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Opening the Schoolhouse Door to Procedural Due Process

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OPENING THE SCHOOLHOUSE DOOR TO PROCEDURAL DUE PROCESS

Nine Ohio public high school students who had been suspended from school for up to 10 days without notice of charges or a hearing, pursuant to a state statute which permitted such suspensions,[1] brought a class action against local school officials seeking a declaration that the statute violated the procedural due process protections of the fourteenth amendment and an order directing the officials to expunge the students' records of the suspensions. A three-judge district court granted the requested relief and the United States Supreme Court *held,* affirmed: Where a state offers free education to a class of people, students within that class who face temporary suspension from a public school have both property and liberty interests that qualify for protection under the due process clause, thereby requiring the public school to give the students both notice of the charges and a hearing prior to suspension except in certain emergency situations. *Goss v. Lopez,* 95 S. Ct. 729 (1975).

Like most constitutional law decisions of the United States Supreme Court, *Goss* has implications on two interrelated levels. In its narrower sense, the holding brings suspension from public schools within the spreading umbrella of procedural due process protections. More significantly, however, *Goss* has distinct implications in relation to the overall scope of procedural due process which should ultimately be of much greater consequence in the field of constitutional law than its bare holding.

The procedural due process aspect of *Goss* signifies the further development of a new approach to procedural due process which has been quietly evolving in a line of cases[2] over the past few years, until finally crystalizing in *Board of Regents v. Roth.*[3] The crux of this approach lies in the Court's more recent definition of the property and liberty interests encompassed within the due process clause.[4] Here the Court departs from past due process tests by redefining property and liberty interests to include a wide spectrum of interests not found within the traditional definitions of these concepts.[5]

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1. OHIO REV. CODE § 3313.66 provides:
The superintendent of schools of a city or exempted village, or the executive head of a local school district may *suspend* a pupil from school not more than ten days. Such superintendent or executive head may *expel* a pupil from school. Such superintendent or executive head shall within twenty-four hours after the time of *expulsion,* notify the parent or guardian of the child and the clerk of the board of education in writing of such *expulsion,* including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so *expelled* may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the *expulsion* . . . (emphasis added).

It should be noted that OHIO REV. CODE § 3313.66 provides procedural protections for expulsions, but not for suspensions.

2. See notes 7-12 *infra.*

3. 408 U.S. 564 (1972).

4. U.S. CONST. amend. XIV, § 1.

5. Goldberg v. Kelly, 397 U.S. 254 (1970).

Under this approach, "property interests protected by procedural due process [now] extend well beyond actual ownership of real estate, chattels or money,"[6] and include claims to such things as a driver's license,[7] welfare benefits,[8] unemployment compensation,[9] tax exemptions,[10] public employment,[11] and a public education.[12] Moreover, such property interests are generally not created by the Constitution, but rather by some independent source, such as a state statute.[13] Thus, in *Goss* the Court was able to find that a protected property interest, in the form of an entitlement to a public education, had been created by Ohio statute[14] because it provided for a free public education for all residents between the ages of six and twenty-one.[15]

Unlike the property concept, the protected liberty interest—the second aspect of the new procedural due process approach—has been the subject of judicial expansion for some time. It has long been recognized that an individual's liberty interest under the due process clause goes far beyond mere freedom from bodily restraint[16] or the formal constraints of criminal process,[17] but includes

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6. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

7. Bell v. Burson, 402 U.S. 535 (1971).

8. Goldberg v. Kelly, 397 U.S. 254 (1970).

9. Sherbert v. Verner, 374 U.S. 398 (1962).

10. Speiser v. Randall, 357 U.S. 513 (1958).

11. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). Such a property interest only exists, however, when the employee has "more than a unilateral expectation of it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The employee must have some valid entitlement to it, such as by reason of tenure, *Slochower,* or by contract, Wieman v. Updegraff, 344 U.S. 183 (1952), or by promise, Connell v. Higginbothem, 403 U.S. 207 (1971).

