” of the Compensation Clause trading off against “currency effects,” the results are not at all straightforward:

[E]xcessively low compensation might produce a cadre of insufficiently talented amateur enthusiasts, but excessively high compensation might produce a cadre of talented but venal opportunists. So the argument from selection effects is always incomplete if it fails to specify why the salary level claimed to be inadequate is on the low side of the optimum point.

Vermeule, *supra* note 6, at 536-37.

We disagree with Professor Vermeule on some particulars,¹⁹⁵ but we agree on a fundamental point: a broad interpretation of the Compensation Clause, particularly as the Clause might apply to taxation, is unnecessary to recruit the sort of people we should want to serve on the federal bench.¹⁹⁶

The recruitment rationale is thus a shaky underpinning for the Compensation Clause, but the Supreme Court has endorsed it. The Court has unthinkingly accepted the propositions that the Clause serves to keep salaries up, and that higher after-tax compensation may be constitutionally favored. As a result, one can imagine a future judge—one with skin thick enough to handle public ridicule—challenging a tax of general application on the ground that the tax has the effect of making judicial take-home pay unattractive to potential judges. And if the Court takes seriously an open-ended justification for preserving the economic positions of federal judges, it is possible that a tax not affecting judicial independence might be treated as violating the Compensation Clause. That would be a bizarre result as a matter of constitutional law, but it would not be an impossible one under existing doctrine.

Of course, reducing taxes on federal judges could be a backdoor way of increasing their real compensation, and, as salaries for new law firm associates increase—and occasionally skyrocket—one might applaud that goal.¹⁹⁷ But, as is always the case, we should not conflate policy arguments and the requirements of constitutional law.

VI. A FEW FINAL THOUGHTS ON TAXATION AND JUDICIAL TURNOVER

Professor Vermeule turned the recruitment rationale on its head: the Compensation Clause may actually have worked over the years to limit, rather than enhance, judicial compensation. Another practical consideration should be taken into account in evaluating the Clause's effects on taxation. If the recruitment rationale has any substantive force—and we are skeptical about that—it should not be applied in a way that might actually *reduce* judicial quality. Exempting federal

¹⁹⁵ For example, we think that the Compensation Clause has been properly interpreted to forbid a tax that discriminates against the judiciary. Vermeule does not. Vermeule, *supra* note 6, at 504.

¹⁹⁶ Vermeule's analysis leads him to doubt "that an interpretation of the Clause prohibiting only a reduction in statutory salaries will not attract a sufficiently talented pool of judges." *Id.* at 537.

¹⁹⁷ We applaud similar sentiments directed at the compensation of another grossly underpaid segment of society, the law professoriate.

judges from a tax of general application would do just that: it would create an incentive for judges to stay on the bench *too long*.

History is replete with examples of judges who remained on the bench after physical and mental infirmity had set in, and judicial compensation policies sometimes contributed to that problem. In the early years of the republic, the lack of pensions for retired judges made leaving the bench financially disastrous for some. That problem was later addressed, but, in the early twentieth century, with a national income tax in place, a new concern arose: the income tax suddenly applied in full force to a retired judge whose judicial income, with *Evans* and *Miles* on the books, had been exempt from taxation.¹⁹⁸ Even if retirement pay equaled judicial pay, after-tax income dropped with retirement, a clear disincentive to leave the bench. If quality is a concern—and of course it is—the compensation of federal judges, and the taxation of that compensation, should be structured in such a way that those no longer able to meet the demands of judging can go quietly, in a financially secure way.¹⁹⁹

Although the founders realized that life tenure could lead to very long terms—and, for that reason, some Anti-Federalists were worried about *excessive* judicial independence²⁰⁰—long terms were unlikely to be the norm in the late eighteenth century. Life expectancy was so much lower then than today that worrying about a superannuated judiciary may have seemed like a waste of time.

The founders' blissful ignorance on this point did not last long, however. Life expectancy may have been short, but judicial infirmity

¹⁹⁸ Or so it was assumed. In fact, it was assumed that Congress could reduce retirement pay directly, and during the Great Depression it did so. See *supra* notes 93-98 and accompanying text. We are not convinced that the governing assumption was correct. The danger of congressional retaliation in response to an unpopular judicial opinion is as real here as it is in the situations to which the Compensation Clause was clearly intended to apply. (It might not seem like a real concern in *any* circumstance, but the founders thought there was something to worry about.) Retirement income is not a gratuity, after all; it is deferred compensation attributable to a judge's time on the bench.

In any event, a direct reduction in retirement income is exceedingly unlikely ever to happen again. A decline in the *value* of retirement compensation is quite another thing, of course. However, because such a decline for sitting judges has been held not to violate the Clause, see *supra* note 108, it is inconceivable that such a decline in value would be seen to have constitutional problems.

