Rethinking United States v. Detroit Timber & Lumber Co.

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The reports of the opinions of the United States Supreme Court have been accompanied by syllabi for virtually the entire history of the Court.[1] In United States v. Detroit Timber and Lumber Company,[2] the Court announced that "the headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession."[3] The Court constantly reminds the world of this decision.[4] Although this federal rule that "the syllabus is not the law of the case" is followed in most American jurisdictions,[5] there are a few exceptions,[6] Ohio[7] being the most

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1. See, e.g., Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 1 (1801); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803); Martin v. Hunter's Lesee, 14 U.S. (1 Wheat.) 304, 304 (1816). These headnotes were prepared by the reporter, who was not, at first, an employee of the United States but a private entrepreneur. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834). This practice was in accord with English reporting of cases, and has left its mark in the early volumes of United States Reports named after their reporters.

2. United States v. Detroit Timber & Lumber Co., 200 U.S. 321 (1906).

3. Id. at 337.

4. See, e.g., University of Cal. Regents v. Bakke, 438 U.S. 265, slip op. at 1 (1978); Roe v. Wade, 410 U.S. 115, slip op. at 1 (1973).

5. See, e.g., Brown v. Railway Express Agency, 134 Me. 477, 188 A. 716 (1936); Minnesota v. National Tea Co., 309 U.S. 551, 554 & n.6 (1940) (Minnesota law construed); Burbank v. Ernst, 232 U.S. 162, 165 (1914) (Holmes, J.) (Louisiana law construed); 20 Am. Jur. 2d Courts § 189 at 525.

6. See, e.g., Forrester v. Forrester, 155 Ga. 722, 726-27, 118 S.E. 373, 375 (1923); But cf. Central R.R. & Banking Co. v. Wright, 164 U.S. 327, 332-33 (1896) (U.S. Supreme Court rejects Georgia headnote).

7. Engle v. Isaac, 50 U.S.L.W. 4376, 4377 n.7 (April 5, 1982); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 & n.2 (1977); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 441-42 & n.3 (1952) (citing cases); Hass v. State, 103 Ohio St. 1, 7-8, 132 N.E. 158, 159-60 (1921); State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913) (not in syllabus, however). See also text accompanying notes 13-17 infra.

notable. Notwithstanding the long history of the majority rule, it is time to reconsider it, because changing circumstances have undercut the rationale which gave birth to the rule.

The Detroit Lumber decision was necessitated by an erroneous syllabus in an earlier case[8] which did not state correctly the holding of the Court.[9] That syllabus was prepared by the Court's reporter,[10] and not by a Justice of the Court or, for that matter, any Article III judge.[11] To prevent the reporter from having final say on any legal question, the Detroit Lumber rule is mandated when a non-judicial employee prepares the syllabus.[12] This situation can be contrasted with the Ohio experience. Since 1858, a justice of the Ohio Supreme Court[13] has prepared the syllabus, which must be drafted to the satisfaction of all justices concurring in the judgment.[14] This judicial preparation led to the current rule that the court "speaks as a court only through the syllabi";[15]

8. Hawley v. Diller, 178 U.S. 476 (1900).

9. United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906).

10. Id. See 28 U.S.C. § 673 (1976) (position of reporter authorized, duties fixed); SUP. CT. R. 55(1) (clerk to furnish decisions handed down to reporter).

11. U.S. CONST. art. III, § 1, protects the independence of the federal judiciary by giving judges life tenure and preventing the reduction of their salary. See generally Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105, 1120-30 (1977).

12. Although the reporter can be discharged at will by the Court, 28 U.S.C. § 673(a) (1976), this extreme sanction may not serve as an effective deterrent.

13. The Ohio rule does not apply to lower Ohio courts, but only to the Ohio Supreme Court. Royal Indem. Co. v. McFadden, 65 Ohio App. 15, 29 N.E.2d 181 (1940); see also 14 U. CIN. L. REV. 573 (1940).