12. Goss v. Lopez, 95 S. Ct. 729 (1975). *Goss* plays a potentially greater role in the development of this approach than the mere defining of a new property interest under it. The majority opinion introduces what may prove to be an important refinement by rejecting, albeit *sub silentio,* the previous determination in Arnett v. Kennedy, 416 U.S. 134 (1974), that the source creating the property interest may also completely define its dimensions, including the extent of procedural safeguards that shall accompany its withdrawal.

The extent of this particular phase of the Court's decision is not clear, however, because of the majority's approach in ignoring, rather than confronting the argument. Thus, it is uncertain whether future cases will construe *Goss* narrowly by holding that the Court will only step in to require procedural due process when the statute creating the property interest fails to provide for meaningful procedural safeguards or whether they will follow the dissent of Mr. Justice Marshall in *Arnett,* which concluded that once the property interest is created, the Constitution, rather than the granting statute, will determine what procedural protections are necessary to ensure due process. Arnett v. Kennedy, 416 U.S. 134 (1974) (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.). *See also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961), in which the court noted "that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." *Id.* at 156.

13. 95 S. Ct. at 735. *See also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). It should be noted, however, that while the Court finds a protected property interest in the entitlement to a public education, it has previously held that there is no fundamental constitutional right thereto. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

14. OHIO REV. CODE § 3313.64 provides in part: "The schools of each city, exempted village, or local school district shall be free to all school residents between six and twenty-one years of age. . . ."

15. 95 S. Ct. at 736.

16. Meyer v. Nebraska, 262 U.S. 390 (1923).

17. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[18]

Under more recent cases, this concept of the liberty interest has been even further expanded to require procedural protections whenever governmental actions place "a person's good name, reputation, honor or integrity at stake . . . ."[19] Thus, the Court in *Goss,* in addition to finding a protected property interest, also found the threatening of a liberty interest encompassed within the due process clause by concluding that suspension could "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[20]

Even though "the range of [these property and liberty] interests protected by procedural due process is not infinite,"[21] certainly it is not limited to a narrow confine. As Mr. Justice Brennan observed in *Goldberg v. Kelly:*

> [M]uch of the existing wealth in this country takes the form of rights that do not fall within the traditional common law concepts of property. It has been aptly noted that "[S]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract and pension rights, the executive his contract and stock options . . . . [Moreover] many of the most important of these entitlements now flow from the government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space and education; social security pensions for individuals."[22]

It is clear that if the Court continues to define property and liberty interests in terms of these new forms of wealth and status, the full

18. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

19. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). The Court found that a state statute authorizing certain officials to order the posting of a notice prohibiting the sale of liquor to one who was prone to excessive drinking was violative of procedural due process under the fourteenth amendment because the statute failed to provide for notice of the charges and a hearing thereupon.

This form of a liberty interest was first introduced by Mr. Justice Frankfurter in a concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951). Following *Constantineau,* this approach was also adopted in Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth,* however, the Court concluded that a state's refusal to rehire a *non-tenured* professor without making any charge against him that might damage his standing, did not put his reputation at stake, so that the state's refusal to grant the professor a hearing did not violate procedural due process.

20. 95 S. Ct. at 736.

21. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

22. 397 U.S. 254, 261 (1970), *quoting* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245, 1255 (1965).

impact of the *Goss* approach to procedural due process is still to be felt.

In adopting this new approach, *Goss,* as well as its predecessor *Roth,* rejects the "severe detriment or grievous loss" test previously used by the Court to determine whether there was a right to procedural due process,[23] a test first enunciated by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath,*[24] and then adopted by a majority of the Court in *Goldberg v. Kelly*[25] and *Morrissey v. Brewer.*[26] In rejecting this test,[27] under which the individual was entitled to procedural due process protections only when "condemned to suffer grievous loss"[28] by the action of the state, the *Goss* majority noted that to "determin[e] 'whether the due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake.' "[29] Except to the extent of measuring the low threshold of detriment required by the Court,[30] the length and resulting severity of the deprivation is only another factor to be used in determining the *form* of the hearing and not the basic *right* thereto.[31]