¹⁹⁹ See Rosenn, *supra* note 24, at 328 ("To induce infirm and/or superannuated judges to retire, Congress has been forced to eliminate virtually all of the economic incentives for remaining on active status."); Van Tassel, *supra* note 5, at 395-99.

²⁰⁰ See, e.g., *supra* text accompanying note 42 (noting possibility of terms of thirty or forty years). As far as we can tell, however, no one in the founding debates argued that a cap on salary increases, a possibility that was taken seriously, might encourage judicial turnover in a desirable way. Even the Anti-Federalists, who were concerned that the Constitution provided too much independence to the judiciary, did not make that argument. See *supra* Part I. Maybe they should have.

soon became a serious problem. And retiring was often not an economically feasible option for the disabled judges. As Professor Van Tassel explains, “For the first eight decades of the federal judiciary, . . . [a]ged judges were forced to choose between resigning from the bench and losing their salary, or continuing in office (often despite incapacity) in order to retain financial support.”²⁰¹

In 1869, Congress, for the first time, passed legislation providing for retirement pay for judges. The legislation allowed a judge who had reached the age of seventy with at least ten years in service to retire with an annual pension equal to his salary at the time of retirement.²⁰² The primary motivation was apparently to push some Supreme Court justices, particularly Robert C. Grier and Samuel Nelson, in the direction of the sunset, and it worked.²⁰³ Congress finally recognized, according to Van Tassel, “that there were good reasons to allow elderly judges to retire without consigning them to destitution.”²⁰⁴

Retirement compensation for federal judges has been modified in fits and starts since that time, but Congress has always tried to facilitate a desirable level of judicial turnover. Perhaps the most important change with constitutional overtones was the creation, in 1919, of what would later be called “senior” status, making it possible for judges to leave active duty without totally resigning from office (and thus to continue to be protected by the Compensation Clause), while permitting the President to nominate additional judges to fill the “active” slots.²⁰⁵

²⁰¹ Van Tassel, *supra* note 5, at 395.

²⁰² Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 44, 45 (“[A]ny judge of any court of the United States, who, . . . having attained to the age of seventy years, [shall] resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.”).

²⁰³ Fairman, *supra* note 93, at 416-19; John S. Goff, *Old Age and the Supreme Court*, in *SELECTED READINGS: JUDICIAL DISCIPLINE AND REMOVAL* 30, 32-35 (Glenn R. Winters ed., 1973); Van Tassel, *supra* note 5, at 396-97. Attorney General Edward Bates noted in his diary in 1864 that Chief Justice Taney and Justices Wayne, Catron, and Grier “would gladly retire, if Congress would pass the proposed bill—to enable the justices to resign, upon an adequate pensi[o]n.” *THE DIARY OF EDWARD BATES, 1859-1866*, at 358 (Howard K. Beale ed., 1933). Without the legislation, however, “most of them, if not all, cannot afford to resign, having no support but their salaries.” *Id.* The justices were lobbied as Congress considered the legislation. According to Fairman, Philadelphia lawyer George Harding wrote on July 19, 1869, to Joseph P. Bradley: “A kind of pledge was made that [Justice Grier] w.^d [sic] resign if the bill was passed in its present form.” Fairman, *supra* note 93, at 417 (citation omitted).

²⁰⁴ Van Tassel, *supra* note 5, at 397.

²⁰⁵ See Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157. Section 6 states, in relevant part:

But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the Presi-

Under the law today—as has been generally true for decades—the retirement pay for a judge who altogether leaves the bench is that which he was receiving at the time of retirement (“retirement on salary”). For a judge who assumes senior status, the compensation continues to be that for the office (“retirement on senior status”)—thus including increases provided by Congress (such as cost of living adjustments).²⁰⁶

Direct diminution in compensation is not possible—on that point, all commentators agree—and Congress cannot tax judges in a discriminatory way. Congress thus cannot impose a tax intended to drive judges off the bench. And judges should be subject to taxes of general application, as they will be unless the recruitment rationale is given independent weight.²⁰⁷ As a result, a retired judge will be subject to the income tax just as he was on the bench, and taxation should therefore create no incentive for a judge to stay on the bench longer than is

dent shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon [to fulfill a number of service obligations].