14. The Ohio rule dates to the adoption of Ohio Sup. Ct. R. VI, 5 Ohio St. vii (1858), which provided for the preparation of the syllabus by the court. A similar provision is now contained in OHIO REV. CODE ANN. § 2503.20 (Page 1953). Before the promulgation of Rule VI, the syllabus was not deserving of special weight. McGorray v. Sutter, 80 Ohio St. 400, 409-10, 89 N.E. 10, 11 (1909) (refusing to follow syllabus of pre-Rule VI case). But preparation by the justice announcing the judgment of the court, along with the requirement that the concurring justices approve the syllabus, led to the rule as it stands today: the syllabus is controlling, see supra note 7, although it must be read in light of the facts of the case and the questions before the court. See Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 403 (1934); 14 Ohio Jur. 2d Courts §§ 246-249; Note, Deceptive Certainty of the Ohio Syllabus, 35 U. CIN. L. REV. 630, 637-43 (1966). See generally id. at 634-37 (history of rule).

15. Beck v. Ohio, 379 U.S. 89, 93 n.2 (1964) (emphasis added).

the written opinion is mere dictum.[16] Because the syllabus is written and approved by the court, it is fitting that it be given special status.[17]

In the recent[18] past it has become common for the Justices of the United States Supreme Court substantially to revise and redraft the syllabi in conjunction with writing the opinion of the Court.[19] The changes made by the Justices to the reporter's draft often reflect a change in emphasis given various parts of the Court's opinion; but on some occasions a Justice may insert into the syllabus matter which he is unable to place in the opinion because the concurring Justices refuse to accept the language at issue.[20]

While the extent of this editing is not publicly known,[21] it is clear that the rationale for the Detroit Lumber rule is no longer valid. This compels a rejection of the rule and a rethinking of possible alternatives. The Ohio rule seems appealing; it would greatly reduce the reading required of members of the bar, which has increased dramatically as the number of clerks assigned to each Justice has grown. However, the appeal of the Ohio rule is deceptive, because the rule is based on a syllabus which a majority of the court must approve. Because at present only the Justice who drafts a United States Supreme Court opinion revises the syllabus, a rule which made the

16. State ex rel. Donahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913).

17. But cf. Note, supra note 14, 35 U. CIN. L. REV. at 634-37 (recounting history of Ohio rule; concludes that point taken too far).

18. The reporter prepared the syllabus during October Term, 1930. Telephone interview with Robert W. Wales, Esq., Law Clerk to Justice O.W. Holmes, October Term, 1930 (April 27, 1982) (notes on file with Journal of Attenuated Subtleties).

19. Interview with Prof. Paul Gewirtz, Law Clerk to Justice T. Marshall, October Term, 1971 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties); Interview with Prof. John C. Jeffries, Jr., Law Clerk to Justice L. Powell, October Term, 1973 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties).

20. See, e.g., Michael M. v. Superior Court, 450 U.S. 464 (1981) (Rehnquist, J.). In this case, which involved an equal protection challenge to a California statutory rape law only applied to male defendants, the opinion cites both Reed v. Reed, 404 U.S. 71 (1971) ("fair and substantial relationship" test) and Craig v. Boren, 429 U.S. 190 (1977) (acknowledging a "sharper focus" when gender-based classifications are challenged). 450 U.S. at 468. The syllabus, however, cites only the less restrictive Reed standard. Id. at 464.

21. The Supreme Court is very secretive about almost all of its internal activities. See generally R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

syllabus controlling is unacceptable.[22] However, a compromise between the current federal rule and the Ohio rule is obviously appropriate: the syllabus should be treated as one part of the Court's decision, not controlling but certainly not irrelevant.

22. Cf. James, Instructions in Supreme Court Jury Trials, 1 J. ATTEN. SUBT. 5, 8 & n.17 (1982) (discussing "unarticulated yet powerful principle of equality among Justices").