"Once it is determined that due process applies, the question remains what process is due."[32] At the very minimum, because there is a protected property or liberty interest involved, there must be "*some* kind of notice and . . . some kind of hearing."[33]

The type of notice and the nature of the hearing is to be determined by reference to the balancing test set out in *Cafeteria Workers*

23. In addition to the "severe detriment or grievous loss" test, a second casualty is the "right v. privilege" test, under which the right to procedural due process was made to turn upon the characterization of the benefit being deprived as either a "right" or a "privilege." This test originated in Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1951), but it has been unequivocally repudiated by the *Goss* line of cases. See notes 7-11 *supra.*

24. 341 U.S. 123, 149 (1951).

25. 397 U.S. 254 (1970).

26. 408 U.S. 471 (1972).

27. In urging the adoption of this test the appellees argued that the loss of 10 days from school was neither severe nor grievous, so that the due process clause was not applicable.

28. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).

29. 95 S. Ct. at 737, *quoting* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

30. The Court maintains this low threshold by stating, "as long as a property deprivation is not *de minimis,* its gravity is irrelevant to the question [of] whether account must be taken of the Due Process Clause." 95 S. Ct. at 737.

The question of what constitutes a mere *de minimis* loss is left unanswered by the Court. In *Goss,* the only case which uses this specific term, the Court merely notes that "[a] 10-day suspension from school is not *de minimis* . . .," *Id.;* the cases cited in *Goss* as authority merely allude to the concept of some significant interest. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

31. It should be noted that this distinction has often eluded the lower courts. *See, e.g.,* Goss v. Lopez, 372 F. Supp. 1279 (S.D. Ohio 1974). This is most likely due to the Supreme Court's failure to clarify it until Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, when this balancing test was originally adopted in Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961), the Court had relied upon the now discredited "right v. privilege test" to determine the right to procedural due process protections in the first place, further clouding the issue.

32. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

33. 95 S. Ct. at 738.

Local 473 v. McElroy.[34] Under this test the interest of the state in providing something less than a full evidentiary hearing[35] is balanced against the individual's interest in avoiding unfair or mistaken deprivation of property or liberty. Therefore, the *Goss* Court, in determining the type of notice and form of hearing required by due process, balanced "[t]he student's interest . . . to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences"[36] against the school's need to maintain discipline through suspension, with all of the burdens that would result from the imposition of elaborate procedural requirements.

The result of this balancing process was the Court's holding[37] that the public school student, *prior* to suspension, except in emergency situations,[38] must

> be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.[39]

The scope of this holding in relation to the area of students' rights, however, is not as clear as the decision's previously discussed constitutional implications for procedural due process. The Court seems to take away in the small print what it gives in the large. Scrutiny of the guidelines set down leaves serious doubt whether the protections provided are in fact meaningful. There is no requirement that there be any type of impartial hearing,[40] a right of review, an opportunity to prepare a defense, or even that the student understand the charges against him. Thus, as the dissenters point out,

> [t]he Court only requires oral *or* written notice to the pupil, with no notice being required to the parents or the Board of Education. . . .

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34. 367 U.S. 886 (1961). The Court balanced the government's interest in summarily denying a civilian employee of private contractor access to a military installation for security reasons against the employee's interest in maintaining her job on the base, concluding that there was no violation of the due process clause.

35. The Court has previously noted that the due process clause
> does not require a trial type hearing in every conceivable case of government impairment of private interest . . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

Id. at 894-95.

36. 95 S. Ct. at 739.

37. The Court expressly notes that this procedure is limited to short suspensions of 10 days or less, as longer suspensions or expulsions *might* require more formal proceedings.

38. An emergency situation may arise, for example, when the student's "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process . . . ." 95 S. Ct. at 740. In such cases the suspension may be immediate and the prescribed notice and hearing are to follow as soon as practicable. *Id.*

39. *Id.* For a survey of lower court decisions prior to *Goss* treating the adequacy of notice and hearing, see Annot., 58 A.L.R.2d 903 (1958).