Since 1919, Congress has fine-tuned judicial retirement provisions on several occasions. *E.g.*, Act of Mar. 1, 1937, ch. 21, 50 Stat. 24 (giving Supreme Court justices same choice between retiring or resigning that other life-term judges had been given earlier); Act of June 25, 1948, ch. 646, § 371, 62 Stat. 869, 903 (permitting judges resigning at age seventy, after ten years' service, to receive salary they were receiving when they resigned, while permitting judges assuming what was in effect senior status to receive the future salary of the office); Act of Feb. 10, 1954, ch. 6, § 4, 68 Stat. 8, 12 (extending “senior status” option to judges who had reached age sixty-five and served at least fifteen years); Act of Aug. 25, 1958, Pub. L. No. 85-755, § 5, 72 Stat. 848, 849 (changing name of judges retiring from regular active service from “retired” judges to “senior” judges); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 204(a), 98 Stat. 333, 350 (adopting modified “rule of 80,” allowing judges to take senior status on a sliding scale of age and service totaling at least eighty); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1005(a), 102 Stat. 4642, 4666 (1988) (dealing with military retirement pay for senior or retired judges); Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705(a), 103 Stat. 1716, 1770 (dealing with requirements senior judges must satisfy to receive salary of office); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 301, 110 Stat. 3847, 3851 (providing for possibility of retroactive credit for senior judge's resuming significant court workload); National Defense Authorization Act of 2001, Pub. L. No. 106-398, § 654(a), 114 Stat. 1654, 1654A-165 (2000) (providing same treatment for federal judges as for other federal officials regarding military retirement pay); Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 303, 114 Stat. 2410, 2417 (making technical change regarding payments to military survivors benefits plan). *See generally* Van Tassel, *supra* note 5, at 397-98.

²⁰⁶ 28 U.S.C. § 371(a), (b) (2000). Cost-of-living adjustments, where applicable, “shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.” *Id.* § 461(b).

²⁰⁷ *See supra* Part V. In addition, those judges who benefit from the result in *Hatter* (those sitting in 1983 when the OASDI tax was extended to the federal judiciary) will be preferentially treated until they completely leave the bench.

appropriate. That result is consistent with the Compensation Clause's dictates, and it is the right result as a matter of policy.²⁰⁸

We are now seeing proposals, from serious scholars, for a limit on judicial terms, particularly for Supreme Court justices.²⁰⁹ Some justices, it is argued, have overstayed their welcome—remaining on the bench longer than their physical and mental capacities permit, and also losing touch with the real world.²¹⁰

We do not mean to endorse those proposals, but our discussion in this article is relevant to this question. The understanding of the Compensation Clause, and of compensation generally, should operate to ensure that judges are not staying on the bench primarily for financial reasons. The recruitment rationale was not part of original understanding, and we think it was never an appropriate justification for the Compensation Clause. Making sure that judges are subject to taxes of general application, just like other American citizens—one of the apparent results of *Hatter*—is consistent with judicial independence, the real goal of the Compensation Clause, and it also ensures that the compensation scheme for federal judges does not operate to diminish the quality of the federal bench.

* * * * *

We have shown, we hope, that the application of the Compensation Clause to the taxation of federal judges has a long and interesting history. With the Supreme Court's 2001 decision in *United States v. Hatter*, however, it is time for that history to come to an end. The *Hatter* decision should preclude future arguments that federal judges are automatically exempt from the application of nondiscriminatory national taxes; indeed, such an argument should have been regarded as preposterous at any time in our history. Judges should have the same obligations as other citizens. Furthermore, the idea that exemption from taxation is necessary to recruit able people to the federal bench, an idea that has been hinted at in many cases over the years and that was reinforced in *Hatter*, is just wrong-headed. It is not sup-

²⁰⁸ If the judge is completely retiring, and not merely moving to another line of employment, he will no longer be subject to Social Security taxes upon leaving the bench. That result is not anomalous, however; it is consistent with the way any other retired employee is treated. In any event, if an incentive is created by that result, it is to retire rather than to stay too long.

²⁰⁹ See, e.g., REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Paul D. Carrington & Roger C. Cramton eds., 2006).

²¹⁰ The concern is not new. Between 1809 and 1869, members of Congress proposed four constitutional amendments that would have established mandatory retirement ages for federal judges. Van Tassel, *supra* note 5, at 396; see also Fairman, *supra* note 93, at 397, 433-35 (noting, at time of Roosevelt's court-packing plan, the "general agreement that it would probably be desirable to bring about earlier retirement through a constitutional amendment" and providing proposed language for such an amendment).

ported by the history or logic of the Compensation Clause, and it sends an inappropriate signal about the importance of service on the federal bench.

The Clause does prohibit discriminatory taxation, or so we have argued, but that proposition too should be irrelevant to future legal analysis. Although the federal judges in *Hatter* convinced the Supreme Court that the extension of a Social Security tax to them was in fact discriminatory, and therefore invalid—even though Congress had no mean-spirited goal in mind with the extension—the probability of a similar set of facts arising again is very small.

To be sure, mean-spiritedness seems to be on the rise in the political arena, and perhaps we cannot rule out Congress's enacting a tax that overtly discriminates against the judiciary. But we still think that to be unlikely. Congress has so many weapons in its arsenal, and taxation is an inefficient means of conveying congressional disapproval of the judiciary. In any event, if Congress were to declare war on the judiciary, whether by use of taxation or other means, the technical dictates of the Compensation Clause would be the least of the nation's worries.