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Law in the Grand Manner, 2 Const. Comment. 9 1985

PERSPECTIVES: LAW IN THE GRAND MANNER

Being a Supreme Court justice must have been more fun in the eighteenth century than it is today. The caseload was lighter, and the Court was a social as well as a political center.¹ The justices also apparently felt considerably less constrained by formal or informal rules of governance. In a single case in 1796, the Court violated virtually every rule of procedure and canon of construction. *Hylton v. United States*² is an obscure taxation case cited occasionally as an unilluminating pre-*Marbury* example of judicial review.³ It is a charming illustration of the nonchalance with which the early Court approached its constitutional duties.

The case arrived at the Court only by the combined manipulative efforts of the United States Attorney General, who argued the case for the United States but paid the attorneys' fees for Hylton; the "Attorney of the Virginia District," who prosecuted Hylton below but argued on his behalf in the Supreme Court; and such Virginia notables as Chief Justice Edmund Pendleton, ex-Senator John Taylor, and the notorious Spencer Roane, all of whom refused, along with Hylton, to pay the disputed tax, but were less interested in seeing their names in the Supreme Court reports. Hylton himself, after confessing judgment at the circuit court level, declined to participate further.⁴

The reporter's description of the case is rife with evidence of collusion. Hylton was alleged to have owned (for a period of less than four months, according to Justice Paterson's account) 125 carriages for his own personal use, on which the federal government levied a purportedly unconstitutional tax. Hylton's need for

1. See, e.g., White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1 (1984).

2. 3 U.S. (3 Dall.) 171 (1796). The entire case is quite short, taking up fewer than 15 pages in the original reports. In the interest of readability, therefore, no jump citations will be provided. All unidentified statements and quotations are from either the opinions of the justices or the reporter's syllabus.

3. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 13 (1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 20 (1978). Of course, there is no case too obscure, nor any issue too tedious, to escape the notice of our diligent constitutional historians. For thorough and exhaustive treatments of the merits of this obscure tax case, see J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801 (OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. I) 778-82 (1971); Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 853-60 (1981).

4. See 3 U.S. at 171-72 (reporter's syllabus); J. GOEBEL, *supra* note 3, at 779 & n.59.

such extravagant transportation is explained when one multiplies 125 carriages by \$16, the tax on each carriage: the calculation yields a conveniently exact \$2000, the minimum amount then necessary to obtain federal jurisdiction.⁵ Hylton did not seem particularly concerned about his potential \$2000 liability. According to the reporter, Hylton waived his right to a jury trial, submitted the case to the court on stipulated facts that went against him on every count, and then, when an equally divided court was unable to reach a decision, confessed judgment. He did not even await a retrial by a new circuit justice, for which Congress had presciently provided in the event of such judicial ties.⁶ Perhaps his carefree attitude stemmed from the government's stipulation that if judgment were entered for the plaintiff for \$2000, it would be "discharged by the payment of 16 dollars, the amount of the duty and penalty."

The reporter's account of the suit is straightforward and ingenuous, with no attempt to disguise the collusive nature of the proceedings. He did not even bother to fill in the blank space left for the name of the other circuit justice who sat with Supreme Court Justice Wilson below. Perhaps he may be forgiven for overlooking such trivial matters, since he so carefully identifies the Supreme Court's reason for considering the case, "which (as well as the original proceeding) was brought merely to try the constitutionality of the tax." Even the most activist member of the Warren Court might have blanched at so blatant an admission of jurisdictional overreaching. Or perhaps not—Justice Douglas might have considered it refreshingly frank.

In order to decide the case, the Supreme Court had to overlook not only the procedural errors below, but also the requirement of a quorum. Of the six justices then on the Court, only three managed to participate in the decision. Chief Justice Ellsworth "was sworn into office, in the morning; but not having heard the whole of the argument, he declined taking any part in the decision in this cause." Justice Cushing, "hav[ing] been prevented, by indisposition, from attending to the argument" thought it "improper to give an opinion on the merits of the cause." Justice Wilson had been the circuit justice below, and thus professed himself relieved that the unanimity of his brethren obviated the necessity of expressing an opinion. He did note, however, that his

5. Goebel thinks the ruse was suggested by Hamilton; both Goebel and Currie point out that in fact the statute provides for federal jurisdiction only for amounts *over* \$2000. J. GOEBEL, *supra* note 3, at 680; Currie, *supra* note 3, at 853. Even the deliberate procedural machinations were erroneous.

6. See Act of Mar. 2, 1793, ch. 22, § 2, 1 Stat. 333, 334.

“sentiments, in favor of the constitutionality of the tax in question [had] not been changed.” If that sentimental annotation did not amount to an opinion—and he apparently did not mean it to—the remaining three justices (Chase, Paterson, and Iredell) did not constitute a quorum.

The three justices who did venture opinions felt free to follow their own consciences. They certainly did not appear to be following much else. Justice Chase’s three-page statement illustrates why judicial writings are called “opinions.” His eighteen short paragraphs, when they are not mere restatements of the arguments of the parties, convey as much confidence and certainty as most first-year law exams. He writes of the argument of the plaintiff in error that it “did *not* satisfy my mind,” and that “I think, at least, that it may be *doubted*.” This certainty of mind is echoed throughout the opinion: “I am inclined to think,” “I believe,” “It appears to me,” “I admit that this mode might be adopted,” “it seems to me,” “I think,” “it seems to me,” and finally, “I am inclined to think, but of this I do not give a judicial opinion.”

Justice Paterson, on the other hand, is so sure of himself that he expresses views not only on the constitutionality of the tax but on the wisdom of the constitutional provision itself. The plaintiff in error had argued that the tax on carriages was invalid because it was direct rather than apportioned. In the course of rejecting this argument, Paterson lambasts the drafters of the Constitution for *their* apportionment rules:

The rule of apportionment . . . is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle laid down in the Constitution.

Fortunately, Justice Paterson was able to find a better foundation for his decision than the Constitution: he “close[d] the discourse with reading a passage or two from *Smith’s Wealth of Nations*.” (What was that about Herbert Spencer’s *Social Statics*?)

Had Justice Iredell’s opinion been subject to review by the current Tenth Circuit, it might never have been published.⁷ His ridicule of the arguments at bar must have caused no little con-

7. The Tenth Circuit recently enjoined the West Publishing Company from printing a district court opinion that was critical of several Justice Department attorneys. See Riley, *Court Blocks Publication of U.S. Judge’s Opinion*, Nat’l L.J., Jan. 30, 1984, at 3, col. 1. The Tenth Circuit later withdrew its order. See Riley, *10th Circuit Vacates No-Publication Order*, Nat’l L.J., Feb. 6, 1984, at 3, col. 1.

sternation among the two distinguished lawyers who had been hand-picked by the U.S. Attorney General to represent Hylton before the Supreme Court.⁸ He restates their argument, and then opines: "I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one." It takes him just over a page to refute the respectable gentlemen's exercise of ingenuity, although a later scholar has in turn questioned the soundness of his reasoning.⁹

Imagine Chief Justice Warren reacting to John W. Davis's arguments in *Brown v. Board of Education* by asking whether Davis was joking; Justice Blackmun writing "I am inclined to think that the right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy, but of this I do not give a judicial opinion"; or the dissenters in *New York Times v. United States* questioning the wisdom of the first amendment. Life on the eighteenth-century Supreme Court was probably more interesting. It was also a lot simpler.

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8. J. GOEBEL, *supra* note 3, at 779.

9. Currie, *supra* note 3, at 856-60.