40. As the Court notes:
> We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

95 S. Ct. at 740.

> Nor does the Court's due process "hearing" appear to provide significantly more protection than that already available. The Court holds only that the principal must listen to the student's "version of the events," either before suspension or thereafter—depending upon the circumstances. . . . Such a truncated "hearing" is likely to be considerably less meaningful than the opportunities for correcting mistakes already available . . . .[41]

Moreover, the Court expressly "stops short" of interpreting the due process clause to require that students be afforded the opportunity to secure counsel, to confront and cross-examine witnesses or even to call their own witnesses to support their version of the incident.[42]

While it is clear that the Court's rationale is based upon the realistic determination that a full evidentiary hearing would be overwhelmingly burdensome on a school because of the countless number of suspensions, it seems equally apparent that some middle ground, providing the student with more meaningful procedural safeguards, would be more in line with the requirements of the due process clause, especially in light of the severe consequences of a suspension upon the student.[43] At the very least, the student should be provided with an impartial tribunal[44] and given the right to confront and cross-examine his accusers,[45] as well as to call his own witnesses. For as the Court notes,

> [t]he concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately this is not the case, and no one suggests that it is. . . . The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.[46]

Thus, "[a]lthough a closely knit home-school community is a desirable ideal, the student's rights should be protected by procedures adapted to reality."[47]

By giving the entire decision a reading broader than its specific

41. *Id.* at 747 (Powell, J., dissenting).

42. *Id.* at 740. Most lower court decisions prior to *Goss* have also held that there is no *right* to cross-examination in school discipline hearings, although some have stated that cross-examination is permissible. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 598 (1971) [hereinafter cited as Buss].

43. See note 23 *supra.*

44. The failure to require an impartial hearing leaves the efficacy of the Court's other protections in serious doubt. Without such a safeguard, there is the danger of both personal bias against the student, especially if he is a "known troublemaker," and risk that the decisionmaker will have a personal stake in the outcome of the hearing because of a " 'combination of functions' in which the decisionmaker plays one or more roles in addition to acting as judge." Buss, *supra* note 42, at 617. *See also* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

45. In Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970), the Court stated that "[i]n almost every setting where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses."

46. 95 S. Ct. at 739.

47. Buss, *supra* note 42, at 561.

holding, however, *Goss* may have significant implications in extending the scope of constitutional rights afforded students. Noting that students "do not 'shed their constitutional rights' at the school door,"[48] the Court rejects the idea that school officials have either unlimited discretion or absolute authority over their students,[49] and thus implicitly suggests the possibility of further developments in student rights.

This movement to cloak students and other minors with fundamental constitutional protections had its most auspicious beginnings in *In re Gault*.[50] While *Gault* is not completely analogous to students' rights cases,[51] it does lay down the principle that "neither the fourteenth amendment nor the Bill of Rights is for adults alone."[52] Moreover, *Gault* further opened the schoolhouse door to the Constitution by stressing the concept that "the good motives and alleged achievements of the state's procedures are not enough when a serious threat to individual liberty, even a child's . . . , is involved."[53]

With the stage so set,[54] the first protections *expressly* afforded stu-

48. 95 S. Ct. at 736, *quoting* Tinker v. Des Moines Community School Dist., 393 U.S. 503, 506 (1969).

49. Although the dissenters argue that the majority's decision gives the federal courts, rather than the school systems, the authority to structure classroom discipline, the Court has long recognized that its

> duty to apply the Bill of Rights to assertions of official authority [does not] depend upon [the Court's] possession of marked competence in [a] field where the invasion of rights occurs. . . . [The Court] cannot, because of modest estimates of [its] competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943). Furthermore, it has been suggested that "[h]owever little courts may know about education or school discipline, they do know about fact finding, decision making, fairness and procedure." Buss, *supra* note 42, at 571.

50. 387 U.S. 1 (1967). The Court reversed the dismissal of the habeas corpus petition of a 15-year old who had been committed to a reform school for a term of up to six years for making an obscene phone call, even though the evidence was largely hearsay and the maximum sentence for an adult convicted of the same crime would have been $50 or two months in jail. The plaintiff was given neither adequate notice of the hearing and charge, nor advised of his right to remain silent, and at the juvenile hearing, he was denied the rights of cross-examination and counsel.

51. "Although *Gault* heralded a constitutional revolution in juvenile proceedings, several considerations urge caution in analogizing it to the school discipline area." Buss, *supra* note 42, at 557. First, although *Gault* is technically not a criminal case, it is quasi-criminal in nature and is treated as such by the Court. Secondly, and even more significantly, the public school and juvenile justice systems play widely divergent roles in society. The former is intended to provide an education, while the latter is intended to prevent anti-social conduct or rehabilitate offenders. *Id.*

52. 387 U.S. at 13.

53. Buss, *supra* note 42, at 558.

54. Although not dealing with students' rights per se, a line of cases imposing various constitutional limitations upon the actions of school authorities formed an important part of the background to the students' rights decisions by creating a strong precedent for the Court's intrusion into the domain of public education. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (statute prohibiting the teaching of the theory of evolution to students violated the first amendment's establishment clause); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (statute providing for teachers' automatic dismissal for certain specified offenses violated the first amendment's right to freedom of association); Shelton v. Tucker, 364 U.S. 479 (1960) (compelling teachers to disclose every associational tie violated the first amendment right to freedom of association); State *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (the encouraging of religious instruction in the school violated the first amendment's establishment clause); Board of

dents were, naturally enough, the most fundamental—those of the first amendment. Thus, shortly after *Gault*,[55] the Court declared in *Tinker v. Des Moines Community School District*[56] that a school could not regulate a student's speech or expression unless it had a constitutionally valid reason to do so. The Court also made clear that the state may not impose whatever unreasonable conditions that it chooses upon attendance at public schools.[57]

Goss is a natural second step in this process, forming a logical counterpart to *Tinker*. While *Tinker* is the first case expressly to consider students' substantive constitutional rights, *Goss* is the first to examine students' procedural constitutional protections.

Just how far the students' rights movement will go is not yet clear. Although the schoolhouse door has finally been opened, the Court has often taken the position that "the full panoply of rights due a defendant in . . . a [criminal] proceeding does not necessarily apply to other types of proceedings."[58] The Court clearly takes this stance in *Goss* by denying students facing suspensions the rights to counsel, cross-examination and confrontation.[59] Moreover, a majority of the present Court, composed of Chief Justice Burger and Justices Stewart, Powell, Blackmun, and Rehnquist, has expressed the view that the constitutional rights of "children" are not necessarily co-extensive with those of adults.[60] Given this situation, it is not certain how the Court will respond to future students' rights questions involving the constitutional issues of search and seizure, freedom of the press, freedom of associa-

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Educ. v. Barnette, 319 U.S. 624 (1943) (statute requiring all students to salute the flag violated the first amendment's right to freedom of religion); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting the teaching of a foreign language to students violated the due process clause).

55. Three of the decisions also had the corollary effect of extending the first amendment's guarantee of freedom of religion to students, but in each case the Court did so *without expressly* considering the question of the students' constitutional rights, most likely because each was brought by and in the name of adults. *See* Engel v. Vitale, 370 U.S. 421 (1962); State *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Board of Educ. v. Barnette, 319 U.S. 624 (1943).

There is also a line of cases dealing with schools and the equal protection clause; however, these decisions are based upon racial discrimination, rather than upon students' rights. *See* Rogers v. Paul, 382 U.S. 198 (1965); Brown v. Board of Educ., 347 U.S. 483 (1954).

56. 393 U.S. 504 (1969). It was held that a school regulation prohibiting the wearing of black armbands to protest the Vietnam War violated the students' first amendment right to freedom of expression in the absence of any facts which might have reasonably led school officials to believe that such actions would cause substantial disruptions of school activities.

57. *Id.* at 506. The Court expressly rejected the argument that Hamilton v. Regents, 293 U.S. 245 (1934) supported the proposition that a state may impose whatever conditions that it chooses upon attendance at public schools. Rather, the Court noted that *Hamilton* was confined to the narrow holding that a school may require a student to participate in a military science class without violating his freedom of conscience.

58. Morrissey v. Brewer, 408 U.S. 471 (1972) (parole hearing). *See also* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) which involved a proceeding by a military base commander to revoke the security clearance of a civilian employee on the base.

59. 95 S. Ct. at 740.

60. *Id.* at 744 (Powell, J., dissenting); Tinker v. Des Moines Community School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

tion, and cruel and unusual punishment, to name just a few. It can only be suggested that the Court will employ a case-by-case approach similar to that used by the "fundamentalist" justices[61] in applying the Bill of Rights to the states.

ROBERT D. PELTZ

FREEDOM OF INFORMATION ACT REQUIRES DISCLOSURE OF IRS LETTER RULINGS

Tax Analysts & Advocates, a public interest law firm, petitioned the Internal Revenue Service[1] for disclosure of certain letter rulings, technical advice memoranda, and related communications.[2] These had been issued by the Service to producers of certain minerals regarding the Service's determination of which processes were "mining" within the meaning of subsection 613(c) of the Internal Revenue Code.[3] After its petition was denied, and other administrative alternatives exhausted, Tax Analysts & Advocates sued in federal district court to compel disclosure of the rulings under the Freedom of Information Act.[4] The IRS contended that these rulings were not within the scope of the Act, and, alternatively, that they were specifically exempt from disclosure. The district court rejected both of these positions and ordered disclosure of the letter rulings, technical advice memoranda,

61. Mr. Justice Harlan, one of the Court's staunchest fundamentalists, defined fundamentalism by saying that it

> start[s] with the words "liberty" and "due process of law" and attempt[s] to define them in a way that accords with American traditions and our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is . . . the one that was followed throughout the 19th and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles . . . of justice which inhere in the very idea of free government which no member of the Union may disregard."

Duncan v. Louisiana, 391 U.S. 145, 176 (1968). Justice Harlan continued by pointing out that "[t]he logically critical thing . . . was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental." *Id.* at 179.

1. Hereinafter referred to as the IRS or Service.

2. "A [letter] 'ruling' is a written statement issued to a taxpayer . . . which interprets and applies the tax laws to a specific set of facts." 26 C.F.R. § 601.201(a)(2) (1974). It is requested by a taxpayer who desires to know in advance the tax consequences of a proposed action.

A technical advice memorandum is issued by the National Office of the IRS to a District Director who requests advice regarding treatment of a specific set of facts contained in a return filed by a taxpayer. *Id.*, § 601.105(b)(5) (1974).

The communications involved included correspondence to and from the IRS in regard to the rulings sought, memoranda of conferences, telephone calls and index-digest card summaries.

Hereinafter the foregoing will be collectively referred to as rulings except where otherwise indicated.

3. 26 U.S.C. § 613(c) (1970). This subsection deals with the computation of gross income from property for percentage depletion purposes.

4. 5 U.S.C. § 552 (1970).

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Duncan v. Louisiana, 391 U.S. 145, 176 (1968). Justice Harlan continued by pointing out that "[t]he logically critical thing . . . was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental." *Id.* at 179.

1. Hereinafter referred to as the IRS or Service.

2. "A [letter] 'ruling' is a written statement issued to a taxpayer . . . which interprets and applies the tax laws to a specific set of facts." 26 C.F.R. § 601.201(a)(2) (1974). It is requested by a taxpayer who desires to know in advance the tax consequences of a proposed action.

A technical advice memorandum is issued by the National Office of the IRS to a District Director who requests advice regarding treatment of a specific set of facts contained in a return filed by a taxpayer. *Id.*, § 601.105(b)(5) (1974).

The communications involved included correspondence to and from the IRS in regard to the rulings sought, memoranda of conferences, telephone calls and index-digest card summaries.

Hereinafter the foregoing will be collectively referred to as rulings except where otherwise indicated.

3. 26 U.S.C. § 613(c) (1970). This subsection deals with the computation of gross income from property for percentage depletion purposes.

4. 5 U.S.C. § 552 (1970).